

Reply to Ombudsman questions to the EBA

Period prior to 2 August 2019 (when the EBA was informed by its Executive Director of his intention to engage in a new occupational activity and when he submitted his resignation letter)

- 1. When and how did the Executive Director become aware of the job opportunity with AFME? Please include in the answer: i. whether AFME's CEO vacancy was published and ii. whether it was AFME or the Executive Director who initiated contact on the matter?**

Mr Farkas has provided the following information in reply to this question:

- As far as he is aware, the AFME CEO vacancy was not published. An executive search firm was retained by AFME to conduct the recruitment of a new CEO. The executive search firm first contacted Mr Farkas regarding the vacancy on 18 April 2019. The contact was unsolicited and initiated by the search firm.
 - Subsequently, all contacts with AFME board members involved in the selection process were arranged through the search firm in a confidential setting not involving AFME staff other than the outgoing CEO who was part of the selection process. In person, video or phone interviews were held with Mr Farkas during May-June-July.
 - Following the close of the selection process, a short offer letter was issued to Mr Farkas via the search firm on 29 July 2019, followed by the draft employment contract and detailed conditions on 30 July. Once read and accepted with a conditional starting date subject to the EBA's decision, Mr Farkas informed the EBA Chairperson about his intention to resign from the EBA verbally on 1 August, and submitted his resignation formally in writing on 2 August. He was then on annual leave until 26 August.
- 2. Please provide a chronology of all contacts between the Executive Director and AFME that took place between 1 January 2018 and 2 August 2019, beyond those listed on the calendar of meetings that the EBA has published.**

Please find the chronology below. The email exchanges referred to below were initiated by AFME and include emails to or from Mr Farkas personally through his EBA email account and to and from his assistants on his behalf through either their respective EBA email accounts and/or the EBA Executive Office email account.

2018:

- *21 February to 27 March:* Email exchange regarding Mr Farkas' speaking engagement at an AFME Regulatory Committee meeting, speaking on the topic of EBA work on non-performing loans, Basel implementation and review of the European Supervisory Authorities. Mr Farkas spoke on 21 March.
- *28 February to 18 May:* Email exchange on Mr Farkas speaking at AFME/IMN Global ABS Conference on 6 June 2018
- *10 April to 25 April:* Email exchange on AFME-PwC study on impact of regulation on banks' capital markets activity
- *18 May:* Email from AFME on its response to Solvency II amendments and liquidity coverage ratio revisions
- *17 May to 5 June:* Briefing calls and email exchanges regarding Mr Farkas' speaking engagement at AFME/IMN Global ABS Conference; Mr Farkas attended a dinner on 5 June with the AFME CEO and spoke at the conference on 6 June.
- *12 July and 6 August:* AFME invitation to its annual dinner on 17 October 2018 (declined)
- *26 July:* Email exchange on AFME RRM paper
- *6 September:* Meeting with AFME Chairman
- *18 September:* AFME invitation to attend launch on 24 September 2018 of AFME report ('Capital Markets Union – Measuring progress and planning for success') (not accepted)
- *1 October:* AFME email circulating newsletter on its input on capital markets union
- *14 November:* AFME email on Global Financial Markets Association deck and Global Association of Risk Professionals study on securities financing transaction haircuts
- *13 December:* Meeting with AFME, Oliver Wyman and bank representatives on EU-wide stress test

2019

- *9 January:* Email exchange on capital markets growth index report
- *6 February to 14 March:* Email exchange regarding Mr Farkas' speaking engagement at AFME European Public Policy Committee meeting. Mr Farkas spoke on 7 March 2019.
- *5 March to 27 May:* Email exchange regarding Mr Farkas' panel participation and speaking engagement and related video recording at the AFME Supervision and Integration Conference on 23 May 2019
- *12 July:* AFME email two AFME publications, inviting Mr Farkas to discuss; Mr Farkas replies that he will circulate the publications internally to inform EBA policy colleagues and to see if a meeting would be useful for the EBA to have more background (no further emails were exchanged externally nor were there any emails circulated internally)
- *11/17 July:* AFME invitation to AFME anniversary event on 26 September 2019 (accepted)

3. Please provide copies of any communication between the Executive Director and AFME that are in the possession of the EBA.

The copies of communications identified in response to this question accompany this Reply. In addressing the question the EBA considered the period from when Mr Farkas took up his post as Executive Director on 16 April 2011, as requested by the Ombudsman Office by phone and confirmed on correspondence. To identify copies of communications the EBA carried out a targeted search of EBA email accounts of Mr Farkas and his assistants working with the EBA and hardcopies of correspondence retained by Mr Farkas' assistants. No copies of communications were available through Mr Farkas' EBA tablet and Blackberry which were returned to the EBA.

4. Prior to 2 August 2019, did the Executive Director recuse himself from any of his responsibilities at the EBA? If so, please provide an explanation as to why this was deemed necessary.

As Mr Farkas was applying for the vacant post of EBA Chairperson which was advertised on 12 December 2018, he excluded himself from involvement in the EBA's process for making that appointment. To our knowledge, Mr Farkas did not recuse himself from other responsibilities as Executive Director in the period prior to 2 August 2019. In considering this question we have addressed the period back to 1 January 2018.

5. Has the EBA assessed whether the Executive Director had any responsibilities or tasks during the period prior to 2 August 2019, when he was aware of the job opportunity at AFME, that could have caused a risk of conflict of interest? If not, please do so for the purpose of replying to this question.

