Friday 20 March 2020.

To the European Ombudsman

Re complaint no. 201902168, comments from the complainant to the EBA's reply to the Ombudsman's questions

Thank you for the opportunity to comment on the European Banking Authority's (EBA) response to the questions from the Ombudsman. We will comment on the replies from one end to the other and then sum up with some overarching conclusions.

Questions 1, 2, 4 and 5.

We find it problematic that the Executive Director was in the process of applying for a job at AFME for 3½ months before notifying his associates. This raises questions about his activities in the first months, before his associates and colleagues were notified. The massive conflict of interest implied calls for solutions in the future.

In this connection it is worth noting the exchanges with AFME in that period:

"• 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)."

We assume that in the end Mr. Farkas declined to participate at the AFME anniversary event. It would, however, be a relevant question to ask.

The full list of interaction with AFME since early 2018 underlines a widespread general concern with revolving doors cases. If an institution is lenient or flexible towards moves to the private sector after end of term, civil servants can have a private interest in displaying favouritism of associations or companies with whom it would be realistic to find a job. The list of exchanges with AFME shows frequent and personal contact between Adam Farkas and AFME on perhaps the biggest current work strands at the EBA of interest to AFME.

The EBA's reply to question 5 appears contradictory and it is in any case difficult to comment on without the supporting documents. The minutes of the meeting of the Board of Supervisors on 9-10 July is not available, it is unclear what assessment of Mr Farkas tasks this refers to, and the EBA Fraud Risk Assessment 2018 is not available.

As far as we can tell, it is implicitly claimed that the obvious conflict of interest at play when the Director is conducting talks on future employment with an organisation with a vested interest in the decisions made by the EBA, is somehow neutralised by "the EBA's governance, internal review processes, transparency through public consultation on regulatory policy and through the public meeting register." We believe that cannot possibly be the case when the talks between AFME and Mr. Farkas are unknown to the EBA as well as the Board of Supervisors, preventing any restrictions or precautionary measures. If that were the case, then no specific restrictions would have been necessary at the later stages either.

It is not quite clear from the text, but it would appears strange if the EBA conclusion to a specific investigation into the months before Adam Farkas notified the EBA about his new employment, incidentally showed that the tasks he performed during those months were of a nature that entailed no risk of conflict of interest. The EBA did work on a series of important policy issues during this time, including stress tests and the finalization of the Basel III framework, as is obvious from the one set of minutes of a meeting of the Board of Supervisors available from the relevant period, 12-13 June 2019.

It becomes even further problematic when including the minutes from the meeting of the Management Board on 4 June 2019. At the meeting, the then Executive Director played a main role throughout the meeting, including when the EBA's handling of one of the biggest money laundering cases in modern history was discussed, concerning illicit transfers of up to 1 trillion euros. The case involved not only two financial services authorities, the Danish and the Estonian, but a series of big banks as well, first and foremost Danske Bank and Deutsche Bank. Both are members of AFME.

In the minutes, the case referred to as the 'BUL case' (Breach of Union Law case), is discussed from various angles, including how the case is communicated to the public. We note that at the meeting the Commission representative voiced concern about the way the case had been communicated by the EBA, and raised reservations about the efficiency of the measures adopted to strengthen supervision. We see Adam Farkas in the main role at the meeting.

To be clear: we find it outrageous that the most important money laundering case in years, in which EBA played a major role in making the decisions on the consequences in legal and political terms, has an EBA Director as a protagonist which was in contact with AFME over a lucrative job.

We assume the date of the first contact between Mr Farkas and AFME/the recruitment firm is correct. 18 April is the day after the EBA communicated in a dry an succinct manner, its decision not to open a case about breach of Union Law. Had there been any contact before – ie. before the crucial meeting of the Board of Supervisors on 16-17 April, it would be an even more absurd story.

Question 3

We find it peculiar that no communications was found on Adam Farkas tablet and Blackberry in that they were work tools provided by the EBA and can then not be considered personal. Communications on such equipment can be covered by EU rules on transparency/access to documents under Regulation 1049/2001.

Question 6-8

No comments.

Question 9

The question of enforcement of the restrictions adopted by AFME when approving Adam Farkas move to AFME, was key to our complaint. We find it interesting that the EBA has adopted a series of additional implementing measures. It is not that we do not appreciate the effort, it is not that we do not welcome the extra effort, but we have argued in our complaint that the fundamental problem is that it is not possible to find effective measures that can safeguard the EU institutions in general and the EBA in particular from undue use of the information and experiences from Adam Farkas' time with the EBA when in his new position. Also, we have argued that AFME was set up to influence the EU institutions on behalf of some of the biggest banks in the world. AFME cannot be expected to quietly respect limitations to their operations.

For the sake of clarity we will comment briefly on all additional measures:

* 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.

Comment: Even if AFME would decide to reply positively to such a request, the EBA would not be in a position to verify it.

* 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.

