

Ombudsman complaint, EBA, Farkas case

1. Complainant:

Kenneth Haar, Shonan Kothari, Jana Leutner (on behalf of Change Finance)

This complaint by the Change Finance coalition has the backing of key Members of European Parliament (MEPs) from the Committee on Economic and Financial Affairs, who have signed a letter to express their support.¹

2. Against which European Union (EU) institution or body do you wish to complain?

The European Banking Authority (EBA)

3. What is the decision or matter about which you complain? When did you become aware of it?

The Management Board and the Board of Supervisors of the EBA have allowed their Executive Director, Adam Farkas, to take up a position as Chief Executive Officer of the Association for Financial Markets in Europe (AFME) immediately after leaving the EBA.²

As a regulator of the EU's banking sector, the EBA is one of Europe's most important institutions and a prime lobbying target for the industry. The direct shift of EBA's executive director to the sector's most powerful lobbying group – AFME represents the interests of over 180 banks and finance institutions – raises alarm. We wish to complain about the decision to approve this move, and the way the decision was made. Also, we feel there is a need for the Ombudsman to take a close look at how the decision was communicated to the public.

This move could grant AFME privileged insights into the EBA's decision-making process, a new direct line to key policymakers within the EBA and as such the ability to influence key regulatory activities. It also sends the wrong message to EU policymakers in Brussels and beyond that if, as a regulator, you maintain a friendly relationship with the industry you regulate, you will be rewarded with a well-paying job. Mr. Farkas has had regular meetings with AFME during his time at the EBA, and he has participated in and spoken at

¹ Letter of support by MEPs.

https://www.changefinance.org/wp-content/uploads/2019/11/Letter-of-support-by-MEPs_-for-Ombudsman-complaint.pdf

² EBA, Decision of the European Banking Authority of 12th September 2019 concerning restrictions on engagement in an occupational activity.

https://www.asktheeu.org/en/request/7295/response/24096/attach/8/2019%2009%2012%20Decision%20concerning%20restrictions%20on%20engagement%20in%20an%20occupational%20activity%20ED.pdf?cookie_passthrough=1

several public events organised by AFME.³ This past working relationship may lead citizens to believe that the conduct of Mr. Farkas while in office gave him an advantage with AFME.

News of this decision was announced in a press release of the EBA on 17th September.⁴ It showed how the European Banking Authority is failing to protect its own operations from substantial conflict of interest risks, as its Executive Director is set to move to a lobby group with a strong vested interest in the decisions made by the EBA.

The decision has led to a strong reaction among MEPs from a broad political spectrum, as well as from civil society organisations who have followed the financial reform debate in the EU institutions for several years. A sign of this is a statement signed by 62 civil society organisations demanding the decision to allow Mr. Farkas to go straight to AFME be reversed.⁵ While there have been other similar cases in the past, this move stands out as a stark symbol of an EU institution with little regard for citizens' concerns over strong links between senior officials and the industries they are supposed to regulate or supervise.

4. What do you consider that the EU institution or body has done wrong?

Under the provisions of EU Staff Regulations, the European Banking Authority (EBA) had the prerogative to block this move, but it chose not to do so. Its outgoing Director's new position is not compatible with his obligations to the EBA. The EBA acknowledges there is a conflict of interest at play, yet it has not acted strongly enough to prevent a detrimental outcome.

The Executive Director is set to leave the EBA on 31st January, going straight to a position as CEO for the Association for Financial Markets in Europe (AFME) on 1st February. AFME is one of the most powerful finance lobby groups operating in the EU institutions, one with the largest budget (approximately 5 million euros annually, according to the Transparency Register). The approval of this move straight to AFME is the main point of this complaint.

When Mr. Farkas assumes this new position, he will have to abide by certain restrictions on his work, as laid out by the EBA's Board of Supervisors. But there are no effective enforcement mechanisms for these restrictions, putting the interests of the EBA, and hence of citizens, in peril. The right decision would have been to reject the application.

