

THE CHAIRPERSON

Emily O'Reilly
European Ombudsman
1 avenue du Président Robert Schuman
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28 August 2020

Subject: Complaint 2168/2019/KR

Dear Ms O'Reilly,

Thank you for your letter of 7 May 2020 enclosing your findings and recommendations in the above case concerning the notification by the EBA's former Executive Director of his intention to become CEO of the Association of Financial Markets in Europe.

Following your inquiry you made two findings of maladministration by the EBA, issued three recommendations and requested the EBA's detailed opinion before 31 August 2020. This letter sets out the EBA's detailed opinion and has been approved by its Board of Supervisors.

The EBA welcomes the Ombudsman's comments on the clear, extensive and ambitious nature of the restrictions adopted by the EBA and on the overall approach taken by the EBA that forbidding an occupational activity should be used only where other less restrictive measures are not adequate to protect the EBA's interest. Nevertheless, we accept that you reached a different conclusion on the sufficiency of the restrictions imposed by the EBA in relation to the former Executive Director when measured against the risks involved to the EBA's legitimate interests.

The EBA agrees fully with your statement that maintaining public trust is an important interest of the EBA, and that citizens need to be reassured that the EBA is taking all possible steps to ensure that it remains independent from the banking sector. However, you set out concerns regarding the impression that EBA senior staff are allowed to maintain very close ties with the banking sector, that confidential information may be disclosed or misused, and that close personal contacts and friendships with ex-colleagues may be used to lobby. Regarding these concerns, in order to carry out its work effectively, the EBA needs input from the banking sector but maintains internal procedures to ensure that its impartiality and independence are not impaired. The EBA takes care to ensure that it receives this input in a transparent way, for example by publishing contributions to and holding public hearings on our consultations and publishing information on meetings held



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by any staff members with industry representatives. In addition, the EBA's structure means that no individual staff members have decisive input on EBA regulatory or supervisory activities: all of our core tasks are subject to scrutiny and approval by the Board of Supervisors, and all regulatory measures are developed through a committee structure involving staff and competent authority representatives. This is further safeguarded by the EBA's practice of undertaking regular risk assessments as part of its anti-fraud policy to identify the risk of EBA work being affected by individual interests and to take mitigating measures for such cases. We recognise the risks when staff leave to join the banking sector and we make use of restrictions on lobbying and on use of confidential information in order to mitigate those risks. So we are confident that the EBA maintains high standards of independence in its work. However, we recognise that, in order to maintain public confidence, we must also be *perceived* to be, and demonstrate that we are, independent. We take note in this regard that you consider that, given the significance of the Executive Director role, the restrictions that the EBA imposed were not sufficient to achieve this and that forbidding the job move would have been both necessary and proportionate.

While recognising the conclusions that you reach in your enquiry, including as to the inherent difficulties in monitoring the activities of former staff members, the EBA would like to emphasise its continued commitment to ensuring the implementation of the restrictions imposed on its former Executive Director. This has included informing all staff of the restrictions imposed in relation to the former Executive Director and of the internal measures designed to identify interactions with AFME and obtain assurances as to the non-involvement of its CEO in those interactions and their preparation, and writing to AFME to ensure that they are aware of the restrictions and are putting in place internal measures to facilitate their CEO's compliance with them. The EBA also wrote to the principal EU bodies with which AFME engages in order to inform them of the EBA's restrictions, so as to facilitate any measures that they might wish to take in order to mitigate any conflicts with their own interests. If the EBA identifies any breaches of the restrictions, it stands ready to take any further measures available to it.

In relation to your findings as regards the steps taken by the EBA when informed that the former Executive Director planned to take up a job with AFME, the EBA recognises that it took some time to completely remove access to confidential information in terms of access to the EBA's systems. In principle, the former Executive Director may have had access to some part of the EBA's systems where information was stored. Steps were taken to restrict his supervisory and regulatory responsibilities upon his return from annual leave and, in particular, to remove his primary access to such information by ensuring that no information of this type was circulated to him by EBA staff.

I turn now to your recommendations.

1. For the future, the EBA should, where necessary, invoke the option of forbidding its senior staff from taking up certain positions after their term-of-office. Any such prohibition should be time-limited, for example, for two years.