Comment: It is not possible for the EBA to verify the information Adam Farkas may give in reply (assuming the EBA will insist on a reply, which is not clear from this text.)

* 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.

Comment: We do not imagine the interaction between AFME and the EBA will change in nature. The problems will lie in the preparatory process at AFME. This will hardly be detected through this procedure.

* 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.

Comment: This makes sense in that potential direct encounters with the former Director can be prevented. But it does not solve the main problem.

* 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.

Comment: The EBA will have no possibility to check the information provided by AFME. It is highly unlikely AFME would ever admit it if the former Director had violated the restrictions.

* 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.

Comment: It will be costless to AFME to make a solemn promise along these lines. But the EBA will have no way of ensuring the veracity of such statements.

* 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.

Comment: A sensible measure. This is one of the few ways the EBA can enforce one of the restrictions. We assume it can have consequences if an employee would not report contact with Adam Farkas. However, the direct contact with EBA Staff has no influence on the 'indirect lobbying' that was always our main concern as regards the post-employment period.

* 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.

Comment: This measure too, is appreciated. It may help detect behavior by Adam Farkas in violation of the restrictions, if he would be so bold as to conduct lobbying in person on one of the topics he has worked on at the EBA for the past three years, ie. basically all key topics on banking regulation. But there will be even fewer tools available to the persons in question when compared to the EBA when it comes to detecting Adam Farkas' potential role as advisor to AFME staff and AFME members (indirect lobbying) on the issues covered by the restrictions. Also, there is no guarantee the addressees can or will respond positively to the invitation.

* 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).

Comment: AFME will hardly ever admit to direct involvement of its CEO in preparing meetings or other activities of AFME. The problem remains that the EBA will be in no position to certify whether such statements are to be trusted. The remaining measures should be standard praxis for any meeting with external stakeholders.

* 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.

Comment: It would seem obvious that EBA staff cannot participate at events wholly or partly prepared by the CEO of AFME under the circumstances. This procedure seems to provide too much flexibility, except if the criteria by which EBA participation is decided, are very strict. Such criteria are not explained in the information available on the new measures, except it will be up to a Director and the Ethics Officer to make the decision.

* 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.

Comment: As above: the EBA cannot expect AFME to disclose the CEO's involvement should it inhibit their work.

* 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.

Comment: As above: the EBA cannot expect AFME to disclose the CEO's involvement should it inhibit their work. Furthermore, there is the question of AFME members. As pointed out on an earlier occasion, the current Banking Stakeholder Group already has an AFME member: Veronique Ormezzano represents BNP Paribas, but she is also a prominent and active participant in AFME's work in that she is the chair of the Prudential Regulation Board of the organisation:

In sum, while the additional measures are welcome, they cannot make up for the fundamental contradictions in the Restriction Decision made on 12 September 2019 by the EBA: As of when Adam Farkas took up his position at AFME, there was very little the EBA could do to enforce the restrictions. The fundamental problem is that the "primary responsibility rests with Mr. Farkas," as the EBA notes in its reply. And as Mr. Farkas was hired to do just the thing the EBA would prefer he didn't – use his extraordinary networks and insider knowledge from the EBA – there is still a very real and deep conflict of interest at play.

The EBA's considerations on the description of AFME in the reply to question 9 do not improve on the problem. When the EBA notes that "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," we understand this as an attempt to show other areas of work the new CEO of AFME could engage in. Our comment is, that this represents yet another big integrity challenge.

Undue use of his experiences with the EBA in its interaction with other institutions, and inappropriate use of knowledge about specific dossiers reserved for a small group of regulators in the EBA and in other institutions, is even more difficult to prevent when it comes to other EU-institutions with no implementing measures in place that address eg. the Commission. The EBA argues that "the EBA's Restriction Decision may indirectly protect the interest 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 direcly linked to work carried out by Mr. Fakras in his last three years in service, as these topics are likely to be topcis relevant to other Union bodies…" We find this unconvincing. The mentioned restrictions cannot be enforced properly by the EBA, and the other institutions have no mechanisms in place to enforce anything of the sort.

Finally, the EBA points out that AFME works in areas beyond the scope of the issues covered by the restriction. "Mr Farkas and AFME are not excluded from wider activities within the area of AFME's interest indicated by the Transparency Register." That is correct. But as we pointed out in our complaint, on the

long list included in the Transparency Register, only two are beyond the scope of the restrictions: the Financial Transaction Tax and the European Strategic Investment Fund. We do not believe a CEO of AFME would be able to limit his work to these two areas.

In sum: we welcome the additional measures, but they do not solve the problem that the EBA created for itself when Adam Farkas' move to AFME was approved.