The EBA's assessment following Mr Farkas' notice of resignation did identify such responsibilities or tasks for which there was potential for conflict of interest. The Restrictions Decision refers to various topics directly linked to work carried out by Mr Farkas during his EBA service, which includes topics of work in the period from mid-April to 2 August 2019, such as the EU impact and implementation of the finalised Basel III standards. Moreover, the preparation of the EBA's response to this and other Questions put by the Ombudsman does not demonstrate that Mr Farkas' responsibilities and tasks during the period could have caused a risk of conflict of interest. This is the case in relation to the EBA's policy work in particular, based on review of the agenda items for the meetings of the Board of Supervisors which were held in this period.¹

¹ Agendas of the Board of Supervisors for its meetings on 16/17 April, 12/13 June and 9/10 July 2019

The EBA carries out risk assessments under its wider anti-fraud policy which assess the particular risks of EBA work being affected by individual interests and where necessary identifies mitigating measures.² This risk assessment takes into account existing controls including the EBA's governance, internal review processes, transparency through public consultation on regulatory policy and through the public meeting register.

Period after 2 August 2019

6. At what point in time were all the arrangements in place to reassign the Executive Director's responsibilities to other senior members of the EBA's staff?

All arrangements were in place by 31 October 2019 as provided for under the decision of the Board of Supervisors of 12 September 2019 imposing restrictions with immediate effect in relation to Mr Farkas' taking up of the position of AFME CEO (Restrictions Decision). Mr Farkas' recusal from regulatory and supervisory matters following his return from annual leave on 26 August meant that he no longer took part in Board of Supervisors or Management Board agenda items concerning such matters, or internal preparation of the topics and papers, with existing speaking engagements and planned participation in external meetings reallocated among EBA staff from that date onwards. Mr Farkas' work therefore focused on administrative matters including finance, human resources, procurement, and finalisation of the 2020 work programme and budget, and it is these tasks where the arrangements were finalised with a delegation decision adopted by Mr Farkas on 29 October 2019.

Please see the Appendix to this Reply which provides further detail on the actions which the EBA took in this context, and which also sets out the background to the EBA's response to the Ombudsman's other questions.

7. Did the Executive Director recuse himself from any of his responsibilities in the period between 2 August 2019 and the date on which the EBA put in place the necessary arrangements?

Yes. The Appendix addresses Mr Farkas' actions in this regard, including in particular Mr Farkas' letter of resignation and accompanying declaration of interests of 2 August; Mr Farkas' express recusal from policy and supervisory activities on his return to work on 26 August; Mr Farkas' arrangements for the delegation of external speaking commitments; and Mr Farkas' arrangements for the delegation of his administrative tasks.

8. The EBA's decision on the Executive Director's post-employment activities included that he would no longer participate in the EBA's policy and supervisory work and would have only

² Report on the EBA Fraud Risk Assessment 2018

organisational tasks until 31 October 2019. From then, until his departure on 31 January 2020, his functions were delegated to other EBA managers.

The Executive Director of the EBA seems to remain a member of the Board of Supervisors of the European Securities and Markets Authority (ESMA). This body's main role is *"to make policy decisions of ESMA"*. It could be perceived as being contradictory that, in an effort to mitigate risks of conflict of interest, the Executive Director would no longer be involved in policy matters at the EBA but would, at the same time, remain involved in ESMA policy-making.

Did the EBA communicate to ESMA, the EBA's decision to approve its Executive Director's new job with restrictions, including by limiting his tasks to organisational matters during the remainder of his time in office, and that he would be on leave from 1 November 2019 until 31 January 2020?

Yes. ESMA's Executive Director received on 30 August a copy of the draft restrictions decision initially put to the Board of Supervisors for adoption,³ on 10 September a copy of a revised decision (i.e. the Restrictions Decision) put to the Board of Supervisors which was adopted on 12 September,⁴ and on 13 September a notice that the Decision had been adopted.⁵ Mr Farkas did not attend meetings of ESMA's (or EIOPA's) Board of Supervisors following his notice of resignation on 2 August 2019.

General

9. The legal framework that applies to former senior EU civil servants includes a lobbying ban of one year. The EBA has defined lobbying as: *"activities conducted, directly or indirectly, by the former staff member of the EBA which aim to influence staff working at the EBA"*⁵. Indirect influencing is defined by the EBA as *"influencing through activities not conducted directly by the former staff member vis-a-vis the staff of the EBA but on which he/she is involved, e.g. managing a team of people who will conduct those activities, or designing such activities, or providing advice to the organisation for which he/she works or provides professional services"* (emphasis added).

The EBA described AFME in its Decision as: *"an industry body representing global and European banks and other significant capital market players. It is providing expertise and comments on regulatory and capital market issues. For instance, AFME has regularly*

³ 30 August 2019 email from BoS Support to BoS mailing list

⁴ 10 September 2019 email from BoS Support to BoS mailing list

⁵ 13 September 2019 email from BoS Support to BoS mailing list

provided comments during public consultations on technical standards (e.g. regulatory technical standards, implementing technical standards, guidelines) developed by the EBA”.

Could the EBA please comment on its decision to approve the job move, with restrictions, with specific reference to the abovementioned elements?

