

## Explanatory Note on

# Management Board Decision adopting special rules to guarantee the independence of the Fundamental Rights Officer in the performance of her or his duties

## 1. Background

The Fundamental Rights Officer (“FRO”) should play a central role in ensuring respect for, protection and promotion of fundamental rights and monitoring compliance with fundamental rights in all activities of the Agency at the external borders and in return operations. Therefore, it is crucial that the FRO is able to independently and efficiently exercise assigned tasks while respecting the overall legal, administrative and financial framework of the Agency. The FRO needs to have the necessary level of managerial responsibility while remaining fully accountable for his or her actions.

With the overall responsibility for the day-to-day administration of the Agency, the Executive Director should ensure that the FRO is able to autonomously manage human and financial resources at his or her disposal where necessary for the fulfilment of his or her tasks. In particular, the Deputy FRO, Fundamental Rights Monitors and other staff necessary for the FRO to exercise his or her duties should report to the FRO in relation to their tasks. In addition, the Deputy FRO and Fundamental Rights Monitors should also enjoy independence in the performance of their duties provided for by the European Border and Coast Guard Regulation (‘EBCG Regulation’)<sup>1</sup>.

Taking into account the overall need to ensure good governance and accountability, “*the Agency shall ensure that the fundamental rights officer is able to act autonomously and is able to be independent in the conduct of his or her duties*”<sup>2</sup>.

In accordance with Article 109(4) of the EBCG Regulation, “*the management board shall lay down special rules applicable to the fundamental rights officer in order to guarantee that the fundamental rights officer and his or her staff are independent in the performance of their duties*”<sup>3</sup> (the “FRO independence rules”).

## 2. Progress so far

The Agency is concluding its work on the final draft of the FRO independence rules. Currently, the Agency is incorporating input received from the European Commission.

To ensure an inclusive stakeholders engagement, the Executive Director has opted to consult the Consultative Forum on the draft, even though it is not a legal requirement. This consultation is ongoing as well as the consultation of the Fundamental Rights Officer ad interim.

## 3. Main elements of the future FRO independence rules

In order to comply with the requirements provided by the EBCG Regulation, the future Management Board Decision on FRO independence will need to address a number of practical and functional aspects. The FRO shall act autonomously in the exercise of those tasks and, **shall neither seek nor take instructions** from any member of the Agency’s staff, any government or any other body.

When necessary to perform his or her tasks, the FRO should have a possibility to access operational areas and access the relevant information. In particular, the FRO shall have access to all information concerning respect for fundamental rights in all activities of the Agency<sup>4</sup> while ensuring the confidentiality and security of the information

<sup>1</sup> See Article 109(6) and Article 110(5) of the EBCG Regulation.

<sup>2</sup> See Article 109(5) of the EBCG Regulation. Duties means the tasks set out in Article 109(2) of the EBCG Regulation.

<sup>3</sup> See Article 109(4) of the EBCG Regulation.

<sup>4</sup> See Article 109(7) of the EBCG Regulation.

in line with applicable legislation. The FRO shall carry out **on-the-spot visits** to any joint operation, rapid border intervention, pilot project, migration management support team deployment, return operation or return intervention, including in third countries<sup>5</sup>. In this context, the FRO will need to notify the Executive Director and the relevant National Frontex Point of Contact<sup>6</sup> in advance of that visit in order to ensure the necessary assistance.

The FRO should also be empowered to **advise the Agency** upon his or her initiative or upon a request by the Management Board or the Executive Director, on any activity of the Agency<sup>7</sup>. The time necessary for obtaining the advice shall not delay the related activity of the Agency.

Insofar as necessary for the fulfilment of his or her tasks, the FRO should be able to autonomously manage **adequate human and financial resources** at his or her disposal. The FRO is the **Head of the Fundamental Rights Office**, which has been established by the Decision of the Management Board 18/2017<sup>8</sup> and comprises of the FRO, the Deputy FRO, Fundamental Rights Monitors and other necessary staff. The Fundamental Rights Office is a separate office in the organisational structure of the Agency. In relation to the duties of the FRO, the office shall report directly to her or him<sup>9</sup>.