In our view, this is a case where the need to reject the move of a senior EU official directly to a particular position is very clear. Yet, the decision to approve a move was taken without giving that option serious consideration, according to the evidence we have acquired.

³ See e.g. Mr. Farkas' notification to the EBA.

https://www.asktheeu.org/en/request/7295/response/24096/attach/3/EBA%20JC%202019%2001%20Opinion%20AF%20Annex%201.pdf?cookie_passthrough=1

⁴ EBA press release, 17 September 2019.

<https://eba.europa.eu/adam-farkas-steps-down-as-eba-executive-director>

⁵ Letter of support by civil society organisations.

<https://www.changefinance.org/wp-content/uploads/2019/11/Joint-Civil-Society-Statement-Stop-Top-Banking-Supervisor-from-moving-to-the-Finance-Lobby-updated-in-Nov-2019.pdf>

The case in brief

The question of whether this case represents a challenge under ethics rules is not disputed by the EBA. In his letter to us, dated 30th October 2019, the Chairman of the EBA states that there is a “substantial conflict with the legitimate interests of the EBA.”⁶ AFME’s work is very much about influencing the EU institutions on behalf of its members, and as such, special care needs to be taken. Where we differ with the assessment of the EBA is on the scale of the problem and on the solution.

The EBA is an institution with considerable power in the area of banking regulation. It develops technical standards to ensure implementation of EU rules, it makes decisions on whether a financial services authority or a financial company has acted in breach of EU legislation, and it advises the European Parliament and the Commission on legislative initiatives.

AFME is a coalition of perhaps the biggest banks in the world, including the biggest global and European banks. It was set up to be the voice of the most powerful financial companies, specifically with the intention to influence the decisions made in EU institutions. It actively contributes to consultations on legislative acts in all relevant EU institutions, including the EBA. The individual members of AFME all share an interest in the decisions taken by the EBA on financial regulation. This is why AFME is one of the most active players engaging with the EBA, e.g. it is the second most active contributor to consultations, second only to the French Banking Association, if we count the numbers of written contributions since January 2018. Judging by the priorities listed by AFME in the Transparency Register, almost all of its interests directly relate to the work of the EBA, with the exception of two (Financial Transaction Tax and the European Fund for Strategic Investments).⁷

With this background, the EBA had to consider whether the request for approval of a move straight to AFME should be rejected – and in our opinion, it should have been rejected. But instead, the EBA decided merely to apply the following restrictions:

- The Director will only work on administrative issues the rest of his time with the EBA.
- He is prohibited from engaging in lobbying the EBA or its staff for 24 months.
- For 18 months after leaving the service, he is to refrain from assisting AFME members on issues he has worked on at the EBA over the past three years.⁸

According to the letter from the EBA Chairman to Change Finance, these restrictions “exceeded the requirement of the Staff Regulations and Commission Decision” in that they impose a restriction on

⁶ Letter from the Chairman of the EBA José Manuel Campa to Shonan Kothari, Kenneth Haar and Jana Leutner. <https://www.changefinance.org/wp-content/uploads/2019/11/2019-10-30-Letter-to-Change-Finance-Executive-Director-occupational-activity.pdf>

⁷ AFME, entry to the Transparency Register. <http://ec.europa.eu/transparencyregister/public/consultation/displaylobbyist.do?id=65110063986-76>

⁸ See EBA decision of 12th September 2019. https://www.asktheeu.org/en/request/7295/response/24096/attach/8/2019%2009%2012%20Decision%20concernin%20restrictions%20on%20engagement%20in%20an%20occupational%20activity%20ED.pdf?cookie_passthrough=1

engaging in lobbying for 24 months “rather than the 12 months provided for in the Commission Decision.”⁹ This suggests that the EBA thinks its decision imposes even more restrictions than the rules require. We do not agree with that. Staff Regulations do enable the EU institutions to impose a ban longer than 12 months, and this is also provided for in the Commission Decision (Commission Decision C(2018) 4048 final, article 21 3(b)). The EBA has not adopted a restrictive decision. Quite the contrary. The restrictions listed above provide no guarantee that Mr. Farkas will not be involved in lobbying in the period mentioned.