(i) EBA comment on Restrictions Decision, with reference to the interpretation of lobbying

This question refers to and quotes from the EBA’s 2018 annual report regarding the publication of information concerning occupational activities of senior officials after leaving the EBA’s service,⁶ where the EBA describes ‘lobbying activities’ as follows:

“Lobbying activities: activities conducted, directly or indirectly, by the former staff member of the EBA which aim to influence staff working at the EBA in:

a) the decision-making processes of the EBA, in particular in relation to the formulation or implementation of regulations, rules or standards,

b) any other activities under the scope of competence of the EBA in accordance with its founding Regulation and sectoral legislation, in the interest of the party (e.g. organisation, association, firm, body or person) at which the former staff member is

currently employed or provides professional services, or intends to be employed with or provide professional services, irrespective of the legal status of the party or of the professional relationship.

For this definition,

‘Directly influencing’ means influencing by way of a direct contact or communication with the staff working for the EBA or other action following up on such activities.

‘Indirectly influencing’ means influencing through activities not conducted directly by the former staff member vis-a-vis the staff of the EBA but on which he/she is involved, e.g. managing a team of people who will conduct those activities, or designing such activities, or providing advice to the organisation for which he/she works or provides professional services.

The EBA’s 2018 report thereby provides a broad interpretation of lobbying as well as advocacy which is consistent with the approach stated in the more recently published Ombudsman’s report

⁶ EBA 2018 annual report regarding the publication of information concerning occupational activities of senior officials after leaving the EBA’s service

on publication of information concerning the one-year ban under Article 16 of the Staff Regulations.⁷

Lobbying activities refer to activities which “aim to influence staff working at the EBA”, including direct influencing and indirect influencing of EBA staff.

The position regarding “direct influencing” in the case of Mr Farkas is that Article 2(2) of the Restrictions Decision prohibits Mr Farkas for two years from direct contact or communication with EBA staff in relation to any topics on which he was involved in his last three years of service. Article 2(3) additionally prohibits any professional contacts with EBA staff on behalf of AFME for two years, without being limited to topics on which Mr Farkas was involved in his last three years of service. These restrictions include contact with EBA staff concerning the EBA’s decision-making processes in relation to regulations, rules or standards and contact in relation to other EBA activities. The EBA considers these wide-ranging restrictions appropriate and adequate to protect the EBA’s legitimate interests, taking into account the further restrictions under the Restrictions Decision.

The position regarding “indirect influencing” in the case of Mr Farkas is that Article 2(2) of the Restrictions Decision therefore prohibits Mr Farkas for two years from managing AFME staff in their conduct of activities, or designing their activities, in a way which aims to influence by way of direct communication/contact of AFME staff with EBA staff regarding any EBA activity. Again this is a wide-ranging restriction which the EBA considers appropriate and adequate to protect the EBA’s legitimate interests, bearing in mind the other restrictions under the Restrictions Decision.

The effect of those other restrictions should be noted as they work in conjunction with the lobbying and contact prohibitions:

- Article 2(4) of the Restrictions Decision restricts Mr Farkas’ impact on AFME work with respect to the EBA by requiring Mr Farkas to refrain for eighteen months from assisting AFME members and otherwise contributing to AFME’s activities on topics directly linked to work carried out by him in his last three years in service. This means that even to the extent that AFME does not seek to influence the EBA through contact with EBA staff, Mr Farkas cannot assist or contribute to AFME work on topics linked to work on policy or supervisory matters on which Mr Farkas was involved in the EBA as far back as 1 February 2017.
- Article 2(5) of the Restrictions Decision prohibits Mr Farkas from ever disclosing information obtained at any time during his EBA service (except information which is already accessible to the public), meaning that he cannot impart such information to AFME staff under any circumstances.

⁷ Report of the European Ombudsman on the publication of information on former senior staff so as to enforce the one-year lobbying and advocacy ban: SI/2/2017/NF, p 7

While primary responsibility for applying the Restrictions Decision rests with Mr Farkas, the EBA has adopted additional implementing measures designed to reduce the risk that lobbying through AFME staff takes place in breach of the Restrictions Decision. These additional measures comprise the following:

- AFME and Mr Farkas have been requested to confirm, on a six-monthly basis, that Mr Farkas has not been involved in topics directly linked to work carried out by him during his last three years of service, and to inform the EBA of any changes to the AFME CEO's tasks;⁸
- The EBA will write to the AFME CEO on a six-monthly basis to confirm that no use has been made of EBA information or confidential insights;
- Meetings, calls or other bilateral engagements between any EBA staff member and AFME will need to be approved in advance by a Director on advice from the EBA's Ethics Officer;
- Invitations to AFME events or meetings with any AFME representative will need to be approved in advance by a Director on advice from the Ethics Officer;
- Where AFME requests to attend an EBA public hearing or other public event, AFME will need to state the extent of involvement of the AFME CEO in the topics and in the preparation for the public hearing before participation is approved;
- If an AFME representative were to apply to participate in the Banking Stakeholder Group, this would require confirmation from the AFME Chair that there will be no involvement of the AFME CEO in the preparation of any topics in which he may be conflicted;
- EBA staff have been informed of the restrictions and implementation measures including the need to report contacts from Mr Farkas to the EBA Chairperson through their Director or a directly-reporting Head of Unit;
- The EBA has informed the Chair of ECON, the Chair of the Financial Services Committee, the Acting Director-General of DG FISMA, the Chairs of ESMA and EIOPA, the Chair of the Supervisory Board of the SSM, the Chair of the SRB, the Chair of the ESRB, and the Chair of the Basel Committee, of the implementation measures and invited them to contact the EBA's Ethics Officer if they identify concerns that the EBA's restrictions are not being complied with.