When assisting the FRO or assuming his or her duties, the **Deputy FRO** should also enjoy functional independence. The functional independence of **Fundamental Rights Monitors** should also be ensured insofar as necessary for the performance of their duties provided for by the Regulation.

Moreover, in full compliance with the Frontex Financial Regulation<sup>10</sup>, the FRO may be provided with the **powers of budget implementation** to the extent necessary to perform his or her duties. The FRO shall implement the budget in accordance with the Frontex Financial Regulation and he or she shall be accountable for his or her actions. The FRO may also be empowered to suggest the expenditure requirements necessary for the fulfilment of his or her tasks.

**In summary**, the future Management Board Decision on the FRO independence rules will feature the following:

- **A description of tasks requiring particular attention.**
- **Adequate human and financial resources for the FRO.**
- **A reiteration of FRO's possibility to access operational areas and access the relevant information when necessary to perform his or her tasks.**
- **Managerial status.**
- **Congruity with the Agency's new mandate.**

Finally, the revised Management Board decision delegating Appointing Authority powers pursuant to Article 100(2)(s) and Article 100(8) of the EBCG Regulation will help with increasing FRO's independence.

#### **4. Safeguards**

There is a need to successfully reconcile the functional independence of the FRO (as provided for in the Regulation) with the need to maintain a system ensuring good governance and accountability.

To allow this, the FRO independence rules will clarify the following:

- **According to Article 109(2)(e) of the EBCG Regulation, the FRO may be requested by the Agency to advise on any activity without delaying that activity.** Therefore, tasking FRO is not a breach of his or her independence.
- **The FRO independence rules apply without prejudice to the existing legal framework ensuring good governance and accountability in the Agency.** The FRO, Deputy FRO, and staff in his or her office are fully subject to, *inter alia*, the following rules:

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<sup>5</sup> See Article 109(2)(g) of the EBCG Regulation.

<sup>6</sup> Or, as the case may be, the competent authority of the third country.

<sup>7</sup> See Article 109(2)(d) of the EBCG Regulation.

<sup>8</sup> Management Board Decision 18/2017 of 14 June 2017 on the new organisational structure of the Agency.

<sup>9</sup> See Article 109(2)(j) and Article 110(5) of the EBCG Regulation. Further details related to the human resources aspects of the Fundamental Rights Officer and the Fundamental Rights Office will be addressed in the revised Management Board decision delegating Appointing Authority powers pursuant to Article 100(2)(s) and Article 100(8) of the EBCG Regulation.

<sup>10</sup> Management Board Decision 19/2019 of 23 July 2019 adopting the Frontex Financial Regulation.

- ✓ **the Staff Regulations and the CEOS<sup>11</sup> and rules giving effect to them adopted by the Management Board, and all administrative and financial decisions** of the Management Board and the Executive Director, as well as administrative notices unless otherwise provided therein;
- ✓ **rules regarding:** security, Frontex's sensitive posts policy, the anti-fraud strategy<sup>12</sup>, internal inspections and controls, whistleblowing rules<sup>13</sup>, the conduct of administrative inquiries and disciplinary proceedings<sup>14</sup>, Frontex's policy on protecting the dignity of the person and preventing psychological and sexual harassment<sup>15</sup>. For the avoidance of doubt, procedures and rules laid down therein apply without being affected by the FRO independence rules.
- ✓ **the applicable data protection framework.**

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<sup>11</sup> Regulation No 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community (OJ L 45, 14.6.1962, p. 1385).

<sup>12</sup> Management Board Decision 36/2018 of 6 November 2018 adopting the Anti-Fraud Strategy 2019-2021.

<sup>13</sup> Management Board Decision 17/2019 of 18 July 2019 adopting the Frontex Guidelines on Whistleblowing.

<sup>14</sup> Management Board Decision 26/2018 of 25 October 2018 adopting general implementing provisions on the conduct of administrative inquiries and disciplinary proceedings.

<sup>15</sup> Management Board Decision 16/2019 of 18 July 2019 on the Frontex policy on protecting the dignity of the person and preventing psychological and sexual harassment.