

RESOLUTION (EU) 2022/298 OF THE EUROPEAN PARLIAMENT**of 21 October 2021****with observations forming an integral part of the decision on discharge in respect of the implementation of the budget of the European Border and Coast Guard Agency for the financial year 2019**

THE EUROPEAN PARLIAMENT,

- having regard to its decision on discharge in respect of the implementation of the budget of the European Border and Coast Guard Agency for the financial year 2019,
 - having regard to the report on the fact-finding investigation on Frontex concerning alleged fundamental rights violations drawn up by Parliament's Committee on Civil Liberties, Justice and Home Affairs,
 - having regard to Rule 100 of and Annex V to its Rules of Procedure,
 - having regard to the opinion of the Committee on Civil Liberties, Justice and Home Affairs,
 - having regard to the second report of the Committee on Budgetary Control (A9-0270/2021),
- A. whereas all Union bodies, offices and agencies ought to be transparent and fully accountable to the citizens of the Union for the funds entrusted to them;
- B. whereas Parliament's role in respect of the budget discharge is specified in the Treaty on the Functioning of the European Union (TFEU), in Regulation (EU, Euratom) 2018/1046 ⁽¹⁾ and in Delegated Regulation (EU) 2019/715 ⁽²⁾;
1. Underlines the importance of acting responsibly and transparently in the implementation of the Union budget;
 2. Recalls the role of Parliament within the discharge procedure, as governed by the TFEU, Regulation (EU, Euratom) 2018/1046 and Parliament's Rules of Procedure;
 3. Recalls that on 28 April 2021 Parliament adopted Decision (EU, Euratom) 2021/1613 ⁽³⁾ postponing the decision on discharge in respect of the implementation of the budget of the European Border and Coast Guard Agency (the 'Agency') for the financial year 2019; calls on the Agency to regularly report to the discharge authority on the actions taken towards and the timeline of the implementation of recommendations made in Resolution (EU) 2021/1615 ⁽⁴⁾; calls on the Agency to present those reports on a quarterly basis, at the request of the discharge authority;
 4. Notes that the Agency has prepared an initial business continuity plan and that at the moment of the Agency's reply, the plan was undergoing final fine-tuning with the aim to be adopted by the end of the second quarter of 2021; calls on the Agency to report back to the discharge authority about the state of implementation of its business continuity plan;
 5. Welcomes the Agency's ongoing efforts to create a register of all documents that the Agency produces, in line with its transformation and digitalisation; welcomes that the Agency proactively published key documents on its website, making them available through the Public Access to Documents register; calls on the Agency to continue to improve public access to documents and to refrain from seeking to recover the sometimes disproportionate costs of external

⁽¹⁾ Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012 (OJ L 193, 30.7.2018, p. 1).

⁽²⁾ Commission Delegated Regulation (EU) 2019/715 of 18 December 2018 on the framework financial regulation for the bodies set up under the TFEU and Euratom Treaty and referred to in Article 70 of Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council (OJ L 122, 10.5.2019, p. 1).

⁽³⁾ Decision (EU, Euratom) 2021/1613 of the European Parliament of 28 April 2021 on discharge in respect of the implementation of the budget of the European Border and Coast Guard Agency for the financial year 2019 (OJ L 340, 24.9.2021, p. 324).

⁽⁴⁾ Resolution (EU) 2021/1615 of the European Parliament of 29 April 2021 with observations forming an integral part of the decision on discharge in respect of the implementation of the budget of the European Border and Coast Guard Agency for the financial year 2019 (OJ L 340, 24.9.2021, p. 328).

lawyers from applicants in court cases based on access to information requests in the future; reminds in this regard that the Resolution (EU) 2021/1615 called on the Agency to withdraw its demand to recover the legal fees in the General Court case T-31/18; notes that the legal fees have been decreased by the Court in comparison to the Agency's initial demands; reminds the Agency to act in compliance with the principle of sound financial management, both as regards complying with Court orders, and as regards refraining from assigning external lawyers to such cases; calls on the Agency to avoid unreasonably high legal costs and to ensure that their recovery remains within acceptable limits in the future;

