

EBA/DC/2020/329

EBA RESTRICTED USE

# Decision of the European Banking Authority

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of 27 May 2020

concerning prohibition on engagement in an occupational activity

**Addressed to: Adam Farkas**

**Notification of intention to engage in occupational activity as Non-executive member of the Board of Directors of TheCityUK Limited (the “Activity”)**

## **The Board of Supervisors**

**Having regard to** Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC<sup>1</sup>, in particular Article 68(3) thereof,

**Having regard to** Regulation No 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials (Staff Regulations) and the Conditions of Employment of Other Servants (CEOS) of the European Economic Community and the European Atomic Energy Community<sup>2</sup>, in particular Article 16 of the Staff Regulations,

## **Whereas:**

### *Notification*

- (1) On 18 April 2020 Mr. Adam Farkas, former Executive Director of the EBA and now chief executive officer (CEO) of the Association for Financial Markets in Europe (AFME), informed the EBA of his intention to accept an appointment as a non-executive member of the Board of Directors of TheCityUK Limited (“TheCityUK”). Mr. Farkas provided further information on 20 April and again on 29 April 2020 (the “Notification”). On 19 May 2020 the Board of Supervisors

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<sup>1</sup> OJ L331, 15.12.2010, p. 12.

<sup>2</sup> OJ P 045 14.6.1962, p. 1385.

discussed the Notification and a proposed decision to forbid Mr. Farkas from undertaking the Activity until 31 January 2022, being two years after Mr. Farkas left the EBA's service. Mr. Farkas was then invited to express his views on a proposed decision and did so on 21 May 2020.

- (2) According to the Notification, the Activity is *“directly related to [Mr. Farkas’ role as AFME CEO], as AFME is a member of TheCityUK”* and is not remunerated and does not involve participation in the operational management of TheCityUK. The Notification refers to a specific section on TheCityUK’s website in describing the non-executive director role as *“part of the accountability framework of TheCityUK to its members”*. That is understood to be a reference to the statement on TheCityUK’s website on the role of its Board as distinct from the role of a non-executive director in particular, namely that the Board *“sets and oversees our strategy, ensures the effective delivery of our work and is accountable to our members for good governance in its management of the affairs of the company”* (emphasis added).
- (3) The Notification outlines that in his capacity as Executive Director of the EBA Mr. Farkas had a number of meetings with TheCityUK as recorded in the EBA’s Public Register. Mr. Farkas states that TheCityUK *“is expected to have possible contacts with the EBA in the future”*. In connection with this, Mr. Farkas sets out that he does not anticipate that as part of the Activity he would have direct contact with the EBA or any participation or involvement in the preparation of such activities carried out by TheCityUK. Mr. Farkas notes that by taking up the Activity he could be appointed to various board committees under the Board Charter for TheCityUK.
- (4) In the Notification Mr. Farkas states that *“[s]ince the activities of TheCityUK, although primarily UK-focused – extends to a wide range of financial services policy matters including some EU policy issues, I would fully observe – by extension – the conditions set out by the EBA Board of Supervisors in its decision dated 12 September 2019 in relation to my position at AFME, and in particular the restrictions to be observed for the period after leaving the service of the EBA”*.

#### *Former staff member’s views*

- (5) Mr. Farkas expressed the following views in response to the proposed decision.
- (6) Mr. Farkas stated that it would be disproportionate and unnecessary to forbid him for two years from joining the Board of Directors at CityUK because the risks for the EBA could be adequately managed through the restrictions imposed by the EBA pursuant to its decision of 12 September 2019 (EBA/DC/2019/289) permitting Mr. Farkas to take up the post of AFME CEO (the “AFME Decision”).
- (7) Mr. Farkas noted that although it was not specifically highlighted in the notification he gave to the EBA on 2 August 2019 regarding his intention to take up the AFME CEO post, his role as AFME CEO is clearly broad and encompasses representing the association in various fora. Mr. Farkas stated that the Activity is in reality an ancillary part of the AFME CEO role and does not present additional risks conflicting with the EBA’s legitimate interests which would not be adequately addressed by applying the same conditions as apply to his role as AFME CEO. Mr. Farkas noted that the proposed decision stated that the Activity would involve carrying out

activities that would be subject to the restrictions on his AFME CEO post if they were carried on by Mr. Farkas at AFME.

