



EUROPEAN COMMISSION  
DIRECTORATE-GENERAL FOR MIGRATION AND HOME AFFAIRS

Directorate B: Borders, Interoperability and Innovation  
The Director

Brussels,  
HOME.B/MO

Mr. Marko Gasperlin  
Chairman of the Management Board  
of the 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 7 January 2020**

With the above-mentioned letter, you asked for the Commission's opinion whether the current Fundamental Rights Officer (FRO) can continue to carry out all her duties under the terms of Regulation No 2019/1896, in particular as regards her responsibilities for filling an immediate vacancy for the Deputy FRO. You also enquired about an interim solution, proposed by the Executive Director, that the Management Board appoints the current FRO as “*middle manager under the rule of temporary assignment to managerial function to ensure continuity of service*”.

Please find below the assessment of the Commission's services:

### **Analysis**

**1. The Commission recalls that the main feature of the FRO and his/her *raison d'être* is his/her independence**, which is mentioned several times in both Regulation No 2016/1624 and Regulation No 2019/1896<sup>1</sup>. The independence of the FRO rules out premature termination of the employment contract of the current FRO with no other cause than the new definition of the post by Regulation No 2019/1896.

While Regulation No 2019/1896 repealed Regulation No 2016/1624 and some relevant transitional measures were set out in Article 123, the co-legislators decided not to define any transitional arrangements in relation to the FRO. In this sense, Regulation No 2019/1896 did not question the recruitments made pursuant to Regulation No 2016/1624.

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<sup>1</sup> See Article 71, paragraph 2, of Regulation No 2016/1624 and Articles 109, paragraphs 4 and 6, and 110, paragraph 5, of Regulation No 2019/1896.

The repeal of Regulation 2016/1624 produces an effect *ex nunc* and the current FRO remains in place<sup>2</sup>.

**2. At the same time, Regulation No 2019/1896 has significantly increased the power and the remit of the FRO.** The FRO is part of the “*management structure*”<sup>3</sup> and is expected to manage a team of at least 40 persons. The FRO is in charge of selecting and evaluating the team of fundamental rights monitors, who are under his/her sole responsibility<sup>4</sup>. In addition, Article 109(6) of Regulation No 2019/1896 created the Deputy Fundamental Rights Officer (DFRO), and the FRO is in charge of the recruitment of his/her deputy.

In this context, the Management Board, acting in its capacity as appointing authority, should revise the current job description of the FRO in order to adjust it to the new management functions of this post.

It has to be noted that the FRO falls within the scope of the Commission decision on middle management staff<sup>5</sup>, as pursuant to Regulation No 2019/1896 this position involves the permanent management of an administrative unit. However, the current FRO was not recruited as a “middle manager” within the meaning of that decision.

Pursuant to Article 7(2) of the Staff Regulations (SR), an official may be called upon to occupy temporarily a post in a grade in his function group that is higher than his substantive grade. The duration of a temporary posting shall not exceed one year. The procedure for temporary postings is laid down in Commission Decision C(2009)7839 of 19 October 2009<sup>6</sup>.

The Agency has neither adopted its own decision on middle management staff following the Commission agreement C(2018)2542 of 24 April 2018 to the model decision, nor the decision on the temporary occupation of management posts for which the Commission gave its agreement to the corresponding model decision (C(2017)7332 of 6 November 2017). The Agency should therefore adopt decisions following the above mentioned model decisions (instead of applying by analogy Commission decisions C(2016)3288 on middle management and C(2009)7839 on temporary occupation of management posts, which do not take into account the special needs and characteristics of the agencies).

**3. Against this background, a balance must be struck between two aspects.** On the one hand, the independence of the current holder of the post, which, in the opinion of the Commission, rules out any **immediate** publication of a vacancy notice, which could be interpreted as a means to discredit or weaken his/her action. On the other hand, there is the necessity to upgrade the job description and the status of the current holder.

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<sup>2</sup> See, by analogy, Case T-430/93, para. 60: “...*the annulment of an act which has already been implemented or which has in the meantime been repealed from a certain date is still capable of having legal consequences*”. Emphasis added.

<sup>3</sup> Article 99 of Regulation No 2019/1896.

<sup>4</sup> See Article 109, paragraph 5, of Regulation No 2019/1896.

<sup>5</sup> Decision C(2016)3288 final of 15 June 2016 as amended by Commission Decision of 6 June 2018.

<sup>6</sup> Decision C(2009)7839 of 19 October 2009 laying down implementing rules as regards temporary occupation of managements posts.

## RECOMMENDED APPROACH

**1. As a matter of urgency, the Management Board should adopt a modified decision delegating relevant appointing-authority (AA) powers adapted to Regulation No 2019/1896<sup>7</sup> as already indicated in my letter of 3 December 2019 (Ref. Ares(2019)7449751). This new decision should be adopted without delay, as the current decision is in the contradiction with the founding Regulation.**

The modified decision should clearly provide for the Management Board to exercise all the AA powers in respect of the FRO and delegating the AA powers to the FRO as regards his/her staff, in particular the fundamental rights monitors.

In addition, the modified decision should provide that major AA powers (e.g. engagement, appraisal, reclassification, extension of contract, end of the contract) over the security officer are also exercised by the Management Board.

**2. As regards your enquiry of 7 January 2020, the Commission recommends a twofold approach:**

- 1) the status of the current job holder is enhanced in line with his/her new powers and tasks and in the light of the Commission decision of 15 June 2016 on middle management staff, and
- 2) the Management Board should consequently adopt a temporary decision in accordance with Article 7(2) of the Staff Regulations on temporary occupation of management posts.

**This approach can be implemented through the following steps:**

- a) The Management Board revises the current job/post description of the FRO in order to reflect the new characteristics of the post (management role);
- b) At the same time, the MB adopts as soon as possible the model decision on middle management staff and the model decision on temporary occupation of management posts<sup>8</sup>;
- c) The current FRO is temporarily appointed to occupy the middle management functions of the future FRO, in accordance with Article 7, paragraph 2, of the Staff Regulation. As the duration of a temporary posting shall not exceed one year, this may have an impact on the timing of the publication of the vacant post, given that the FRO's current contract expires at the end of 2022.
- d) A new vacancy notice is prepared by the Management Board in order to upgrade the post to its new powers and challenges.
- e) The new vacancy notice is published sufficiently early so that the end of the temporary posting as a middle manager and the entry of service of the new FRO will coincide.

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<sup>7</sup> Article 100, paragraph 8, of Regulation No 2019/1896. The adoption of that decision requires the agreement of the Commission under Article 110(2) of Staff Regulations. The Agency should submit the draft decision to the Commission after receiving the preliminary approval by the Management Board.

<sup>8</sup> The Management Board may directly adopt the two decisions (on middle management staff and on interim occupation of management posts), as the Commission has already gave respective agreements under Article 110(2) of Staff Regulations.

In addition, the current FRO should organise without further delay the recruitment of the Deputy FRO in accordance with Article 109(6) of Regulation No 2019/1896, so she could present to the Management Board a list of at least three candidates for the appointment of the Deputy FRO. The current FRO should also engage urgently in the recruitment of 40 fundamental rights monitors. These selection processes should begin immediately

The Commission services stand ready 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. Monique Pariat, Director-General DG Migration and Home Affairs