In addition the EBA has informed AFME of the following practical steps to be followed in order to put these measures into practice, and has put in place processes to give effect to these arrangements:⁹

⁸ 11 February 2020 Letter from EBA to AFME

⁹ 11 February 2020 Letter from EBA to AFME

- When proposing a meeting, call or other bilateral engagement with EBA staff, the meeting organiser will need to specify the topics to be covered; the attendees and their organisational role; the involvement of AFME's CEO in the topics and preparation of the meeting/call, or engagement with participants in any of the topics in the agenda; and that they agree that the EBA will draft minutes which may be published (excluding commercially confidential information).
- When sending an invitation to EBA staff to attend an AFME meeting/event, AFME will have to specify the topics and extent of participation of the AFME CEO in the meeting/event or its preparation, or his engagement with participants in any of the topics in the agenda.
- For any EBA public hearing or other public event, any proposed AFME participant should register as usual on the EBA website and send a separate email to ethics@eba.europa.eu stating the extent of involvement of the AFME CEO in the topics and preparation for the public hearing.
- If an AFME representative applies to participate in the Banking Stakeholder Group, their application should be accompanied by confirmation from the AFME Chair that no indirect lobbying or advocacy by the AFME CEO will take place through the AFME representative, setting out the arrangements that will be put in place to ensure this.

(ii) EBA comment on Restrictions Decision, with reference to the description of AFME

The description given of AFME referred to by the Ombudsman notes that AFME is an industry body representing global and European banks and other significant capital market players. It is one of a number of such representative bodies. Moreover, banks and other firms represented by AFME may represent their own interests directly on regulatory matters.

The description notes that AFME provides expertise and comments on regulatory and capital markets issues. The Transparency Register indicates that AFME focuses on a very broad spectrum of regulatory and capital markets issues, listing AFME's interests as follows: *“AFME follows all EU initiatives affecting wholesale financial markets, including: Capital Markets Union; Banking Union; MIFID II/MIFIR; CRRII/CRDV implementation; Risk Reduction Measures, Bank Recovery and Resolution; Financial Transactions Tax; Bank Structural Reform; Implementation of Benchmarks Regulation; Implementation of Securities Financing Transactions Regulation; Implementation of Money Market Funds Regulation; Securitisation; European System of Financial Supervision; CRAs; Corporate Governance; Shareholders' Rights; Post Trade; Implementation of Settlement and Central Securities Depositories Regulation, Insolvency Law Reform, Market Abuse Regulation, EDIS; European Fund for Strategic Investments; Implementation of the General Data Protection*

Regulation, Revision to the 4th Anti-Money Laundering Directive, Financial Technology and Brexit.”¹⁰

While the EBA has an important role in relation to financial regulation in the Union, it is one of a number of Union bodies with responsibilities and tasks in this context. As an illustration of this, policies and rules on financial regulation in the Union are primarily set by the European Parliament and the Council in regulations and directives adopted on proposals from the Commission (‘Level 1 legislation’), with the Commission having competence to adopt delegated and implementing acts on limited elements where the Level 1 legislation so provides (‘Level 2 acts’). There are then other bodies at Union and Member State level that directly supervise and enforce compliance with those policies and rules. AFME’s wide-ranging areas of interest therefore relate not only to the EBA but to other bodies with responsibilities and tasks in relation to financial regulation in the Union. While the EBA’s Restrictions Decision contains wide-ranging restrictions on Mr Farkas in order to protect the EBA’s interests, Mr Farkas and AFME are not excluded from wider activities within the areas of AFME’s interest indicated by the Transparency Register, which may include activities relating to the work of other bodies with responsibilities and tasks in relation to financial regulation in the Union. The scope of the Restrictions Decision – in particular that the restrictions are designed to address interference with the EBA’s interests – reflects the particular focus of Article 16 of the Staff Regulations, which is to address conflicts with the legitimate interests of the direct employer, as distinct from the potential interests of other bodies to whom the restricted party’s activities may also relate. Nevertheless, the EBA’s Restrictions Decision may indirectly protect the interests of other Union bodies through, in particular, the restriction on use of confidential information and insights and the restriction on assisting AFME members and contributing to AFME’s activities on topics directly linked to work carried out by Mr Farkas in his last three years in service, as these topics are likely to be topics relevant to other Union bodies including the Commission, Parliament, Council, ESMA, ECB-SSM and SRB over the next 18 months. As noted above, these Union bodies have been informed of the restrictions and so are in a position to decide what measures they wish to take to protect their own interests.

Regarding its comments on issues to the EBA, AFME regularly provides comment during the EBA’s public consultations on draft technical standards and guidelines as indicated in the description given of AFME. Consultation on draft technical standards and guidelines is a legal requirement intended to give citizens, firms and other bodies the opportunity to submit their views on the EBA’s initial proposals for draft technical standards or guidelines. The EBA ensures a transparent consultation process in which it publishes submissions received during consultation, examines those submissions based on their technical merit, and publishes its responses. The EBA is not obliged to change the content of proposed draft technical standards or guidelines in light of submissions from AFME or others.