6. Recalls the conclusions of the opinion of Parliament's Committee on Civil Liberties, Justice and Home Affairs of 25 February 2021, which led to the decision to postpone the granting of discharge in respect of the implementation of the budget of the Agency for the financial year 2019 'until these elements have been adequately clarified and presented by the Agency and until the OLAF investigation is completed'; emphasises the fact that by postponing the discharge, Parliament has given the Agency an additional six months to respond to the various elements that were developed in the Resolution (EU) 2021/1615;

Issues with expenditure identified by the Court

7. Recalls the finding of the Court regarding financing agreements for operational activities that reimbursements for equipment-related expenditure were still based on actual costs and the associated issue of lack of supporting evidence such as invoices; recalls that this issue was also identified in the discharge for 2018, when the Court recommended to use the 'unit cost approach'; notes that the 'unit cost approach' is a simplified cost option for which a price for use of heavy technical equipment is defined based on a pre-defined methodology, overcoming the issues associated with the reimbursement of actual costs; welcomes that the Agency has piloted the 'unit cost approach' for heavy technical equipment with two Member States; notes that the pilot projects for heavy technical equipment revealed that the 'unit cost approach' increased the total costs and regrets that the Agency concluded that moving to unit-based reimbursements in case of heavy equipment is not feasible; regrets that the issue of lack of supporting evidence is herewith not solved and reminds the Agency to not accept reimbursements for cost claims not supported by invoices; calls on the Agency and the Commission to review the Court's recommendation and to discuss with the Court the results of the pilot projects with 'unit cost approach' for heavy technical equipment to see how the issue of lacking supporting evidence can be solved; reminds the Agency and the Commission that, as a general principle, any unnecessary bureaucratic burden needs to be avoided;
8. Takes note of the Agency's reply to the discharge authority on the review of its mechanisms concerning the construction payments and the call to ensure compliance with the principles of sound financial management; acknowledges that the Agency reported that a mechanism to prevent unchecked pre-financing payments has been implemented throughout the financial circuit; notes that the Agency reported that all project managers, operational and financial actors dealing with facilities of the Agency's headquarters have been instructed not to approve and not to launch such payments and that financial verifiers have been instructed to reject such pre-financing payments and advise the authorising officers to reject them as well;

The Court's Special Report 08/2021 entitled: 'Frontex's support to external border management: not sufficiently effective to date'

9. Notes with concern the findings of the Court of Auditors (the 'Court') in its Special Report 08/2021 entitled 'Frontex's support to external border management: not sufficiently effective to date' ⁽⁵⁾; points out that the audit covered the period from the end of 2016, when the Agency's new mandate under Regulation (EU) 2016/1624 ⁽⁶⁾ came into force, to the end of 2020, and therefore entirely covered the year 2019 of the current discharge exercise, but did not take into account some recent steps taken by the Agency to comply with its mandate; acknowledges that an analysis of respect for fundamental rights by the Agency was not included within the scope of the Court's special report since that would require a specific audit in view of the complexity of the matter; asks the Court to carry out such a specific audit in the future;

⁽⁵⁾ https://www.eca.europa.eu/Lists/ECADocuments/SR21_08/SR_Frontex_EN.pdf.

⁽⁶⁾ Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC (OJ L 251, 16.9.2016, p. 1).