The EBA has been open to the option of forbidding its senior staff from taking up certain positions when they leave the EBA, in line with the Staff Regulations, and remains willing to do so where necessary. Indeed, on 27 May 2020 the Board of Supervisors adopted a decision prohibiting the former Executive Director from becoming a non-executive director of TheCityUK, an industry-led body representing UK-based financial and related professional services, before 1 February 2021 which is two years after the former Executive Director left the EBA's service.

2. To give clarity to senior staff, the EBA should set out criteria for when it will forbid such moves in future. Applicants for senior EBA posts should be informed of the criteria when they apply.

The EBA has adopted such a policy which is set out in the annex to this letter. In addition to setting out criteria for senior staff, the policy also provides information on how the EBA expects to operate Article 16 of the Staff Regulations in relation to post-employment occupational activities of other staff members. In doing so, the EBA has had regard to the post-employment regime operated by the European Central Bank while adjusting it to reflect the different responsibilities of the EBA, and to reflect the compensation available to ECB staff where they are prevented from taking up employment under the ECB's staff arrangements, compensation which is not available to EBA staff under the Staff Regulations.

This policy will be included in the EBA's Ethics Guide which is available on the EBA's website. EBA vacancy notices now contain a new section which summarises the post-employment restrictions and which will refer candidates to the policy in the Ethics Guide to ensure that they are aware of the criteria that apply.

3. The EBA should put in place internal procedures so that once it is known that a member of its staff is moving to another job, their access to confidential information is cut off with immediate effect.

The EBA has operated such internal procedures in the case of other staff members who have had potential conflicts of interests. Those procedures have now been formalised and adopted and will be included in the EBA's Ethics Guide so that the steps to be taken are clear to all staff, and will be applied to senior management where appropriate.

Access to confidential information via EBA (and, where relevant, non-EBA) systems will be suspended immediately for staff known to be moving to another job unless they fall in to one of four categories in which there would be no conflicts of interest: the staff member will remain in the service of the EU; they will remain in the EEA public sector or an international organisation; their

activities will not relate to their current role; or they have no access to relevant non-public information. Where appropriate, full or limited access may be reinstated after a full assessment of potential conflicts of interest and adoption of any appropriate mitigating measures.

I trust that this information on how the EBA has implemented your recommendations meets your satisfaction. Should you require any further information on the measures taken, the EBA would be happy to assist.

Yours sincerely,

[Signed]

José Manuel Campa

EBA criteria for assessing post-employment restrictions and prohibitions

[These criteria will be incorporated into the EBA Ethics Guide¹, supplementing section 9 on Leaving the EBA]

1. When the EBA assesses the possibility of any actual or potential conflict of interest, the EBA applies the Commission implementing rules which require it to take into account factors such as²:
 - any relation between the occupational activity and the work carried out by the former staff member during the last three years of service
 - whether the occupational activity would involve working on specific files for which the former staff member was responsible during the last three years of service
 - whether the occupational activity would risk harming the reputation of the former staff member and the EBA, for example by retroactively casting doubt on the former staff member's impartiality while he or she was still in service, thereby tarnishing the EBA's image
 - the quality of a future employer (for example whether it is a public authority or a private/commercial company) or the situation of self-employment
 - whether the envisaged activity would involve representing outside interests vis-à-vis the institution
 - whether or not the envisaged activity is remunerated

2. Taking into account the EBA's role in regulating and supervising financial institutions, positions are most likely to give rise to conflicts where they are in the following kinds of organisations:

1

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

² Article 21(2) of Commission Decision C(2018) 4048 final of 29.6.2018 on outside activities and assignments and on occupational activities after leaving the Service.