- (8) Mr. Farkas also disagreed with the conclusion in the proposed decision that excluding potentially conflicting activities does not appear realistic or compatible with the role, adding that the conditions attached by the EBA in its decision of 12 September 2019 regarding his AFME CEO role could apply to the Activity to provide adequate protection to the risks to the EBA. In addition, Mr. Farkas noted that directors of companies under English law have a legal duty to avoid conflicts of interest and therefore as a director of TheCityUK he would be required by law to declare and avoid any conflicts of interest in my performance of the role. Mr. Farkas also added that membership of TheCityUK is geographically very diverse and involves a number of financial services firms headquartered in the EU and active in London's financial market. Adding that the CityUK's Board of Directors is not the ultimate body to approve its strategy, Mr. Farkas considered that the Activity is unlikely to lead to a potential conflict of interest as described in the proposed decision and certainly not one which would not be adequately addressed by existing restrictions on his AFME CEO role. Mr. Farkas added that AFME *"is also involved in developing and promoting the well-functioning of other financial centres located in the European Union in various forms, but not necessarily through an incorporated entity. Across all of these activities, the restrictions applicable in connection with my role as AFME CEO provide sufficient safeguards to avoid potential conflicts with the legitimate interest of the EBA"*. Mr. Farkas also challenged the justification in the proposed decision for a two-year prohibition on taking up the Activity.

#### *TheCityUK*

- (9) TheCityUK is a company limited by guarantee and incorporated in 2009 and registered with Companies House in the United Kingdom, with its registered address in London. Its Articles of Association state that *"[t]he function and principal purpose of the Company (its "Object") is the promotion, development and furtherance of activities regionally, nationally or internationally which are intended to result in the success of (i) the financial services industry and profession, and associated business and educational establishments and (ii) all persons involved in or related to the financial services sector and its success, both in London and throughout the United Kingdom."*
- (10) The Board Charter for TheCityUK<sup>3</sup> describes the role of its Board of Directors as being *"to oversee and direct the affairs of the Company in a manner that seeks to promote the success of the Financial and related Professional Services sector for the benefit of its members as a whole, while complying with relevant legal requirements, the Company's Constitution, and relevant corporate governance standards."* The Board Charter states that the role of non-executive directors of TheCityUK is *"to participate fully in the functioning of the Board, advising, supporting and challenging management as appropriate"* and all directors are required, *inter alia*, to *"provide entrepreneurial leadership of the Company"*, *"set the Company's strategic aims ... and review management performance"*, *"to bring unfettered judgement to bear on the issues*

<sup>3</sup> <https://www.thecityuk.com/assets/2015/Reports-PDF/26c761c396/TheCityUK-Board-Charter-August-2015.pdf>

*of strategy, performance, resources, key appointments and standards of conduct”, “to attend meetings of the Board, any relevant Board Committees and any general meetings of members of the Company”, and to “constructively challenge and contribute to the development of strategy”.*

According to the Notification, TheCityUK is an industry-led body representing UK-based financial and related professional services. TheCityUK’s website states that “[o]ur purpose is to champion and support the success of the UK-based financial and related professional services ecosystem, and thereby our members”, and that TheCityUK “engages with policymakers and other key stakeholders in the UK, across the EU and in Brussels to identify priorities and solutions, and to help shape a new, mutually beneficial relationship with the EU post-Brexit”. According to its website TheCityUK “engages in dialogues with financial sector representatives in a number of EU Member States. TheCityUK also sits on the UK’s government Financial Services Trade and Investment Board (FSTIB), a partnership between government and the industry, which is focused on maintaining and strengthening the UK’s leading position in financial and related professional services and ensuring its continued competitiveness”.

(11)TheCityUK’s website refers to its “UK Work Programme” as having a number of priorities, including notably: *“Maintaining the status of London and the UK as the leading international financial and related professional services centre; ensuring the industry continues to attract and retain the best talent from across the world and has a strong pipeline of home-grown talent; embracing innovating and disruption by scaling-up and diversifying the UK’s strength in Fintech; Planning for and responding to changes in regulation and supervision to enable the industry to remain competitive and allow economic growth; Promoting the wealth of expertise of infrastructure investment in the UK-based financial and related professional services industry”.*

