

Opinion
of the
Independent Ethical Committee
established
by the European Commission

-

26 October 2018

Subject: Request for an opinion on the Draft Guidelines on Ethical Standards for the Participation of the Members of the European Commission in the Election Campaign for the Elections to the European Parliament 2019 (23 – 26 May 2019):

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

Procedure

1. The Committee was asked by the Secretary-General of the Commission, on behalf of the President of the Commission, to advise on the above-mentioned Draft Guidelines in line with Article 12(1), 2nd sentence, of the Code of Conduct for the Members of the European Commission.
2. The Committee deliberated on the Draft Guidelines in its meeting on 26 September 2018.

Legal context

3. The Agreement between the European Parliament and the European Commission amending point 4 of the Framework Agreement on relations between the European Parliament and the European Commission of 7 February 2018¹ provides:
 - 1) *The participation of Members of the Commission in electoral campaigns is governed by the Code of Conduct for the Members of the European Commission.*
 - 2) *Members of the Commission may participate in electoral campaigns in elections to the Parliament, including as candidates.*
 - 3) *They may also be chosen by European political parties as lead candidate (“Spitzenkandidat”) for the position of President of the Commission.*
 - 4) *The President of the Commission shall inform Parliament in due time whether one or more Members of the Commission will stand as candidates in electoral campaigns for elections to the Parliament, as well as of the measures taken to ensure the respect of the principles of independence, integrity and discretion provided for by Article 245 TFEU and the Code of Conduct for the Members of the European Commission.*
 - 5) *Any Member of the Commission standing as candidate or participating in an electoral campaign for elections to the Parliament will undertake to refrain from adopting a position, in the course of the campaign, that would not be in line with his/her duty of confidentiality, or that would infringe the principle of collegiality.*
 - 6) *Members of the Commission standing as candidates or participating in electoral campaigns for elections to the Parliament may not use the Commission's human or material resources for activities linked to the electoral campaign.*
4. The previous provision of the Framework Agreement, which provided that Members participating actively in electoral campaigns as candidates in elections to the Parliament should take unpaid electoral leave with effect from the end of the last part-time session before the elections, was abolished.
5. The new Code of Conduct adopted by the Commission on 31 January 2018 provides in its Article 10 on the participation in European politics during the term of office:

¹ OJ L 45, 17.2.2018, p. 46.

- 1) *Members may participate in European politics as members of European political parties or organisations of the social partners at European level provided that this does not compromise their availability for service in the Commission and the priority to be given to their Commission duties over party commitment. Participation as members of European political parties or organisations of the social partners at European level includes the holding of political, honorary or non-executive functions in bodies of the party structure, but excludes management responsibilities. Political contacts in the capacity as Member of the Commission remain unaffected.*
- 2) *Members may participate in electoral campaigns in elections to the European Parliament, including as candidates. They may also be chosen by European political parties as lead candidate ('Spitzenkandidat') for the position of President of the Commission.*
- 3) *Members shall inform the President of their intention to participate in an election campaign within the meaning of paragraph (2) and the role they expect to play in the campaign.*
- 4) *The President shall inform the European Parliament in due time whether one or more Members will stand as candidates in electoral campaigns for elections to the European Parliament, as well as of the measures taken to ensure the respect of the principles of independence, integrity and discretion provided by Article 245 of the Treaty on the Functioning of the European Union and this Code of Conduct.*
- 5) *Members standing as candidates or participating in an electoral campaign within the meaning of paragraph (2) may not use the Commission's human or material resources for activities linked to the electoral campaign.*
- 6) *Members shall abstain from making public statements or interventions on behalf of any European political party of which they are members, except when standing for election or participating in an election campaign in accordance with paragraphs (3) and (4). This is without prejudice to the right of Members to express their personal opinions. Members so participating in electoral campaigns shall undertake to refrain from adopting a position in the course of the campaign that would not be in line with the duty of confidentiality or infringe the principle of collegiality.*

Opinion

6. The Committee welcomes the Commission's initiative and the timely preparation of Draft Guidelines ahead of the election campaign. Guidelines are important to ensure that the principles of independence, integrity and discretion provided for by Article 245 of the Treaty on the Functioning of the European Union are respected also during the election campaign.
7. The Committee advises the following:

General remarks

8. Participation of the Members in the campaign is not related to accountability for previous actions of the current Commission, but related to the election of a new Parliament and the designation of a new Commission after the elections. Therefore, the Committee suggests rewording the second paragraph of the Introduction of the Draft Guidelines and replacing the word "accountability" by "legitimacy".
9. The third paragraph of the Introduction and par. 3.a) provide that participation of a Member in a campaign can consist in support to a campaign, in standing as a candidate in a Member State and in standing as a lead candidate for President of the Commission. The Guidelines should use and highlight this definition more clearly throughout the entire text. The Committee recommends, in particular, clarifying more explicitly which provisions of the Guidelines apply to all forms of participation and which provisions apply only to some of them.
10. The Committee considers that, once the Guidelines are adopted, the Commission administration should facilitate their implementation through practical guidance and concrete examples for Members.
11. The Committee also considers that the Guidelines should make clear that the President is entitled to take action under Article 13 of the Code in case of non-compliance with the Guidelines.