The restrictions are implausible

This is because the restrictions are implausible. Particularly when considering the EBA’s own definition of lobbying. The definition of lobbying in the EBA has been one of many topics in an earlier exchange between the Ombudsman and the EBA.¹⁰ Presumably, the definition of lobbying used at the EBA is an outcome of this interaction. According to the definition, lobbying is not just about participating and interacting in person with the institution in question. It covers indirect lobbying as well. Indirect lobbying, according to an annual report of the EBA, is about activities “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.”¹¹ This makes it impossible for Adam Farkas to do his job at AFME.

According to the Chairman of the EBA Chairman it is perfectly logical for Adam Farkas to take his position and then concentrate his efforts on the activities of AFME that do not relate to his former workplace. Such activities could include risk assessments of the evolution of the global financial sector, issues beyond the European level, and internal organisational issues, as the EBA Chairman Mr. José Manuel Campa stated at a meeting of the Committee on Economic and Financial Affairs (ECON Committee) in the European Parliament on 4th November. This statement evades the fact that AFME was set up to influence the EU institutions – that is broadly speaking what AFME is about. The issues mentioned may be part of Mr. Farkas’ portfolio when he joins AFME, but except for internal management issues, they are not mentioned in Mr. Farkas’ own notification to the EBA on his new occupation.¹²

⁹ Letter from the Chairman of the EBA José Manuel Campa to Shonan Kothari, Kenneth Haar and Jana Leutner. <https://www.changefinance.org/wp-content/uploads/2019/11/2019-10-30-Letter-to-Change-Finance-Executive-Director-occupational-activity.pdf>

¹⁰ <https://www.ombudsman.europa.eu/da/correspondence/en/80699>

¹¹ EBA, Publication of Information concerning Occupational Activities of Senior Officials after Leaving the Service (Article 16, Fourth Paragraph of the Staff Regulations), Annual Report 2018. [https://eba.europa.eu/documents/10180/2590106/Annual+Report+2018+on+Art+16\(3\)%20SR_Final.pdf/634db05c-6f15-474f-a6ba-bab8251ac36d](https://eba.europa.eu/documents/10180/2590106/Annual+Report+2018+on+Art+16(3)%20SR_Final.pdf/634db05c-6f15-474f-a6ba-bab8251ac36d)

¹² Adam Farkas, Notification of Engagement in an Occupation after leaving the European Banking Authority, 2 August 2019. https://www.asktheeu.org/en/request/7295/response/24096/attach/3/EBA%20JC%202019%2001%20Opinion%20AF%20Annex%201.pdf?cookie_passthrough=1

This notification gives no information of a change of approach by AFME to the EBA – all will continue as always, except the Director acknowledges that he cannot communicate directly with the EBA. To suggest that Adam Farkas can perform his role as CEO in any meaningful manner without getting involved in work related to his former workplace or other kinds of lobbying is not credible. This is especially true when considering the implications of the last restriction, according to which Mr. Farkas cannot be part of AFME's work on issues he has worked on at the EBA. In reality, as explained above – almost all of the priorities AFME is working on correspond to the mandate of the EBA, with a view to influence decisions in the EU institutions.

The restrictions cannot be enforced

The obvious question to ask the EBA is how it imagines the restrictions are to be upheld once Mr. Farkas has taken his new position. How will the EBA follow the daily work of the ex-Director? The answer to that question, following our investigation, is not reassuring.