(12)TheCityUK’s website refers to its “Europe Work Programme” in these terms: *“Our Europe work programme promotes the competitiveness of the UK-based financial and related professional services industry across the continent. We’re producing evidence and policies that respond to and define the challenges and opportunities of Brexit for the industry and clients it serves across Europe. We engage with policymakers and other key stakeholders in the UK, across the EU and in Brussels to identify priorities and solutions, and to help shape a new, mutually beneficial relationship with the EU post-Brexit.”* Referring to the Europe Work Programme the same webpage adds under the heading of “Brexit priorities”: *“Working with our members we have identified the following key Brexit industry priorities: securing the withdrawal agreement to provide the necessary legally-binding transition arrangements; a bespoke future relationship agreement that delivers the best possible mutual market access; continued mutual access to talent and skills; resolution of technical cliff-edge issues, such as contract continuity, which should not be caught up with the wider Brexit negotiations.”* Under the heading “European Policy Priorities” the webpage then adds: *“The mutually beneficial relationship between the UK and Europe’s financial and related professional services industries is underpinned by: - The UK’s share of European financial and related professional services business. - Access to the full range of expertise and inter-relationships only available in a truly international financial centre ecosystem. - The value of euro-denominated business and trading undertaken in the UK. -*

*European businesses' presence in the UK. - European customers of UK-based financial and related professional services businesses."*

*Article 16 of the Staff Regulations*

- (13) The Board of Supervisors is the Appointing Authority for Mr. Farkas as the former Executive Director and therefore responsible for the adoption of decisions under Article 16 of the Staff Regulations. The Board of Supervisors has received and taken into account the opinion of the Joint Committee.
- (14) Mr. Farkas provided a separate notification to the EBA on 2 August 2019 in respect of his intention to take up the post of AFME CEO. Following the AFME Decision, Mr. Farkas has been AFME CEO since 1 February 2020. The notification of 2 August 2019 did not refer to AFME's relationship to TheCityUK or that Mr. Farkas in his capacity as AFME CEO may be put forward for a position as non-executive director of TheCityUK. The AFME Decision does not address the taking up of a non-executive director post with TheCityUK, which is the subject of the Notification presently considered.
- (15) On the above basis, the Board of Supervisors is required to assess whether the Activity could lead to a conflict with the legitimate interests of the EBA. Pursuant to Article 16 paragraph 2 of the Staff Regulations, if the notified activity is related to the work carried out by the former staff member during the last three years of service and could lead to a conflict with the legitimate interests of the institution, the EBA 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. According to Article 16 paragraph 3 of the Staff Regulations, the appointing authority must, in principle, prohibit senior officials such as Mr. Farkas during the 12 months after leaving the service, from engaging in lobbying or advocacy vis-à-vis staff of the EBA for their business, clients or employers on matters for which they were responsible during the last three years in the service.
- (16) It is relevant to recall that Article 2(2) to (5) of the AFME Decision imposed the following prohibitions and restrictions in relation to Mr. Farkas taking up the post as AFME CEO:
- "2. The Staff Member shall not, for 24 months after leaving the service of the EBA, engage in lobbying or advocacy of the EBA or its staff on matters for which he was responsible during the last three years of service.*
- 3. The Staff Member shall not, for 24 months after leaving the service of the EBA, have professional contact with EBA staff on behalf of AFME.*
- 4. The Staff Member shall for 18 months after leaving the service of the EBA refrain from assisting AFME members, and otherwise contributing to AFME's activities on topics directly linked to work carried out by him during his last three years of service. This includes in particular: the EU impact and implementation of the finalised Basel III standards; prudential policies relating to the fundamental review of the trading book, non-performing loans and*

*securitisation; the EBA stress test; ML/TF risks in the prudential supervisory process; and secure customer authentication and API implementation under the Payment Services Directive 2. In case of doubt, the Staff Member shall contact the EBA.*

*5. The Staff Member shall not, without authorisation, disclose information received in the line of duty unless that information has already been made public or is accessible to the public (Article 17(1) Staff Regulations). The Staff Member shall not exploit insights of a confidential nature in policy, strategy or internal processes that the Staff Member has acquired in the line of duty and that have not been made public or is otherwise accessible to the public.”*

(17) Moreover, in assessing the possibility of any actual or potential conflict of interest, the Board of Supervisors should take into account factors such as those listed in Article 21(2) of the Decision on outside activities and assignments and on occupational activities after leaving the Service<sup>4</sup>. In particular, the Board of Supervisors notes that:

- a. there is a clear relation between the role of non-executive director of a representative organisation which lobbies on EU financial services policy matters on behalf of the UK financial services sector, and Mr. Farkas's former work as Executive Director of the EBA;
- b. during his last three years of service, Mr. Farkas was involved in EBA discussions regarding Brexit and the potential future EU-UK relationship which forms part of TheCityUK's priorities in its European Work Programme;
- c. acting as a non-executive director may not require involvement in 'specific files' and Mr. Farkas's notification notes that no participation in contacts with EU institutions or in preparation of such contacts is foreseen, and that the position does not involve any participation in operational management of TheCityUK. However, Mr. Farkas has informed the EBA that he may be appointed to board committees. In his response to the proposed decision on 21 May 2020 Mr Farkas stated that TheCityUK's Board of Directors is not the ultimate body for approving its strategy. However, under TheCityUK's Board Charter non-executive directors have a broad role in advising, supporting and challenging TheCityUK's management including as regards its strategy and performance, and TheCityUK's strategy includes a focus on the future EU-UK relationship and European financial services policy. On 31 January 2020, the withdrawal agreement entered into force upon the UK's exit from the EU. This marked the start of a transition period scheduled to last until 31 December 2020, during which time the UK is still treated as a member state. The transition period may be extended by one or two years, with agreement on extension to be decided not later than June 2020. The EU and the UK have started rounds of negotiations to determine the EU-UK future relationship.

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<sup>4</sup> Commission Decision of 29.6.2018 on outside activities and assignments and on occupational activities after leaving the Service (C(2018) 4048 final), adopted and applied by analogy by the EBA.



Although financial services are not included in the scope of these negotiations, the wider negotiations on the EU-UK future relationship remain of interest for the financial services industry of the UK and their representatives, such as TheCityUK. In particular, the outcome of the discussion on the equivalence of regulatory and supervisory requirements, which are being assessed in parallel, is an important issue for the UK financial industry.

- d. as regards whether the Activity would risk harming the reputation of the former staff member and the EBA, this is the case as the Activity relates to another lobbying organisation and particularly one which promotes the interests of the financial sector in what is now a third country negotiating its future relationship with the EU, so the risks to the EBA and Mr. Farkas are similar to those reflected in the AFME Decision. Furthermore, the views of the European Parliament<sup>5</sup> and of the European Ombudsman<sup>6</sup> on the AFME Decision show the risks of harm to the EBA's reputation if conflicts are not perceived to be adequately addressed;
- e. the future employer is a private, non-profit company which represents the UK financial services industry and thereby gives rise to potential conflicts of interest;
- f. the envisaged activity is not expected by Mr. Farkas to directly involve representing TheCityUK and its members' interests vis-à-vis the EBA, but TheCityUK itself does represent such interests to EU bodies and in individual Member States. The position also requires Mr. Farkas to advise TheCityUK on its strategy, which currently has as priorities the future EU-UK relationship and European policy priorities referred to above. These are topics on which Mr. Farkas worked at the EBA and his advice may be used by TheCityUK for lobbying purposes;
- g. the activity is not remunerated, but is linked to Mr. Farkas's remunerated activity as AFME CEO.

(18) In accordance with Article 16 of the Staff Regulations, and balancing 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 as referred to in Article 21 of the Decision on outside activities, it is therefore necessary to determine whether to forbid the Staff Member from undertaking the intended new occupational activity, or to establish the conditions under which the EBA gives its approval.

(19) Considering all the above, the Activity, if permitted by the EBA, carries a significant risk of conflict with the legitimate interests of the EBA in relation to particular items of EBA work and in contributing to the public interest by promoting the stability and effectiveness of the financial system in the Union. In that regard, the Activity, if permitted by the EBA, entails significant risks that the independence, image and reputation of the EBA and of the Union may

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<sup>5</sup> [https://www.europarl.europa.eu/doceo/document/TA-9-2020-0017\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2020-0017_EN.html).

<sup>6</sup> <https://www.ombudsman.europa.eu/en/recommendation/en/127638>.

be tarnished and confidence in the European System of Financial Supervision undermined, and it is necessary to protect the negotiating position of, and assessments to be carried out by, the Union in the context of the future EU-UK relationship. It is for these reasons that the EBA adopted in its AFME Decision the extensive restrictions on Mr. Farkas's role as AFME CEO in order to mitigate the risks to the EBA's interests. The Activity would involve carrying out activities that would be subject to those restrictions if they were carried on by Mr. Farkas at AFME. As a starting point similar restrictions should therefore be applied to Mr. Farkas.

(20) It is also necessary to assess the appropriate balance between protection of these legitimate interests of the EBA, and the right of Mr. Farkas right to work and carry out a freely chosen career. In that regard, the appropriate balance in relation to the Activity is different from that assessed in the AFME Decision.