10. Notes with concern that the Court detected in its Special Report 08/2021 several shortcomings related to the Agency's primary activities as listed by the Court, namely the situation monitoring, risk analysis, vulnerability assessment, joint operations and rapid border interventions, return operations and the Agency's training and the lack of needs and impact assessments prior to the exponential increase in the Agency's expenses; also expresses concern that the Agency has not taken all measures needed to adapt its organisation to fully implement its mandate under Regulation (EU) 2016/1624; notes further that the Court highlighted significant risks related to the Agency's mandate under Regulation (EU) 2019/1896 ⁽⁷⁾; reminds that the Agency's mandates from 2016 and 2019 partially overlap, which could have potentially impacted their implementation, as identified by the Court;
11. Notes that only two years after Regulation (EU) 2016/1624 came into force, the Commission put forward a proposal for a new regulation for the Agency in the absence of an impact assessment for such new legislation; calls on the Commission and the Agency to quickly find an adequate solution to ensure a proper and timely implementation of the Agency's mandate under Regulation (EU) 2019/1896; urges the Commission and the Court to regularly assess the Agency's and the Member States' performance to identify areas for improvement, including in the respective legal bases for the Agency's activities, and also in the light of results and impacts achieved;
12. Notes with concern the Court's conclusion that the Agency's operational reporting fails to inform decision-makers adequately as it lacks information on actual costs and performance;
13. Notes with concern the Court's conclusion that although a functional information exchange framework is in place to provide relevant migration information about the situation at the external borders, and to support the management of irregular immigration, it did not function well enough to provide accurate, complete and up-to-date situational awareness at the Union's external borders; regrets that adequate information exchange framework has not yet been established for cross-border crime, affecting the capacity of the Agency and Member States to respond quickly to any threats detected; notes that the Agency dispatches timely and relevant migration information about the situation at the external borders and provides information about specific events; is concerned, however, by serious drawbacks undermining complete situational awareness at the Union external borders, such as the lack of information, of technical standards for border control equipment, of a common catalogue for cross-border crime reporting, and of near-real-time information about the situation at the Union's air borders, and by delays in updating the common integrated risk analysis model; underlines that the latter observations cannot be solely attributed to the Agency, but need to be remedied jointly with Member States and the Commission, especially as regards the common integrated risk analysis model, as there are significant differences in reporting across Member States in terms of frequency, format, data or definition of cases; reiterates the discharge authority's call expressed in Resolution (EU) 2021/1615 to improve monitoring and reporting regarding the situation and incidents on the Union's borders, also in the context of potential human rights violations;
14. Notes the Court's conclusion that not all relevant authorities have been included in Regulation (EU) No 1052/2013 ⁽⁸⁾ (for example, customs authorities);
15. Notes the Court's conclusion that Regulation (EU) 2019/1896 introduced significant additional reporting requirements for Member States, which requires an automated transmission of data from Member States to the EUROSUR's database; notes the statement of the Member States that the Agency's direct involvement in this automation is not yet apparent;
16. Is concerned by the Court's finding that the Agency did not provide adequate information about the impact or costs of its activities, that the Agency did not carry out a robust evaluation of joint operations, did not explain any deviation or identify the impact of any gaps in resources, and did not provide information about the real costs of its joint operations; highlights that the Agency has an obligation to provide adequate information about the impacts and costs of its activities to ensure transparency and accountability;

⁽⁷⁾ Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624 (OJ L 295, 14.11.2019, p. 1).

⁽⁸⁾ Regulation (EU) No 1052/2013 of the European Parliament and of the Council of 22 October 2013 establishing the European Border Surveillance System (Eurosir) (OJ L 295, 6.11.2013, p. 11).

Conditionality

17. Notes that the Commission and the Agency accepted or partially accepted all recommendations of the Court; calls on the Agency to comprehensively and in a timely manner address and implement the Court's recommendations and report to the discharge authority about the progress in the implementation of those recommendations; calls on the budgetary authority to put a part of the Agency's budget appropriations for 2022 in a reserve that can be made available when the following conditions are met:
- (a) the remaining 20 fundamental rights monitors are recruited at AD grade in line with Article 110 of Regulation (EU) 2019/1896;
 - (b) three deputy executive directors are recruited in line with Article 107 of Regulation (EU) 2019/1896;
 - (c) a detailed procedure for the implementation of Article 46 of Regulation (EU) 2019/1896 is adopted by the Agency's management board;
 - (d) an adapted Serious Incident Report (SIR) mechanism in line with the recommendations of the Working Group on Fundamental Rights and Legal Operational Aspects of Operations in the Aegean Sea (WG FRaLO) is presented;
 - (e) a fully functioning fundamental rights monitoring system in line with Article 110 of Regulation (EU) 2019/1896 is established;
 - (f) recommendation 5 of the Court's Special Report 08/2021 is implemented successfully (timeframe: end of 2021);
 - (g) the Agency's operations supporting return-related operations from Hungary are suspended as long as, and as concluded by the Court of Justice of the European Union, the return decisions issued by the Hungarian authorities are incompatible with the Return Directive and the Charter of Fundamental Rights of the European Union ⁽⁹⁾;