When addressing the ECON Committee in the European Parliament on 4th November, Mr. Campa acknowledged that the EBA is in a better position to enforce the decision in the first phase, i.e. while Mr. Farkas is still employed by the EBA¹³. This very issue was brought up at the meeting of the Management Board (MB) of the EBA on 10th September 2019, where the conditions were discussed and agreed on. On that occasion, the MB asked for clarification on how the EBA could monitor the activities of the Executive Director after leaving the service. In response, the European Commission representative remarked that “the onus was on the addressee of the decision to comply with its contents while the EBA had to monitor and, if necessary, enforce the limitations in the Decisions, *even if in practice there are limited means to do so*” (emphasis added).¹⁴ In other words, the EBA is imposing restrictions, but Mr. Farkas is supposed to take the ultimate responsibility to respect these restrictions. This is not credible: the EBA is fully aware that it will be difficult if not impossible to monitor and enforce its own decision.

The minutes of the EBA Board of Supervisors meeting on 19th September 2019 are disconcerting. Within this body that approved Mr. Farkas' move to AFME - the question of how the restrictions can be monitored and enforced was not even brought up by the attendees, indicating a careless approach towards the need to assure that conflicts of interest are avoided.¹⁵

In our view, then, an EU institution has decided to take a risk. The EBA shares a responsibility to safeguard citizens from financial instability, from whitewashing and financial fraud. We believe the EBA is taking that responsibility too lightly when it comes to the potential negative effects that could result from a lax approach to revolving doors and ethics regulation.

¹³ A video recording of this meeting is available.

<https://www.europarl.europa.eu/ep-live/en/committees/video?event=20191104-1500-COMMITTEE-ECON>

¹⁴ Management Board of the EBA, Minutes of meeting on 10 September 2019.

<https://eba.europa.eu/file/247735/download?token=imw6mWa0>

¹⁵ Board of Supervisors, minutes of meeting on 19 September 2019. The decision of the Board of Supervisors was taken in written procedure, followed by a discussion at this meeting.

<https://eba.europa.eu/file/191048/download?token=oRvXNkWX>

The EBA did not consider a rejection

In legal terms, the only possible explanation that could free the EBA from blame is if EU rules would prevent the EBA from taking effective action. In this case, the EU Staff Regulations are the main applicable legislative act.

Article 16 of EU Staff Regulations stipulates that if the activity “is related to the work carried out by the official during the last three years of service and could lead to a conflict with the legitimate interests of the institution, the appointing authority may, having regard to the interests of the service, *either forbid him from undertaking it or give its approval subject to any conditions it thinks fit*” (emphasis added).

We understand this in the following way: the appointing authority must explore the case and take the measures it sees fit to protect the interests of the institution. In some cases, it must prohibit the addressee from taking up a particular position. But it appears that this option was not even considered. Instead, the EBA chose to impose conditions on Mr. Farkas’ future post that are vague and almost impossible to verify and enforce in practice.

The EBA is taking the right to work too far

When discussing the matter with the ECON Committee on 4th November, José Manuel Campa stressed three times that the EBA had decided not to prohibit the Director’s move to AFME out of consideration for the outgoing Director’s “fundamental right to work.” “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. He emphasised that the objective of Article 16 has to be balanced with Mr. Farkas’ right to earn a living.¹⁶

The EU Staff Regulations clearly apply in this case, Article 16 in particular, as does the EBA’s own ‘Policy on Independence and Decision Making Processes for Avoiding Conflicts of Interest.’ By introducing the ‘right to work’ consideration, the EBA has indeed chosen to include the ‘Commission Decision on occupational activities after leaving the service’ (C(2018) 4048 final) as a key reference in the decision.

This reference was also highlighted in the letter to Change Finance.¹⁷ According to the response from the Chairman, Article 21(3) of the Commission Decision “requires 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.”

¹⁶ 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>

¹⁷ Letter from the Chairman of the EBA José Manuel Campa to Shonan Kothari, Kenneth Haar and Jana Leutner. <https://www.changefinance.org/wp-content/uploads/2019/11/2019-10-30-Letter-to-Change-Finance-Executive-Director-occupational-activity.pdf>

We would argue that not approving a particular occupation does not amount to denying Adam Farkas the fundamental right to engage in work. If this line of arguing were as clear as the EBA Chairman 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.