Question 10

The EBA argues that if an alternative to outright prohibition is to be found, a "specific assessment is necessary for an appointing authority to identify whether there are alternative to outright prohibition of the move which would protect the EBA's legitimate interests…" We have looked as carefully as we possibly could at the EBA's considerations around the time of the approval of Mr Farkas move to AFME, and we have not found such an assessment. Such an assessment would entail an analysis of the ways the 'legitimate interest' of the EBA could be in peril under the circumstances provided by the Director's move to AFME, and having identified the risks, the EBA could then go on to explore whether particular restrictions could adequately protect the EBA's interests. None of the supporting documents, be it the advice of the ACCI or the Joint Committee, or the 'cover note' provided by the EBA legal services, contains any such assessment. The ACCI, in fact, does not even address the post-employment period of Mr Farkas, despite a broad obligation under internal rules to provide advice on matters regarding conflicts of interest of the Director.

An assessment of this kind would necessarily be about the specific problems raised by a future employment of a high ranking EBA civil servant with AFME. It would require close considerations about scenarios that could compromise the interest of the institution after the Director's departure from the EBA. This never happened, according to the documents we have seen. That conclusion is further supported by the fact that the EBA decided on additional measures only after Mr Farkas had taken his position at AFME. An assessment to ascertain whether alternatives to an outright prohibition were available, would entail considerations of scenarios and of the measures available to enforce the restrictions. But if this ever happened, it was well after the approval of the job move. And the result – the additional measures – are unconvincing and confirm our position: that the EBA was left with no other option but to reject the move, but failed to draw that conclusion.

It is a major flaw in the EBA's approach, then, that the EBA makes a decision on restrictions, without considering in any serious manner, whether the restrictions could be enforced.

As far as the legal basis is concerned, we are now in a position to consider all the legal advice made available to the EBA Management Board and Board of Supervisors. The EBA has kindly provided us with the written advice provided by the EBA legal services, which was not released at an earlier stage.

What we lack in this paper are signs of the EBA considering the option or rejecting Mr Farkas' move to AFME. Considering the evidence, it was our preliminary conclusion that the EBA never seriously considered that option. That is now confirmed by the document provided to the Management Board and the Board of Supervisors – the note provided by the EBA legal services. In the document there are no considerations whatsoever about whether a rejection would be the appropriate measure. Article 16 of the EU Staff Regulations is cited in full, as is the relevant parts of Commission Decision C (2018) 4048 – but at no point is

the question put whether it would be the correct option to reject the move. Instead, it appears to be considered self-evident that the debate should focus on restrictions.

In particular, we have been interested in the arguments behind the application of the "right to work protected by the Charter of Fundamental Rights," as highlighted in the reply. We had expected to see an analysis of the role of this part of the Charter, in light of the overpowering significance the EBA asserts to this part of the legal basis of the decision. The Charter is brought in via a Commission Decision on the implementation of article 16 in a manner that we see as a weakening of article 16. It potentially annuls any attempt to reject a move to an external position, depending on how it is interpreted.

The reply itself is erroneous on this point: the relevant article in the Charter of Fundamental Rights does not guarantee "the right to work" as claimed on page 13, but merely "the right to engage in work". And the EBA would not be preventing Mr Farkas from working, had it not approved the move, it would merely bar Adam Farkas from a particular job. The analysis from the EBA legal services does not take this much further. We find the document utterly disappointing, and it shows, in our view, an institution with a careless approach to article 16. We had hopedto see some considerations about whether the 'right to engage to work' applies to Mr Farkas in this particular situation. It can hardly be argued that this was the only option for Mr Farkas to 'engage in work'. We note, for instance, that Mr Farkas had applied for the job as Director of the EBA, ie. another term. The EBA would hardly consider it an obligation under the Charter of Fundamental Rights to hire Mr Farkas again, yet that would be the logical step, considering the way the EBA has applied the Charter in this case.

We strongly urge the Ombudsman to consider the use of the Charter of Fundamental Rights in this case, as an extensive use of this as a legal basis could severely undermine the option under article 16 to reject a move to a specific position. It would be quite ironic if the main outcome of this part of the Charter of Fundamental Rights were to become an obstacle for effective protection of the integrity of the EU institutions.

Question 11-12

No comments.

Appendix

On page 19, we are told that EBA staff were informed of Mr Farkas' resignation on 20 September. That is very late, considering Mr Farkas resigned on 2 August.

Reading the reply from the EBA, we believe, confirms our position. The EBA was left with no other option but to reject Adam Farkas' move to AFME by imposing a cooling off period, preventing him from taking such a position for a long time. Also, our first analysis has been confirmed: the EBA never considered that option in any serious manner.

If anything, the reply from the EBA adds to our concern, in particular regarding the time between the first contact with AFME or the recruitment agency on the job offer. This, we now know, happened many months before it was notified to the EBA. Considering the many important political matters the Director dealt with in the meantime, makes us wonder how such a situation can be prevented in the future. We note, for

instance, that Adam Farkas handled a very big money laundering scandal in the months before he handed in his resignation and notified his imminent departure to the EBA.

Yours sincerely,

Kenneth Haar

On behalf of the Change Finance coalition