calls on the budgetary authority to assess the progress in fulfilling those conditions in a fact finding mission to the Agency in 2022 in which Members of Parliament's Committee on Budgetary Control will participate; considers that failing to fulfil those conditions also increases the risk of a refusal to grant the discharge for the financial year 2020; considers moreover, in line with the agreement reached during the last budgetary conciliation, that the Commission should exert stronger control functions regarding the agencies; calls on the Commission and the Agency to expound how the identified deficits, including as regards recruitment and procurement, will be solved for the budget for 2022;

Ongoing OLAF investigation

18. Recalls the confirmation of the European Anti-Fraud Office ("OLAF") of an ongoing OLAF investigation involving the Agency; reiterates its call on the Agency to fully cooperate with OLAF and to keep the discharge authority informed on any developments;
19. Recalls that during a meeting of Parliament's Committee on Budgetary Control of 1 September 2021 the deputy director-general of Commission's Directorate-General for Migration and Home Affairs stated that all enquiries have come to an end and that none have led to conclusions that there were traces of budgetary or financial mismanagement or fundamental rights violations or that the Agency had refused to comply with obligations under its regulation;

Transparency

20. Recalls the concerns raised by Parliament on the meetings conducted in 2018 and 2019 by the Agency with representatives of industries relevant for the Agency's work, with a majority of representatives not listed in the Union transparency register; points to Article 118 of Regulation (EU) 2019/1896 that requires the Agency to ensure transparency as regards lobbying by means of a transparency register and by disclosing all meetings with third-party stakeholders; welcomes the decision of the Agency's executive director on the transparency register of the Agency of 5 May 2021; calls on the Agency to regularly report to the discharge authority about the implementation and use of this tool;

⁽⁹⁾ Judgment of 17 December 2020, *Commission v Hungary*, C-808/18, EU:C:2020:1029.

21. Notes that the Agency has an obligation to ensure proactive transparency as stated in Article 114(2) of Regulation (EU) 2019/1896; notes that that Article also provides that such transparency has its limits as it shall be ensured without revealing operational information which, if made public, would jeopardise attainment of the objectives of operations; takes note that the Agency cannot disclose personal data in violation of the legal basis allowing for the processing of personal data, as provided for by Article 5 of Regulation (EU) 2016/679⁽¹⁰⁾; calls on the Commission to ensure binding rules for the protection of information and data;
22. Underlines that transparency is a general rule that applies to the Agency, the Commission and the entities participating in the consultative forum as a precondition of mutual trust and good cooperation;