If there is, in fact, a balance that needs to be found between protecting the integrity of the EBA and Mr. Farkas' fundamental right to work, then we argue that a prohibition on one very specific type of job is not a breach of that right, in any reasonable view. As a former top supervisor, there must be many jobs open to Mr. Farkas.

The EBA is unclear about legal grounds for the decision

The EBA is sending a confusing message about the legal grounds for its decision. We find it peculiar that the EBA's own 'Ethics Guidelines for EBA Staff' (EBA DC 271)¹⁸ are not mentioned in the Decision on the Director's move to AFME.¹⁹

These guidelines include the measures to be taken when officials leave the EBA. While they take the Commission Decision into account, it would make more sense to see the EBA apply its own internal guidelines, its own way to implement Article 16 of EU Staff Regulations. This suggests the EBA may have to review its internal rules to make the ethics guidelines the logical reference for such decisions. It is strange that when taking the most important decision on the departure of a senior official in the history of the EBA, the EBA does not refer to its own rules on the matter.

It is also strange that the ethics guidelines of the EBA are not publicly available. In this case, the complainants had to apply for access to documents to get them. Citizens should be able to assess the quality of EBA rules.

The main problem, however, is the reluctance to consider whether the Director could or should have been prevented from taking up employment at AFME. That question is treated differently in Article 16 of EU Staff Regulations than in the Commission Decision and the EBA ethics guidelines. In the two latter cases, only a ban on 'representing opposing parties' can be applied, bans for other reasons are not an option, it seems. Still, this may actually be such an example: AFME could be considered an opposing party. Both the Commission Decision and the EBA Guidelines enable the EBA to prevent the Director's direct move to AFME.

When the EBA Chairman argues so strongly that the EBA could not have taken such a decision, and when he questions the legality of a ban, this does not appear to have a strong basis in the legal acts. Also, there is no mention of the EBA Chairman's main argument – an imperative to the right to work - neither in the

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https://eba.europa.eu/sites/default/documents/files/document_library//EBA%20DC%20271%20%28Decision%20on%20the%20Revised%20Ethics%20Guidelines%20for%20Staff%29.pdf

¹⁹ EBA, Decision of the European Banking Authority of 12th September 2019 concerning restrictions on engagement in an occupational activity.

https://www.asktheeu.org/en/request/7295/response/24096/attach/8/2019%2009%2012%20Decision%20concernin%20restrictions%20on%20engagement%20in%20an%20occupational%20activity%20ED.pdf?cookie_passthrough=1

minutes of meetings of the Management Board or the Board of Supervisors, nor in the available legal advice, nor in the decision itself.

This raises two concerns:

The EBA's communication to the public appears misleading

Earlier, the Ombudsman has had exchanges with the EBA – as well as many other EU institutions – on the way in which they communicate the decisions they make to implement Article 16 of EU Staff Regulations.²⁰ The information given to the public and to Members of the European Parliament must be precise and must not - which could be the case here - be misleading. We understood from the EBA Chairman's statements to the ECON Committee that due to legal advice received, they saw no possibility for a rejection of Mr. Farkas' desire to take up the position as CEO for AFME straight after leaving the EBA.

This legal advice stressed the need to prioritise Mr. Farkas' right to work, as per the Commission Decision. Whether it is the case, depends on whether the EBA Chairman can produce the legal advice he has referred to when speaking to MEPs, advice that emphasises this particular aspect of the decision. We have had an exchange with the EBA over access to documents since 17th September, and the one question that has proven impossible to get a clear answer to was what advice had been produced.²¹ It is possible that the legal department of the EBA has written a document with such advice. So far, the EBA has not been willing to tell us. If, however, the legal advice provided is limited to the two documents we have received – from the Joint Committee and from the EBA's Advisory Committee on Conflict of Interest (ACCI), then no such advice exists, and the Chairman has misinformed the European Parliament. If, on the other hand, such a document does exist, then we would appreciate assistance from the Ombudsman to have the EBA disclose the document.