¹⁰ <https://ec.europa.eu/transparencyregister/public/consultation/displaylobbyist.do?id=65110063986-76>

In addressing the present question, the EBA's governance structure should be noted. The Board of Supervisors is the decision-making body responsible for the adoption of draft technical standards, guidelines and other regulatory products. The Executive Director participates in, but is not a member of, the Board of Supervisors and does not have any voting rights on the adoption of draft technical standards, guidelines or any other EBA regulatory products. Indeed, pursuant to the EBA's governance structure, the Executive Director¹¹ would not typically contribute to discussions at the Board of Supervisors in relation to the proposed regulatory products or other policy matters.¹² While the Executive Director prepares the work of the EBA's Management Board, the Executive Director is not a member of the Management Board and so does not vote.

10. Please explain how and by whom the option of prohibiting the Executive Director's job move was assessed? In answering this question, please submit all supporting documents.

The Appendix further describes the specific assessment carried out, which included the EBA's Joint Committee providing an opinion to the Management Board, which in turn proposed a decision to the Board of Supervisors. The role of the Board of Supervisors, and the scope of the decision that it could take was set out in notes to the Management Board and Board of Supervisors, and was discussed in the Management Board.¹³

Outright prohibition of a job move would, without depending on assessment, of course preclude possible conflicts of interest linked to the intended post, but specific assessment is necessary for an appointing authority to identify whether there are alternatives to outright prohibition of the move which would protect the EBA's legitimate interests and be proportionate and balance the EBA's interests with those of the staff member, in accordance with the Commission Implementing Decision.

The Management Board therefore focused on the assessment of alternatives to outright prohibition in view of the requirement to identify measures which are proportionate having regard to the right to work protected by the Charter of Fundamental Rights. Recital 5 to the Restrictions

¹¹ Separately, Mr Farkas was appointed by the Board of Supervisors as Chair of the Review Panel which was a body established by the Board of Supervisors to organise and carry out peer reviews and comprised representatives of competent authorities from each Member State. The functions of Chair of the Review Panel are separate and distinct from the functions of the Executive Director. The Review Panel reported to the Board of Supervisors on the progress of its work and submitted the final outcome of each peer review to the Board of Supervisors. Accordingly as Chairperson of the Review Panel Mr Farkas made oral presentations to the Board of Supervisors and answered questions from the Board of Supervisors regarding progress of the Review Panel's work and the submission of the final outcome of peer reviews. However, the Board of Supervisors was responsible for the adoption of the final outcome of each peer review.

¹² The EBA's Chairperson is responsible for preparing the work of the Board of Supervisors, including setting the agenda to be adopted by the Board of Supervisors, convening the meetings and tabling items for decision, and chairing the meetings of the Board of Supervisors.

¹³ The ability of the EBA not to approve the taking up of the new occupational activity was also highlighted in the version of the Restrictions Decision circulated to the Management Board ahead of its meeting on 10 September 2019 (EBA MB 2019 108). Article 2(1) added a provision expressly approving the carrying out of the new occupational activity, subject to conditions. This addition was highlighted in the email circulating the revised draft: see 6 September 2019 email to Management Board.

Decision refers accordingly to Article 21 of the Commission Implementing Decision which provides that an appointing authority is required to “[define] an appropriate balance between the need to ensure integrity through temporary prohibitions and restrictions and the need to respect a former staff member’s fundamental right to engage in work and to pursue a freely chosen or accepted occupation.” Having identified restrictions which were considered to be appropriate and proportionate the EBA, in line with Union law, did not seek to impose an outright prohibition of the job move.

Both legally and factually speaking, had the EBA considered that these restrictions were not appropriate and proportionate, the EBA would have been in a position where it could treat outright prohibition as the appropriate and proportionate measure in Mr Farkas’ case. On the other hand under the legal framework, where an appointing authority considers that there is an appropriate and proportionate alternative, the implication for the appointing authority is that outright prohibition is not a measure which it should seek to impose, and the EBA acted within this limit accordingly.

11. How does the EBA interpret the obligation laid down in Article 16 of the Staff Regulations that former staff: “continue to be bound by the duty to behave with integrity and discretion as regards the acceptance of certain appointments or benefits”?

Having regard to the scope of the Ombudsman’s inquiry, Question 11 is understood to refer to how the EBA interprets the obligation of integrity and discretion under Article 16 of the Staff Regulations with specific reference to the Restrictions Decision which is the subject of the complaint into which the Ombudsman has opened this inquiry.

Article 16(1) of the Staff Regulations states that officials “shall, after leaving the service, continue to be bound by the duty to behave with integrity and discretion as regards the acceptance of certain appointments or benefits”. This obligation applies to Mr Farkas as a former member of EBA staff and in particular in relation to the AFME post which he has taken up.

As emphasised by Article 19 of the Commission Implementing Decision, that obligation is not limited in time. This means that Mr Farkas is expected to act with integrity and discretion as regards the acceptance of certain appointments or benefits in the future. The framework for notifying occupational activities and imposing binding restrictions on former staff is, however, limited to two years under Article 16(2) of the Staff Regulations.

As a related but wider point, it is recognised that Article 16(2) and (3) contain provisions linked to the obligation under Article 16(1) to behave with integrity and discretion as regards the acceptance of appointments or benefits.