Respect of fundamental rights

23. Recalls the establishment of the Frontex Scrutiny Working Group (FSWG) by Parliament's Committee on Civil Liberties, Justice and Home Affairs; notes that the FSWG published its report on the fact-finding investigation on Frontex concerning alleged fundamental rights violations on 14 July 2021, the aim of which was to gather 'all relevant information and evidence regarding alleged violations of fundamental rights in which the Agency was involved, was aware of and/or did not act, internal management, procedures for reporting, and the handling of complaints'; notes that the FSWG 'did not find conclusive evidence on the direct performance of pushbacks and/or collective expulsions by Frontex in the serious incident cases that could be examined by the FSWG'; recalls that the FSWG concluded that the Agency had 'evidence in support of allegations of fundamental rights violations in Member States with which it had a joint operation, but failed to address and follow-up on these violations promptly, vigilantly and effectively' and that 'as a result, Frontex did not prevent these violations, nor reduced the risk of future fundamental rights violations'; reminds at the same time that FSWG also identified gaps in the framework of cooperation with Member States, which may hamper the fulfilment of the Agency's fundamental rights obligations, and highlighted the responsibility of the Member States and the Commission, also outside their role in the management board; notes especially the division of responsibilities between the Agency and the Member States in relation to fundamental rights; acknowledges the limits experienced by the Agency in practice to only investigate fundamental rights compliance in relation to assets financed or co-financed by the Agency; emphasises that the Agency's staff needs legal clarity, particularly during high-risk missions at sea, and that the Commission and the Member States need to ensure legal standards and clarity with regard to the implementation of Regulation (EU) 2019/1896 in the context of various situations during missions; notes nevertheless that while conducting its investigations, FSWG discovered that recommendations and advice provided by the former fundamental rights officer over a four-year period were ignored by the executive director⁽¹¹⁾, notably regarding the Agency's operations in Hungary; calls on the Agency to provide a detailed report to Parliament setting out its plans to implement the recommendations made by FSWG and the progress made;
24. notes that the 'FSWG takes the position that the Management Board should have played a much more proactive role in acknowledging the serious risk of fundamental rights violations and in taking action to ensure that Frontex fulfils its negative and positive fundamental rights obligations as enshrined in the Regulation'; notes that the FSWG welcomes the new internal procedures and rules developed by the Agency during the months preceding the publication of the report to comply with Regulation (EU) 2019/1896 'but urges both actors to further increase the fundamental rights compliance of the Agency by reconsidering its internal structures and communication, as well as the cooperation with the host Member States'; notes that the FSWG 'highlights the responsibility of the Member States and the Commission, outside their role in the Management Board as well';

⁽¹⁰⁾ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ L 119, 4.5.2016, p. 1).

⁽¹¹⁾ Report on the fact-finding investigation on Frontex concerning alleged fundamental rights violations, point 3, point D., Role of the Executive Director, Recommendations, states that 'The FSWG deeply regrets the failure of the Executive Director to respond or follow up to the many expressions of concerns, recommendations, opinions or observations submitted by the FRO over the course of four years.'

25. Highlights that Members had access to information that led the FSWG to conclude that there was a 'lack of cooperation of the Executive Director to ensure compliance with some of the provisions of the EBCG Regulation, notably on fundamental rights'; the FSWG also regretted 'his recurrent refusal to implement the recommendations of the Commission to ensure compliance with the newly adopted Regulation';

European Ombudsman investigation

26. Welcomes the conclusions of the European Ombudsman's strategic inquiry concerning the Agency's complaints mechanism for alleged breaches of fundamental rights OI/5/2020/MHZ; notes that the European Ombudsman did not decide to take the matter further; notes nevertheless identified shortcomings in the complaints mechanism, which could make it more difficult for individuals to report alleged fundamental rights violations and seek redress; notes that the European Ombudsman identified delays in fulfilling the obligations of the Agency in that regard; acknowledges the Agency's commitment to address the areas for which the European Ombudsman identified improvement suggestions;
27. Is concerned about the findings of the FSWG that that the fundamental rights officer and the consultative forum were frequently not involved from the start in the development of rules, procedures and strategies on matters concerning fundamental rights as well as about the fact that the opinions and recommendations of the fundamental rights officer and consultative forum were not sufficiently taken into account by the management board and the executive director; calls on the Agency to fully and actively include the fundamental rights officer and consultative forum in all relevant processes from the very start; calls on the executive director to revise his relationship with the fundamental rights officer and consultative forum, taking into consideration in a timely manner all their recommendations; urges the Agency to fully implement the recommendations of the FSWG and to report to the discharge authority about the progress achieved;
28. Urges the Agency to ensure that it complies with all fundamental rights obligations enshrined in Regulation (EU) 2019/1896 in the implementation of European integrated border management, both in terms of policy and operational activities; calls on the Agency to implement effectively the recommendations from the report of the FSWG and Resolution (EU) 2021/1615 and inform Parliament on a regular basis about the implementation of its recommendations and about ongoing operations, including serious incidents concerning fundamental rights violations at the external borders and how this was addressed by the Agency;