The contributions from advisory groups appear insufficient

The contributions from the Joint Committee and the ACCI stand out in a different manner. While there is no reference to a need to balance the interests of the institutions with the right to work, there is also no sign of the question of whether the application should be rejected or not. Both groups merely set out to define potential restrictions for Mr. Farkas in his new role, and both suggest a less ambitious approach than the one that was adopted in the end.

- the Joint Committee suggests a series of measures to “mitigate potential conflicts with the legitimate interests of the EBA.” All measures proposed by the Joint Committee concern direct lobbying, mainly with the 24 months ban on lobbying. In the document, there is no mention of ‘indirect lobbying.’ This implies that the Joint Committee's advice includes nothing on how Mr. Farkas is to handle his work at AFME, given the considerable insider knowledge he possesses.
- The ACCI sets the bar even lower. Their advice is restricted to the period in which Adam Farkas will still be working for the EBA. Here, the ACCI suggests he should be in a purely administrative role.

²⁰ <https://www.ombudsman.europa.eu/da/correspondence/en/80699>

²¹ [https://www.asktheeu.org/en/request/documents on two revolving doors#incoming-24156](https://www.asktheeu.org/en/request/documents%20on%20two%20revolving%20doors#incoming-24156)

Neither of the two engage in an actual investigation into the implications of Mr. Farkas' new position. Both are very far from even considering the first key question that should arise from a case like this: whether Mr. Farkas should even be allowed to go straight from the EBA to AFME.

In sum: we believe that maladministration has unfolded at several levels.

5. What, in your view, should the institution or body do to put things right?

- The EBA's Board of Supervisors should review its decision and decide to prohibit Adam Farkas from taking up the position with AFME on 1st February.
- The EBA must review its own rules in light of the doubts raised on the legal documents applied in this case. If the EBA believes it needs to resort to a Commission Decision that does not cover the EBA, there must be a void in its own rulebook that needs to be filled. Also, more generally, we believe that if the present case can lead to a decision to allow for a direct departure to a lobby group with a strong interest in the EBA, then there is a need for the rules to be strengthened.
- The EBA must convey a message to the Joint Committee as well as the ACCI to make sure the obvious flaws in their assessment of the case at hand are not repeated. The Joint Committee should be made aware of the implications of the rules vis á vis 'indirect lobbying', and the ACCI should be made aware of its responsibilities to help defend the legitimate interests of the EBA.
- Mr. Campa refers to legal advice provided to the Board of Supervisors that urges the EBA to balance the measures taken to protect the interests of the institution with the fundamental right of Mr. Farkas to employment on legal grounds. If a further investigation by the Ombudsman does not uncover this legal advice - should the Ombudsman agree to take this matter forward - we believe Mr. Campa may have misled members of the European Parliament, and he must be urged to reconsider his way of communicating with the public and with MEPs.

6. Have you already contacted the EU institution or body concerned in order to obtain redress?

This is a mandatory condition for a complaint to be admissible. Evidence that you have contacted the relevant institution or body to seek redress must be annexed to the complaint form. Otherwise, you will be informed that we cannot deal with your complaint.

Yes. On behalf of a coalition of a group of organisations, the Change Finance coalition, we sent a letter to the EBA on 8th October urging its Board of Supervisors to review its decision. In parallel, we have used all available legal means to acquire the documents necessary to assess the basis of the decision.

On 30th October, the EBA Chairman replied on behalf of the EBA. The reply was not satisfactory as explained above.

7. If the complaint concerns work relationships with the EU institutions and bodies: have you used all the possibilities for internal administrative requests and

complaints provided for in the Staff Regulations? If so, have the time limits for replies by the institutions already expired?

Not applicable.

8. Has the object of your complaint already been settled by a court or is it pending before a court?

No.

9. Do you agree that your complaint may be passed on to another institution or body (European or national), if the European Ombudsman decides that he is not entitled to deal with it?

Yes.