Tuesday 29 September 2020

To the European Ombudsman

Regarding complaint 2168/2019/KR

Thank you for your letter dated 31 August inviting Change Finance to comment on the EBA's opinion.

We are happy to see progress at the EBA regarding ethics rules on post-employment restrictions as well as on access to confidential information for staff moving to another job. Still, we do not think the reforms go far enough. The simple litmus test is to ask if the EBA could repeat the mistake they made when they allowed Mr. [redacted] to go straight to a job as executive officer at AFME. In our assessment, that could happen within the new framework.

Access to confidential documents

As for the EBA's decision on 'Access to confidential information for staff moving to another job outside the EBA', we welcome the fact that the EBA has now produced a detailed document outlining the procedures to be followed when a staff member informs the agency of his or her intention of leaving the service. This is in response to the problems raised by the Ombudsman in the Recommendation of 7 May 2020 (hereafter 'the Recommendation').

In the Recommendation's point 54 the Ombudsman highlights the fact that the EBA reacted very slowly to the announcement of the Director's job move. While the EBA was informed on 1 August 2019 about Mr [redacted]' intention to leave the service, he was not prevented from access to confidential information until 23 September 2019. The new decision on 'Access to confidential information for staff moving to another job outside the EBA' is to prevent a repetition. Members of staff are now asked to inform the EBA immediately if they are moving to another job – though the wording makes the decision take shape of guidelines rather than rules. For instance, staff members are told "it is important that you inform your line manager".

The bigger problem, though, is the absence of a time line. Upon receiving the notification of the departure of a member of staff, three related processes will take place, but crucially, there is no indication of the speed of the three processes, nor of when they will be initiated. Though we recognise the effort the EBA has now made to strengthen the rules on access to confidential documents, we believe there is a risk of repetition.

Another related problem is about the long period in which Mr [redacted] was involved in negotiations with AFME but had not yet agreed formally on the job move, a time span of about three months (23 April to 29 July). That problem is raised in the Recommendation's point 53. It is good to see the EBA has followed up on the recommendation to urge staff to

behave with integrity and inform the line manager about negotiations concerning post-employment activities. But we find it peculiar that there is no wording about how the line manager is to respond vis a vis access to confidential information.

Finally, it is unclear if the text covers the Chairman and the Executive Director, both of whom cannot be said to have 'line managers'.

Identifying conflict of interest

The EBA's "Decision on criteria for assessing post-employment restrictions and prohibitions" (hereafter 'The Decision') contain several solid steps forward. The new text to be inserted in the EBA's Ethics Guide supplements its section 9, a text not fit for purpose in its previous state as it provides very few details. In effect, under section 9 in its former shape, the assessment of whether and what restrictive measures are needed is done on the basis of Commission Decision C(2018) 4048 final.

We find section 2 in the Decision, which lists the entities most likely to give rise to conflicts of interest and section 3, which lists the entities which is likely to give rise to the most significant conflict of interest, convincing and appropriate. In particular, we would highlight the listing of influential organisations.

In particular, it is commendable that "the scale of the influence of the organisation on industry practices and policy making" is material, for example the organisation is an influential financial services lobbying body." In some EU institutions, conflict of interest are mainly regarded as a problem in relation to 'competition policy concerns' ie. the risk of one company having an unfair advantage over another, whereas the problems that relate to industry interests in a broad sense which may conflict with other interests in society, are hardly considered.

The explicit mention of prohibition in section 6 of the Decision is a step forward too, in that prohibition 'to carry out the proposed occupation activity' was not mentioned in section 9 of the EBA's Ethics Guide.

Timespan of notification and lobbying ban

The way the EBA foresee the implementation of the notification period and the lobbying ban required by EU Staff Regulations shows some care for detail, but still give reason for some concern. We feel that generally the time frame for notification is too short in some cases, a problem not restricted to the EBA. Our main concern, though, is if there is a risk of the EBA going below the duration of the notification period and the lobbying ban.

There is no mention of a notification period in the new decision on post-employment. It can be assumed that the current text in section 9 of the EBA's Ethics Guide still apply, which is a notification period of two years. But the text of the Decision itself lacks clarity on that point.