- Credit institutions, investment firms, payment institutions and e-money issuers authorised in the EEA
 - Other relevant financial institutions authorised in the EEA, where the staff member's EBA tasks over the preceding three years included, for example, AML/CFT, ECAIs, financial conglomerates, or securitisation, or participation in ESMA/EIOPA/ESRB's work, for example through participation in their boards, standing committees or in the Joint Committee
 - Private sector organisations which represent the interests of such financial institutions, such as industry associations, or which advise and represent them such as consultancies
 - Private sector organisations which are directly linked with the staff member's tasks, such as where a staff member is directly involved in the selection of a supplier or the management of a contract with a supplier
3. The level of conflict of interest is likely to be most significant where:
- staff members have a senior role at the EBA and influence over decision-making at the EBA
 - the staff member's future professional activities can be expected to have a material impact on the organisation's activities, e.g. where they will be in a senior management, senior adviser or senior control function position
 - the scale of the organisation's activities in the EEA is significant, for example an EEA credit institution which is a G-SII or O-SII
 - 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
4. Conflicts of interest are also likely to be most significant, and require more extensive restrictions or prohibitions where the staff member has knowledge of confidential information and/or influence on decision-making which are relevant to the future role, such as:
- information on individual financial institutions, in particular through supervisory roles (e.g. participation in supervisory/resolution colleges), and involvement in stress testing, mediations and breach of Union law investigations
 - influence through senior policy-making and management roles

- involvement in the selection or management of commercial providers of services to the EBA or involvement in a legal dispute or seriously conflictive relationship with another entity
5. Notifications are assessed case-by-case. Where conflicts with the EBA's interests are identified, the Appointing Authority³ adopts a decision which is 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. The Appointing Authority takes into account the opinion of the Joint Committee.
6. Where actual or potential conflicts are identified, the principal kinds of measures that may be adopted are set out below. The type of measures adopted and their duration will reflect the assessment of the extent of conflicts of interest. The least restrictive measures that adequately protect the EBA's interests will be used.
- Restrictions of between six months and two years on lobbying or advocacy of the EBA or its staff on matters for which the staff member was responsible during up to the last three years of service
 - Restrictions excluding the staff member for between six months and two years from professional contacts with EBA colleagues or from representing opposing parties
 - Restrictions for between six months and two years prohibiting the staff member from dealing with files, cases or matters related to the work carried out by him or her during up to their last three years of service, including related or subsequent cases and/or court proceedings
 - Prohibitions from carrying out the proposed occupational activity. Where appropriate, this may take into account any part of the staff member's notice period during which the staff member is relieved of the duties which give rise to the conflict. 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. Such prohibitions are likely to be used principally in relation to senior staff such as the Chairperson, Executive Director, directors and advisers based on the non-exhaustive examples set out in the table below.

³ For staff the Appointing Authority (AA) is the executive director, for the Chairperson and the Executive Director the AA is the Board of Supervisors

Post title	Prohibitions	Other restrictions
Chairperson Executive Director	<p>12-24 months in relation to an EEA credit institution or significant investment firm or an entity providing financial services consultancy services to such firms</p> <p>6-12 months in relation to any other EEA financial institutions or an entity providing financial services consultancy services to such firms</p> <p>12-24 months in relation to any entity engaged in lobbying in relation to the EBA, or consultancy and/or advocacy vis-à-vis the EBA</p>	<p>12-24 months: engaging in lobbying or advocacy, vis-à-vis staff of their former institution, on behalf of their business, clients or employers on matters for which they were responsible during the last three years in the service</p> <p>12-24 months: professional contacts with EBA colleagues and representing opposing parties</p>
Director, Adviser or equivalent ⁴	<p>6-12 months in relation to an EEA credit institution or significant investment firm or an entity providing financial services consultancy services to such firms</p> <p>3-6 months in relation to working for any other financial institution [or an entity providing financial services consultancy services to them</p> <p>6-12 months in relation to any entity engaged in lobbying in relation to the EBA, or consultancy and/or advocacy vis-à-vis the EBA</p>	<p>6-12 months: engaging in lobbying or advocacy, vis-à-vis staff of their former institution, on behalf of their business, clients or employers on matters for which they were responsible during the last three years in the service</p> <p>6-12 months: professional contacts with EBA colleagues and representing opposing parties</p>

7. In addition, the ongoing duty under Article 16(1) of the Staff Regulations to “behave with integrity and discretion as regards the acceptance of certain appointments or benefits” may require a staff member not to advise or work on behalf of a new employer or clients on particular files or matters in which the staff member participated personally and substantially and that would entail relying upon information received while in the EBA’s service that has not been made public. In appropriate cases where precise and defined risks of an ongoing nature can be identified, the Appointing Authority may provide advice on how this duty applies to a staff member. Where a staff member, or former staff member, has questions about the application of this duty, they should contact the Ethics Officer for advice.

⁴ In accordance with EBA DC 2019 253, these posts [are filled from grade [AD12]