12. The Advisory Committee on Conflict of Interest (ACCI) advised the EBA Management Board to consider the costs and benefits to the EBA of retaining the Executive Director in a purely administrative role, and the duration of such a role. ACCI further advised that this consideration should take into account the perception of external stakeholders of the Executive Director's continuing with the EBA given the nature of his future employer.

Did the Management Board do this? If so, please provide an explanation as regards how this was done and any supporting documents.

The advice in the ACCI's Opinion was:

"The ACCI proposes that, during his notice period before leaving the service, Mr. Farkas' tasks and responsibilities be limited to organisational and operational matters. In particular, Mr. Farkas should no longer be involved in the preparation of EBA's prudential and supervisory policies nor have access to confidential information that are outside the scope of the Operations department and Accounting.

The ACCI further advises the Management Board to consider the cost-benefit to the EBA of retaining Mr. Farkas in a purely administrative role, and the duration of such a role. This consideration should also take into account the perception of external stakeholders of Mr. Farkas' continuation of his role with the EBA given the nature of his future employer."

The Management Board considered all advice in the ACCI Opinion. As this Question requests, the following explains how the Management Board considered the advice and the costs and benefits for the EBA of retaining the Mr Farkas in a purely administrative role and the duration of such a role and how in the same context the EBA took into account the perception of external stakeholders.¹⁴

As described in the Appendix, the ACCI provided its Opinion in advance of the Management Board's first meeting held on 27 August in relation to Mr Farkas' resignation. The Management Board also received a note prepared by the EBA legal services unit setting out the legal framework which requires the EBA to define an appropriate balance between the need to ensure integrity through temporary prohibitions and restrictions and the need to respect the former staff member's fundamental right to engage in work and to pursue a freely chosen or accepted occupation.

In the Management Board meeting on 27 August the ACCI Chairperson presented the ACCI Opinion, and the Management Board discussed the Opinion. The EBA Chairperson observed that the Executive Director had up to a six month notice period under the Staff Regulations, that with Mr Farkas' departure the EBA was in a difficult position considering also the Chairperson's recent

¹⁴ Supporting documents include the documentation for the Management Board discussion on 27 August and the draft minutes and further notes of this call which have been provided to the Ombudsman and which reference the points set out in this reply to Question 12.

arrival, its move to Paris and the fact that a new Executive Director would be able to join in January at the earliest. The Chairperson asked the Management Board to carefully consider further working conditions for Mr Farkas in order to continue the smooth day-to-day business of the EBA.

The Management Board members and the Commission representative expressed their views on the length of the notice period and working conditions for the remainder of the notice period. In doing so, consideration was given to the costs and benefits of retaining Mr Farkas in a purely administrative role, taking into account the factor of external stakeholder perception, and the duration of such a role. On the factor of external stakeholder perception, staff notes of the meeting reference a participant mentioning a preference that Mr Farkas should have no duties at all if the alternative were to be that he would possibly be working on sensitive issues which may pose a serious reputational issue. The draft minutes and staff notes also show recognition of the importance of ensuring the continuity of administrative and operational functions in the near term.

EBA staff subsequently discussed potential areas where Mr Farkas' continued involvement in November 2019 could be helpful in ensuring continuity, in particular in finalising the 2020 budget and work programme and the 2019 reclassification process, and potentially in concluding an ongoing management recruitment procedure, finalising ongoing procurement procedures and as validation officer on financial transactions.

As further described in the Appendix, the Management Board held a second conference call on 30 August in which it again considered the costs and benefits the duration of Mr Farkas' role in relation to administrative matters. On the basis of this second discussion, reflecting the further consideration given to Mr Farkas' administrative role, the Management Board brought forward termination of Mr Farkas' involvement on administrative matters to 31 October 2019 from the proposed date of end-November 2019.

APPENDIX

SUMMARY TIMELINE OF EBA ACTIONS IN RELATION TO MR FARKAS' NOTICE OF RESIGNATION

Arrangements to reassign the Executive Director's responsibilities to other senior EBA staff began with the receipt of Mr Farkas' notification of resignation on 2 August 2019. All arrangements were in place by 31 October 2019 as provided for under the Restrictions Decision.

The Restrictions Decision provides in Article 1(1) that Mr Farkas' responsibilities were to be limited to organisational and operational matters and that in particular Mr Farkas was not as of 12 September allowed to participate in the preparation of EBA regulatory and supervisory policies or attend discussions in the Management Board, Board of Supervisors or Joint Committee of the ESAs on such items.

To give effect to this arrangement, the Restrictions Decision further provided that Mr Farkas was not allowed access to EBA information outside the scope of the Operations Department and Accounting function (those being organisational and operational matters) and not allowed to represent the EBA externally save where instructed by the Chairperson or on request of the European Parliament, the Council or Commission. The Restrictions Decision went on to provide for delegation of his administrative functions. Article 1(4) of the Decision provided that those functions were to be delegated to senior managers by 31 October 2019.

In practice, as regards policy and supervisory matters the Restrictions Decision formalised arrangements that had already been put in place, so that Mr Farkas ceased to be involved in those matters following his return from annual leave on 26 August 2019. The following is indicative of the steps taken to reassign that work as well as Mr Farkas' responsibilities on administrative matters.

