



EUROPEAN COMMISSION
DIRECTORATE-GENERAL FOR MIGRATION AND HOME AFFAIRS

The Director-General

Brussels
HOME/MP

Dear Mr Leggeri,

Subject: The rules guaranteeing the independence of Fundamental Rights Officer

Thank you for your letter of 6 November 2019. In this letter, you referred to the preparation of the rules guaranteeing the independence of the Fundamental Rights Officer ('FRO') and his/her staff in the performance of duties in accordance with Article 109 of Regulation (EU) 2019/1896 on the European Border and Coast Guard (EBCG 2.0 Regulation). In your letter, you enquired about the different aspects of the FRO's independence vis-à-vis certain functions and roles of the Executive Director .

In order to offer you a comprehensive reply, DG HOME has sought input from the relevant Commission services, namely DG BUDG and DG HR. This reply also follows the consultation initiated by the Chair of the Management Board on the interpretation of the FRO's role under the EBCG 2.0 Regulation (see Mr. Gasperlin's letters of 22 November 2019 and 7 January 2020).

I consider that Mr Oel's replies of 3 December 2019 and 3 February 2020 to Mr Gasperlin, of which you have received copies, have clarified several matters raised in your own enquiry of 6 November 2019. This letter offers additional clarifications, notably as regards financial management and operational aspects.

1) General

The reinforcement of fundamental rights in the EBCG 2.0 Regulation was a key priority for the co-legislators, in particular with the powers and the remit of the FRO's function being significantly increased, including through the provision of additional staff. As stressed in Mr Oel's letter of 3 February 2020, the main feature of the Fundamental Rights Officer and his/her *raison d'être* is his/her independence.

In this context, the co-legislators considered it necessary to lay down special rules in order to guarantee that the fundamental rights officer be independent in the performance of his/her duties (hereafter "the rules on FRO's independence").

In that respect, it is of the utmost importance that these rules guarantee a high level of independence while taking into account that the FRO is part of the administrative structure of the Agency.

2) HR aspects

In the Commission's view, the Staff Regulations and Conditions of Employment of other Servants (or the relevant implementing rules) provide for the necessary legal provisions catering for most of the specific questions raised in your letter concerning the FRO and his/her staff. In addition, the EBCG 2.0 Regulation defines how the FRO and deputy FRO are appointed, to whom the FRO reports, and who appoints and manages the Fundamental Rights Monitors. I believe that your main concerns as regards the HR aspects can be addressed through the clear definition of the appointing authority powers conferred by the Staff Regulations.

As indicated in Mr Oel's abovementioned letters of 3 December 2019 and 3 February 2020, in parallel to the development of the rules on FRO's independence, the Management Board should modify the 2016 decision¹ delegating relevant appointing-authority (AA) powers adapted to the EBCG 2.0 Regulation in accordance with Article 100 (8) of the EBCG 2.0 Regulation.

That 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. This new decision should be adopted as a matter of urgency, as the current decision contradicts the Regulation. Please note that the adoption of that decision requires the agreement of the Commission under Article 110(2) of the Staff Regulations and in accordance with this procedure, the Agency should submit the draft decision to the Commission after receiving preliminary approval by its Management Board.

As regards human resources aspects, the rules on independence should include cross-references to the above-mentioned decision of the Management Board.

3) Budget aspects

When it comes to financial management, the Executive Director performs the duties of an authorising officer in the preparation, implementation of and reporting on the Agency's budget.

The Executive Director may delegate budget implementation powers to staff of the Agency covered by the Staff Regulations, in accordance with the conditions laid down in the financial rules of the Agency.

In this context, the rules on the FRO's independence should refer to the applicable arrangements provided in the Agency's financial framework² under which the Executive Director, acting as the authorising officer, may delegate relevant powers to the FRO. Of course, such a delegation must be compatible with the duties of the Executive Director, in particular as regards the principle of sound financial management and effective and

¹ By its decision 26/2016 of 6 October 2016, the management board has delegated the appointing-authority powers in respect of staff of the Agency to the executive director, while retaining several powers with the management board. Those retained powers are in relation to the executive director and the deputy executive director, and to the decisions on selection, engagement, extension of contract, termination of contract, appraisal and reclassification of the accounting officer and the fundamental rights officer, which are subject to approval by the management board.

² The Framework Financial Regulation for decentralised agencies (FFR) , and therefore the corresponding FRONTEX Financial Regulation, covers the potential delegation of budget implementation (Art 41 of FFR), the powers and duties of authorising officers (Article 45 FFR) and the withdrawal of such delegations (Art 54 of FFR).

efficient internal controls (i.e. Articles 30 and 39 of the FFR and Article 106 of EBCG 2.0 Regulation).

In accordance with article 109(5) of the EBCG 2.0 Regulation, “*the fundamental rights officer shall have sufficient and adequate human and financial resources at his or her disposal necessary for the fulfilment of his or her tasks*”. In this context, it is important that the rules on independence define the clear arrangements allowing the Fundamental Rights Officers to identify the necessary needs and communicate them to the Executive Director.

While the situation of the FRO is very specific, some inspiration could be drawn from the relevant mechanisms applicable to independent functions in other EU Agencies, for example, the Boards of Appeal in the European Union Intellectual Property Office (EUIPO). In accordance with Article 166 (4) (d) of the EUIPO Regulation, the president of the Boards of Appeal forwards to the Executive Director, the Boards' expenditure requirements with a view to drawing up expenditures estimate.

4) Operational aspects

In addition to the abovementioned essential arrangements for financial and human resources, the core scope of the rules on the FRO's independence should define how the fundamental rights officer and his or her staff are independent in the performance of their duties as regards operational aspects.

The rules should expressly mention that the FRO may not receive instructions with respect to the performance of his/her duties. They should further mention that the FRO and his or her staff, in exercising their tasks and powers, are only accountable to the Management Board.

The rules should define how the Agency should ensure that the FRO is able to act autonomously and is able to be independent in the conduct of his or her duties. Therefore, I suggest that for each of his/her tasks indicated in Article 109 (2) of the EBCG 2.0 Regulation, the rules on the FRO's independence spell out the main parameters under which the FRO performs his duties and interacts with other relevant functions and structures within the Agency (including the Management Board, Executive Director, Consultative Forum).

For the same reason, the rules on the FRO's independence should define how his or her staff can perform their duties independently. In particular, it applies duties of the fundamental rights monitors specified in article 110 (2) of the EBCG 2.0 Regulation. The rules should clearly define how the monitors interact with the relevant staff of the Agency when they are deployed in the operational area or during return operations.

Furthermore, given that the FRO shall report directly to the Management Board, the rules should also define how the Management Board “*ensures that action is taken with regard to recommendations of the fundamental rights officer.*”

5) Concluding remarks

My services remain available to discuss with your team on specific aspects on which you may require further Commission guidance. Given the legal complexity and the sensitivity of this matter, I propose that the Agency closely coordinates the preparation of both

abovementioned Management Board decisions (on appointing authorities powers and on the FRO's independence) with my services and further consider any open or upcoming questions during this process.

Yours sincerely,

Monique PARIAT
(e-signed)

c.c.: Mr Marko Gasperlin, the Chair of the Management Board of the
European Border and Coast Guard Agency
Mr Matthias Oel, Director of Directorate B in DG HOME