In particular, the decision states that “any cooling-off periods would not normally exceed the lesser of: (i) half of the duration of the staff member’s service with the EBA; or (ii) the two year period after the staff member has left the EBA’s service.”

Cooling-off period is not a term used in EU Staff Regulations, but it is normally used as synonymous for ‘notification period’. But the text of the decision, then, would enable staff, including senior staff, to have a shorter notification period than two years. Perhaps this particular text refers to the length of a prohibition, but if that is the case, then that should be clarified. If the text refers to the length of a prohibition the problem is that in some cases, the EBA would have the discretion to shorten the length of the prohibition, even if a case demands or merits a longer prohibition. For instance, if a senior official has spent two years in the service, a prohibition would ”normally” not exceed 12 months, even if the job move in question would merit a two years prohibition.

As for the 1 year lobbying ban for senior officials in EU Staff Regulations, there is no clear wording, not in section 9 of the EBA Ethics Guide, nor in the new decision. As the EBA should not be allowed to go below the standard in EU Staff Regulations, it should be clarified in section 6 of the Decision, that senior officials have to abide by a lobbying ban for at least a year after leaving the service. Apparently, the Decision enables the EBA to decide a mere 6 months lobbying ban for senior staff, including the Director.

We assume that the definition of lobbying in an earlier EBA decision, a definition which underlines that lobbying covers ‘indirect lobbying’ applies to the decision.

The assessment of conflict of interest

Finally, there is the question of the basis of an assessment in a specific case, addressed in section 5 of the Decision. Where conflicts are identified, the Appointing Authority will adopt a decision based on “an appropriate balance between the need to ensure integrity through temporary prohibitions and restrictions, and the need to respect the fundamental right to engage in work and to pursue a freely chosen or accepted occupation.”

We have raised our concerns on this point previously: the reference to ‘the fundamental right to engage in work’ is problematic. The problem becomes acute when an institution understands ‘the fundamental right to engage in work’ in such a way that it to some extent trumps concerns over integrity, and the EBA is a case in point.

At a hearing in the ECON Committee of the European Parliament on 4 November 2019, the EBA Chairman stated when answering a question about why Mr [redacted] was not prohibited from taking up the job at AFME straight after leaving the service:

“I think it is important to realise there is a fundamental right that’s perceived to be a human right and this was an important weight on our decision according to our legal advice: that

we cannot forbid a person to earn a living through their work," Mr. Campa said. The objectives of Article 16 has to be balanced with Mr. [redacted]' right to earn a living, the Chairman explained.[1]

We still argue that not approving a particular occupation does not amount to denying [redacted] the fundamental right to engage in work. If this line of arguing were as clear as Mr. Campa claims, it could prevent everyone at all times from prohibiting anyone from taking a particular job, leaving parts of Article 16 of the EU Staff Regulations meaningless.

Leaving this wording in the crucial clause on how to assess a case, appears to leave ample space for the EBA to make the same wrong call again. We therefore believe that the reference to a fundamental right to engage in work is misplaced, in that the safeguards in ethics rules are already balanced in that prohibitions are temporary, and in that they concern necessary temporary prohibitions against specific jobs, not a prohibition to engage in work as such.

The fact that the EBA has imported this approach from' Commission Decision C(2018) 4048 final' has no bearing on the matter, in our view. It makes it all the more pertinent to address this approach as it constitutes a deeply problematic loophole. The text of the Commission Decision's article 21 (3) and section 5 of the Decision of the EBA, speaks of the need to define "an appropriate balance between the need to ensure integrity through temporary prohibitions and restrictions, and the need to respect the fundamental right to engage in work." In our view, we need rules that put integrity first. In all scenarios that must be the objective on rules on 'revolving doors'. There should be no space to ease restrictions at the cost of integrity in order to ensure the right of a member of staff to take a specific job. We believe that is what happened at the EBA. That section of the EBA decision, and indeed that article in the Commission Decision, should be reworded to clarify that the integrity of the institutions must come first.

Best regards,

[redacted]

Kenneth Haar, on behalf of Change Finance

[1] A video of the meeting in the ECON Committee is available. The relevant questions from MEP's were put at approx. 3.59 PM, 4.24PM and 4.35 PM: https://www.europarl.europa.eu/ep-live/en/committees/video?event=20191104-1500-COMMITTEE-ECON