- *2 August*

On 2 August, Mr Farkas formally provided notice of resignation by letter to the EBA's Chairperson together with his notification of post-employment occupational activity after having contacted the Chairperson to inform him of this on the previous evening.¹⁵ In the documentation provided, he stated his intention to step away from tasks concerning policy and supervisory matters. He referred to his past relations with AFME and expressed his awareness of considerations relating to conflicts of interest. He requested an assessment by the Joint Committee of the potential conflict of interest,

¹⁵ 2 August 2019 Letter of resignation; Notification: Engagement in an Occupation after Leaving the European Banking Authority signed 2 August 2019.

followed by a Management Board discussion and assessment. He stated his desire and intention to follow the applicable requirements regarding potential conflicts of interest.

- *3 August to 25 August*

Having submitted his notice of resignation and declaration of interests, Mr Farkas was on annual leave from close of business on Friday 2 August until Monday 26 August and was not actively engaged in policy and supervisory matters during this period.

During this period the EBA prepared the Joint Committee and ACCI opinions in order to have a basis on which to proceed when Mr Farkas returned to work, and convened its Management Board for 27 August. Essentially, the ACCI addressed conditions for the remainder of Mr Farkas' EBA service and the Joint Committee addressed post-EBA service conditions in relation to the notified AFME post.

The ACCI proposed that Mr Farkas' tasks and responsibilities be limited to organisational and operational matters and more specifically that he should no longer be involved in the preparation of the EBA's prudential and supervisory policies nor have access to confidential information that outside the scope of the Operations department and Accounting.

- *26/27 August*

During the regular weekly management meeting, Mr Farkas informed the management team that he was recusing himself from policy work and acknowledged that the Management Board would determine the extent of other work he would undertake. In that context Mr Farkas added that he would prepare the way by distributing his external speaking arrangements to appropriate colleagues. In short, upon returning to work Mr Farkas ceased to be active in policy and supervisory matters and, to the extent necessary, focused on arrangements for the reallocation of those tasks to other colleagues.

On Tuesday 27 August, the Management Board met to discuss Mr Farkas' notification and to prepare a draft decision for adoption by the Board of Supervisors. The ACCI and Joint Committee Opinions were provided to the Management Board for the purpose of that meeting along with a cover note prepared by the EBA legal services unit which set out factual matters and the legal framework.¹⁶ The cover note set out the possibility to forbid the taking up of a proposed occupational activity, as well as the possibility to accept it with restrictions, together with the requirements under the Commission implementing rules adopted by the EBA which required the Board of Supervisors to define *"an appropriate balance between the need to ensure integrity through temporary prohibitions and restrictions and the need to respect the former staff member's fundamental right to engage in work and to pursue a freely chosen or accepted occupation"*. The

¹⁶ 27 August Management Board conference call - Cover Note: Executive Director's resignation

cover note summarised the opinions of the ACCI and Joint Committee and put forward proposals for a decision of the Board of Supervisors. On the basis of the Management Board's discussion, the EBA legal services then prepared a draft Board of Supervisors' decision for the next Management Board meeting which would take place on 30 August.

EBA staff were informed by email of Mr Farkas' resignation.¹⁷ It was noted that this would affect procedures and daily operations and that EBA would aim to remain fully operational while ensuring adequate measures were in place to ensure transition. It was explained that the Management Board and the Board of Supervisors were being involved to define the terms and conditions for the end of Mr Farkas' service and that there would be an announcement of initiatives to adjust internal procedures to implement these changes.

Consequently Mr Farkas would no longer have a role in the review of policy and supervisory documents being prepared by EBA staff for the Management Board and the Board of Supervisors.¹⁸

Regarding the EBA's external activities, arrangements were made to ensure that the Executive Director would not take up any of the external speaking engagements scheduled for the coming period, and that he would be replaced for those engagements by EBA staff.¹⁹

▪ *30 August*

The Management Board held its second meeting to discuss Mr Farkas' resignation and for this purpose received a draft EBA decision prepared by the EBA legal services unit based on the discussion at the Board's first meeting.²⁰ Having discussed this draft decision, the Management Board agreed to bring forward termination of Mr Farkas' involvement on organisational and operational matters from the proposal of end-November 2019 set out in the draft decision to 31 October 2019. This change of date sought to balance the interests of the EBA in avoiding conflicts of interest with recognition of the desirability of Mr Farkas being available to conclude the EBA's recent relocation to Paris from London and the 2020 work programme, also taking into account the recent arrival of the EBA's Chairperson in May 2019. The Management Board agreed on that basis to propose a vote by the Board of Supervisors on a decision approving Mr Farkas' move to AFME with restrictions.

¹⁷ 20 September 2019 email to EBA staff

¹⁸ See for instance 27 August 2019 internal email

¹⁹ See for instance 4 September 2019 email on EU-Asia/Pacific Forum meeting on 10 and 11 October 2019

²⁰ See Draft BoS decision revised (EBA MB 2019 097)

For this particular category of decision the legal basis, which is set out in the preamble to the draft decision, is Article 68(3) of the EBA's founding Regulation and Articles 16 and 17 of the Staff Regulations. (Although the EBA's Ethics Guidelines (EBA DC 271) cannot be the formal legal basis for decisions of this kind, the approach in the Restrictions Decision is consistent with page 33 of those Guidelines which informs staff of the implications of leaving the service, in particular that the EBA as appointing authority must ensure that restrictive measures on their post-service activity are appropriate and proportionate).

