



EUROPEAN COMMISSION
DIRECTORATE-GENERAL FOR MIGRATION AND HOME AFFAIRS

Directorate B: Borders, Interoperability and Innovation
The Director

Brussels 3rd December 2019
HOME.B/MO

Mr. Marko Gasperlin
Chairman of the Management Board
European Border and Coast Guard Agency

(only via e-mail)

**Subject: Vacancy Notices – Fundamental Rights Officer and Deputy
Fundamental Rights Officer**

Ref.: Your letter of 22 November 2019

Dear Marko,

With above-mentioned letter you asked the Commission for a legal opinion with regard to the recent publication of vacancy notices for posts of the Fundamental Rights Officer and Deputy Fundamental Rights Officer in the European Border and Coast Guard Agency. Please find subsequently the assessment of the Commission services:

Concerning the post of Fundamental Rights Officer

According to Article 109 of Regulation 2019/1896, “a fundamental rights officer shall be appointed by the management board on the basis of a list of three candidates after consultation with the consultative forum”.

The Management Board (MB) decisions 11/2017 and 26/2016 delegated the powers of the appointing authority to the Executive Director of the Agency. Article 2.3 of Management Board decision 26/2016 provides that “decisions on selection, engagement, extension of contract, termination of contract, appraisal and reclassification of ... the Fundamental Rights Officer shall be subject to approval by the Management Board”.

The broad scope of Article 2.3 shows that the Management Board's intention is to be involved in all decisions concerning the appointment of the Fundamental Rights Officer, including his/her classification and conditions of employment.

It follows that the Management Board should approve any initiative regarding the selection and engagement of the Fundamental Rights Officer, especially taking into account the independence requirement, which Regulation 2019/1896 made even more important than the still applicable founding regulation (Regulation 2016/1624).

In concrete terms, the Management Board should approve the selection of the Fundamental Rights Officer. The publication of the vacancy notice is a preliminary (necessary) step of the selection.

Therefore, Article 2.3 of Management Board decision 26/2016 includes the vacancy notice, which should not have been published without the Management Board's prior consent.

In addition, it is to be noted that the publication has been made more than a year prior to the end of the term of office of the current Fundamental Rights Officer. This might have legal consequences because it might be seen as an attempt to discredit or weaken the current holder of the Fundamental Rights Officer office, and give rise to an action for damages.

A regularisation *ex post* should be ruled out: First, in view of the short time remaining for applying before the deadline of 10 December, and second, because the Management Board might have comments on the content of the vacancy notice and on the timing.

In conclusion, the Executive Director should repeal the publication and consult the Management Board as to the next step to take concerning the position of the Fundamental Rights Officer, which is currently not vacant. The procedure of recruitment should be started again from scratch.

Concerning the post of Deputy Fundamental Rights Officer

The Executive Director published a vacancy notice for the post of Deputy Fundamental Rights Officer (DFRO) newly introduced by Regulation 2019/1896.

According to Article 109(6) of Regulation 2019/1896, the DFRO shall be appointed by the Management Board from a list of at least three candidates presented by the Fundamental Rights Officer (FRO). Article 109(6) therefore makes clear that the role of the FRO is key in the procedure for recruitment of his/her deputy.

The publication of the vacancy notice for the DFRO is at odds with this provision since the FRO was not involved in it. The vacancy notice and its publication should therefore be repealed.

Concerning further related questions

To implement the provisions of the new founding regulation of the Agency, and in particular the necessity to adopt specific rules ensuring the independence of the Fundamental Rights Officer, as well as the new rules regarding the exclusive management of the staff of the Fundamental Rights Officer by the latter, it appears necessary to modify the Agency's decision on the delegation of the appointing authority powers. This delegation decision would further clarify the roles of actors within the Agency to avoid inter alia confusion on the different steps of the procedures.

Taking into account the recruitment targets set out in the new founding regulation, which requires the Agency to engage 40 fundamental rights monitors (Fundamental Rights Officer's staff) by 5 December 2020, it is recommendable to modify the delegation decision. The latter should be adopted in accordance with Article 100(8) of the new founding regulation, namely after having received the Commission's formal agreement.

While the new founding regulation does not provide for any specific recruitment grade for the Fundamental Rights Officer, the appointing authority (here the Management Board) is empowered to decide on the most appropriate recruitment grade in line with the relevant provisions of the Conditions of Employment of Other Servants of the EU (CEOS).

The Commission services are available to assist the Management Board and the Agency with the modifications to the current delegation decision and with regard to any further queries relating to the above assessments as well as to the/future selection procedure(s).

Yours sincerely,

(e-signed)
Matthias OEL

c.c.: Mr. Fabrice Leggeri, Executive Director, European Border and Coast Guard Agency;
Ms. Paraskevi Michou, Director-General DG Migration and Home Affairs