(21) Firstly, whether or not Mr. Farkas were to undertake the Activity, it is understood that his principal full-time, permanent and remunerated occupation would continue to be as AFME CEO. Apart from the Activity, Mr. Farkas remains free to pursue other occupations that may run together with his position as AFME CEO subject to the notification and related requirements pursuant to the Staff Regulations. In addition, it appears that the Activity would be only an ancillary part of Mr. Farkas's AFME CEO role, taking into account that it did not form part of the job description originally notified to the EBA. Mr Farkas stated in his response on 21 May 2020 that the Activity would be ancillary to his AFME CEO role.

(22) Secondly, the restrictions in the AFME Decision related to the risks arising from Mr. Farkas taking up the AFME CEO role and, in that regard, were considered sufficient taking into account the ability to focus on aspects of that wide-ranging role which do not conflict with the EBA's interests. However, similar restrictions on Mr. Farkas's activities would not adequately mitigate the harm to the EBA's legitimate interests. That harm arises from Mr. Farkas's mere involvement as a director in advising on and setting the strategy of TheCityUK's representation activities, in particular representative activities of third country institutions while negotiations on the future UK-EU relationship are ongoing. Excluding potentially conflicting activities does not appear to be realistic or compatible with the role. In his response to the proposed decision Mr Farkas referred to the requirement for company directors under English law to declare and avoid conflicts of interest. Whereas that concerns conflicts with the interests of TheCityUK, the EBA must consider whether the Activity could lead to a conflict with the interests of the EBA and must take its own decision under Article 16 of the Staff Regulations rather than rely on duties owed to third parties. Moreover, the geographically diverse membership of TheCityUK mentioned by Mr Farkas does not substantially alter the position that conflict with the EBA's legitimate interests would arise from his involvement as a director in advising on and setting the strategy of TheCityUK's representative activities, given that the members have as the object of their company the advancement and success of the UK financial services sector, an object reflected in the aims and activities under TheCityUK's Work Programmes.

(23) In his response on 21 May 2020 Mr Farkas also stated that the proposed decision did not provide a sufficiently credible explanation for a two-year prohibition on taking up the Activity,



noting that the AFME Decision prevents him for the shorter period of eighteen months from contributing to AFME's activities on topics directly linked to work carried out by him in his last three years of service, and that there is also a shorter twelve-month prohibition on lobbying and advocacy for senior officials under Article 16 of the Staff Regulations. Mr Farkas referred to the AFME Decision's two year ban on "*professional contacts and advocacy towards the EBA and its staff*" and submitted that as "*the Activity does not include personal involvement or contacts on behalf of TheCityUK, this limitation and its length is not relevant in the present case*". However, Article 16 of the Staff Regulations provides that the appointing authority shall, "in principle", prohibit senior officials from engaging in "lobbying or advocacy" vis-à-vis its staff during the 12 months after leaving the service. This does not exclude a longer period for such restrictions and indeed does not exclude a general prohibition on taking up a post, as Article 16 paragraph 2 provides in the first place that the appointing authority may forbid the person from undertaking the activity where it is linked to their work in their last three years of service. While the Activity is linked with Mr. Farkas's role as AFME CEO, and the risks arising to the EBA's interests are similar, there are distinctive risks to the EBA's interests, including the need to avoid potential indirect lobbying or advocacy of the EBA, given TheCityUK's objects and activities and the significant role of its non-executive directors in that regard. There is also a different balance between Mr. Farkas's rights and the EBA's interests. Therefore the EBA should not be strictly limited by the duration of certain restrictions under the AFME Decision on Mr Farkas's role as AFME CEO.

(24) In the EBA's view having regard to all the above, the appropriate balance between the need to ensure integrity and Mr. Farkas' rights in respect of work would not be struck by committing to the imposition and consequent monitoring of restrictions on Mr. Farkas himself, and by extension on TheCityUK, in relation to the Activity. Rather, the appropriate balance between the need to ensure integrity and Mr. Farkas' rights in respect of work is to forbid Mr. Farkas from undertaking the Activity. The prohibition should remain in place for two years after Mr. Farkas left the EBA's service, taking into account the notification period set in Article 16 of the Staff Regulations and the duration of the restrictions in the AFME decision.

(25) In view of all the foregoing, this is a necessary and proportionate measure in this case.

#### **Has decided as follows:**

##### **Article 1**

The Appointing Authority forbids Mr Farkas from undertaking the Activity before 1 February 2022.

##### **Article 2**

This Decision enters into force immediately.

Done at Paris, 27 May 2020

Jose Manuel Campa (May 28, 2020 13:33 GMT+2)

José Manuel Campa

Chairperson

For the Board of Supervisors