- *2 September*

At the weekly management meeting, updating the management team on the Management Board discussions the EBA Chairperson explained that Mr Farkas would work out his notice period, respecting the rules and restrictions that had been proposed to the Board of Supervisors, and Mr Farkas himself gave the assurance that he would do so because of potential conflict of interest. The Chairperson added that Mr Farkas would be excluded from supervisory and policy matters but would continue organisational and management tasks. Mr Farkas added that he was delegating external meetings/events and stepping back from his internal role in relation to the EBA's Euclid data collection and analysis IT programme, peer reviews and other internal policy-related functions, and, in reference to administrative tasks, that he would finalise the 2020 work programme and aspects of the budget and single programming document.

- *5 & 10 September*

The Management Board held further discussions on the proposed restrictions decision in a call on 5 September 2019. This followed input from the Director-General of FISMA²¹ received during the written procedure launched in the Board of Supervisors on 30 August 2019 proposing revisions to the restrictions. The written procedure was suspended to allow consideration of these proposals.

The Director-General of FISMA considered that the decision to be adopted by EBA “should include the strictest approach possible” and expressed concerns that the text of the current draft decision proposed to the Board of Supervisors on 30 August 2019 was too weak. He proposed new text for Article 2(3) including a more comprehensive restriction along the following lines: *“The Staff Member shall refrain, for [xx] months after leaving the service of the EBA, from dealing with files, cases, matters or projects related to the work carried out by him during his last three years of service, including related or subsequent cases and/or court proceedings. This includes in particular [xxx]. In case of doubt, the Staff Member shall contact EBA.”* The Director-General considered that the period of application of such restriction should in principle extend to two years, and it should at the very least apply to the transposition in the EU of Basel III.

The period of the restriction was discussed by the Management Board which requested the Commission representative to provide examples of similar recent senior management cases at the Commission. After reviewing these examples, the Management Board agreed in its meeting held on 10 September to use the Commission's proposed wording, combined with the non-exhaustive list of topics from the original draft. The Management Board concluded at that meeting that a period of 18 months was appropriate, taking into account that the maximum 6-month notice period under the Staff Regulations was also being applied and that from the Executive Director's return to the office from annual leave he had been excluded from regulatory and supervisory matters.

²¹ 3 September 2019 Email from Director-General FISMA to EBA Chairperson

The written procedure was then relaunched with the Board of Supervisors with revised text based on the Commission proposal to align the restrictions more closely with similar recent cases identified by the Commission.

- *12 September*

On 12 September, the Board of Supervisors approved its Restrictions Decision following the resumption of the voting process. The Restrictions Decision was communicated to Mr Farkas on 16 September.²²

- *20 September*

On 20 September EBA staff were informed by email of a package of immediate, medium-term and long-term measures being implemented in response to Mr Farkas' notice of departure.²³ Referring to immediate measures regarding Mr Farkas' policy and supervisory work, it was confirmed that Mr Farkas "*no longer participates in the preparation of EBA regulatory and supervisory policies and does not attend discussions in the Management Board, Board of Supervisors or Joint Committee of the ESAs on such items.*" It was added that (in accordance with the Restrictions Decision) Mr Farkas no longer represented the EBA externally except on the instruction of the EBA Chairperson or on the express request of the European Parliament, the Council or the European Commission. Staff were instructed no longer to involve Mr Farkas on regulatory and supervisory topics. As described above, these instructions based on the Board of Supervisors decision reflected arrangements that were in practice already in place.

Referring to medium-term measures for the period from the end of October to the end of January 2020 it was explained that Mr Farkas' last day in the office would be 31 October and that he would subsequently be on leave and only attending the EBA on the Chairperson's request. It was explained that staff should communicate with their Director or Head of Unit if they considered there to be a need for Mr Farkas' assistance or if they had any professional contacts with Mr Farkas. The email to staff on 20 September also set out the Restriction Decision's longer-term restrictions in relation to Mr Farkas' new position at AFME and the implications of this for his engagement with EBA staff.

- *23 September to 31 October*

EBA's IT staff implemented information controls measures in relation to Mr Farkas with effect from Monday 23 September up to and including Mr Farkas' final day in the office on 31 October. Those

²² 16 September 2019 EBA email to Mr Farkas

²³ 20 September 2019 Internal email to EBA staff

measures were outlined in an action plan prepared at the time, and their execution was recorded in a log of actions taken.²⁴

By Decision of 29 October 2019,²⁵ following discussion between the Chairperson and Director of Operations Mr Farkas was asked to adopt a delegation decision, in line with the Restrictions Decision, delegating his various administrative tasks as Executive Director to the Director of Operations and Chairperson, and adjusting the reporting lines of staff reporting directly to the Executive Director. The Decision entered into effect on 1 November 2019.

On 31 October 2019, Mr Farkas in accordance with the Restrictions Decision ceased to have access to the EBA's premises and to EBA information. While the Restrictions Decision provided that the Chairperson could instruct Mr Farkas to attend EBA premises during the remainder of his service as Executive Director, the arrangements to reassign his responsibilities had been put in place and did not require Mr Farkas' attendance. Mr Farkas was not subsequently requested by the European Parliament, the Council or Commission to represent the EBA externally.

- *11 December 2019*

The Board of Supervisors appointed the Director of Operations as acting Executive Director, replacing the delegation arrangement that had been in place since 1 November.²⁶

²⁴ 12 November 2019 Note on the actions performed after BoS decision on resignation

²⁵ 29 October 2019 Executive Director Delegation Decision

²⁶ 11 December 2019 Decision of the Board of Supervisors