On the applicability of the Guidelines and the relation with national law

12. The Guidelines should be clearer with regard to the relation with national campaign rules and the impact on the different activities of Members of the Commission during the campaign, either in their institutional capacity - which is defined by European Union law, not national law -, or as active participants in the campaign. The Guidelines should have a dedicated general provision in this regard. In this regard, the 2nd sentence of par. 3. n) should be incorporated into the text under "Applicability of the guidelines", 2nd paragraph and par. 3. n) should be deleted. The text would read: "However, Members of the Commission participating in the campaign need to pay particular attention to the applicable legislation on campaign rules in the Member State concerned when they stand as candidates. Members are

advised to make the necessary arrangements with their parties or campaign organisation to abide by these rules. Moreover, the Commission Representations can advise in this regard.”

The last part of the first sentence starting with “*and to possible provisions on restraint by public office holders, especially – but not only – when they stand as candidates*” should be deleted given that such restraint is already regulated by the principles and rules that Commissioners have to respect under the Treaty and the Code of Conduct.

On the ethical standards for the participation of Members in the campaign

- *Information of the President (Article 10(3) of the Code)*

13. With regard to the obligation for Members to inform the President under Article 10(3) of the Code, a sentence should be added after the third paragraph of par. 3. b): “Any change of that role in the course of the campaign shall also be communicated to the President.”

- *Travel*

14. In the section concerning “Travel”, the Committee recommends replacing the words “Members cannot rely on a Commission Representation...” by “Members must not rely on a Commission Representation or EU Delegation for organising such travel.”

- *Public statements and interventions in the campaign*

15. With regard to “Public statements and interventions in the campaign”, the Committee recommends deleting the last sentence (“This is without prejudice to their right to express personal opinions.”. In Article 10 (6) of the Code, this sentence provides for an exception to the prohibition imposed on Members by the first sentence of this provision. That prohibition does not figure in par. 3. f) of the draft Code. Therefore incorporating the reference to the right to express personal opinions in the latter par. risks to be misleading. It might be read as overriding the obligations of independence, confidentiality and collegiality, which would certainly be incorrect.

The Committee proposes instead to add to the first sentence of par. 3. f) the words “as a candidate” which would then read “During the campaign, Members can make public statements or interventions *as a candidate* on behalf of any political party of which they are members.”.

The text should also provide a clearer explanation with regard to the respect of collegiality in the context of the campaign. It shall include, in particular, an obligation not to dissociate oneself from or criticise Commission decisions, policies or positions.

- *Use of social media*

16. The Committee suggests giving clearer guidance for the use of social media with regard to the different forms of participation in the campaign. The Committee deems either option 1 or option 3 appropriate for Commissioners who are a lead candidate

(“Spitzenkandidat”). The Commission should recommend only one of both options for the sake of clarity. For Commissioners who stand as candidates for the European Parliament, the Committee deems option 2 to be the most appropriate option. It suggests, in addition, providing practical guidance to Members, after the adoption of the Guidelines, on how to implement this option visually and textually.

- *Meetings with interest representatives*

17. The Committee notes that Article 7(1) of the Code applies with regard to organisations and self-employed individuals inasmuch as they fall under the scope 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. The scope of the Agreement is defined in points 7 to 20 of the Agreement.

18. It also notes that according to Article 2 of Commission Decision of 25 November 2014 on the publication of information on meetings held between Members of the Commission and organisations and self-employed individuals:

‘Meeting’ means a bilateral encounter organised at the initiative of an organisation or self-employed individual or a Member of the Commission and/or a member of his/her Cabinet to discuss an issue related to policy-making and implementation in the Union. Encounters taking place in the context of an administrative procedure established by the Treaties or Union acts, which falls under the direct responsibility of the Member of the Commission, as well as encounters of a purely private or social character or spontaneous encounters are excluded from this notion;

‘organisation or self-employed individual’ means any organisation or individual, irrespective of their legal status, engaged in activities carried out with the objective of directly or indirectly influencing the formulation or implementation of policy and the decision-making processes of the institutions of the Union, irrespective of where these activities are undertaken and of the channel or medium of communication used.

This notion does not include representatives of other Union institutions or bodies, national, regional and local authorities of Member States and of third countries or international organisations. However, it covers any association or network created to represent regions or other sub-national public authorities collectively.

This Decision shall not apply to meetings held with social partners at Union level in the context of the social dialogue, or to meetings held in the context of the dialogue with churches, religious associations or communities, as well as with philosophical and non-confessional organisations.

This Decision shall not apply to meetings held with representatives of political parties.

19. The Committee considers, on the one hand, that it is an intrinsic part of a campaign that Members who are candidates meet and reach out to citizens and a great variety of stakeholders and can be easily approached by them. On the other hand, it considers that the participation in a campaign must not lead to a circumvention of Article 7(1) and (2) of the Code. The Guidelines should express this latter aspect more clearly.

- *National legislation and European legislation on the election campaign*

20. In line with the Committee's comment above on the applicability of the Guidelines and their relation with national law, par. 3.n) should form part of a separate general provision.

- *The Commission's institutional activities in relation to the European elections: Citizens' dialogues and other events organised by the Commission*

21. The Guidelines should exclude that a Member who stands as candidate either for the European Parliament or as lead candidate participates in such events during the campaign.

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