Internal management, including fundamental right monitors

29. Reiterates with concern that the FSWG expressed 'concern that the Executive Director has delayed the recruitment of the three Deputy Executive Directors, and has refrained from delegating independent powers to them' while expanding his cabinet to 63 staff members; reminds that the FSWG is strongly concerned about insufficient checks and balances within the Agency; acknowledges that the competences of the three deputy executive directors were defined by the management board and respective vacancy notices for the three positions were published in the Official Journal of the European Union on 24 March 2021; calls on the Agency to further report to the discharge authority on the progress obtained with respect to the recruitment process;

Fundamental right monitors

30. Regrets the prolonged delay in appointing the fundamental rights officer and the fundamental rights monitors by the executive director highlighted by FSWG, especially in light of the extension of the cabinet of the executive director of the Agency; notes that the Agency's fundamental rights officer took office on 1 June 2021; underlines that the Agency's establishment plan was cut from 377 AD posts to 275 AD posts in 2020; acknowledges that this has had an effect on the whole personnel structure including the recruitment of the 40 fundamental rights monitors; acknowledges the statements of the Agency's executive director that the recruitment of a first batch of 20 fundamental rights monitors is completed, with the fundamental rights monitors starting their training from 1 June 2021, and that the appointment of a second batch of 20 fundamental rights monitors is ongoing; expresses its concern that of the recruited 20 fundamental right monitors, five have been appointed at AD 7 level and fifteen at AST 4 level; recalls that Parliament highlighted in the FSWG report that this lower ranking may affect the monitors' authority, autonomy and access to classified and sensitive information, and therefore their effectiveness; reminds that it was required of the Agency to engage all 40 fundamental rights monitors at an AD level, in order to ensure

acquisition of the best set of skills and ensure proper deployment to operations; recalls nevertheless that the correction coefficient for staff in various agencies remains low and acknowledges that lower salaries can have a negative impact on European applicants and can lead to difficulties in recruitment by some agencies; takes note of the strong disapproval by the FSWG of the unnecessary delay in the recruitment of the fundamental rights monitors caused by the executive director; reiterates that Regulation (EU) 2019/1896 provides for the recruitment of at least 40 fundamental rights monitors by 5 December 2020; is deeply concerned that this obligation remains unfulfilled and insists that the Agency appoints the remaining 20 fundamental rights monitors in a timely manner, without further delay and at AD grade, to ensure the necessary standing to perform their duties independently; recalls in particular that the FSWG noted that 'unrestricted and unannounced access to relevant spots, assets and information' is crucial for the fundamental rights monitors; stresses also the need for Member States to cooperate fully with the fundamental rights officer by providing evidence on the substance of cases being investigated; stresses the need to clarify the Agency's statement that the remaining 20 fundamental rights monitors will be recruited from an established AD7 reserve list, once additional AD7 posts have been allocated to the Agency while the Commission mentioned there were sufficient AD posts already allocated to it;

31. Notes that in November 2019 new rules concerning the complaints mechanism came into force and that those rules gave more responsibilities to the fundamental rights officer; welcomes the adoption of the updated fundamental rights strategy by the Agency's management board in February 2021; urges the Agency's management board to swiftly adopt the fundamental rights action plan to implement the updated strategy and improve the mechanisms for monitoring and reporting fundamental rights violations and complaints in the Agency;
32. Refers, for other observations of a cross-cutting nature accompanying its decision on discharge, to its resolution of 29 April 2021 ⁽¹³⁾ on the performance, financial management and control of the agencies; calls on the Agency to periodically to present and report to the discharge authority the state of implementation of a roadmap addressing the issues identified in Decision (EU, Euratom) 2021/1613.

⁽¹³⁾ OJ L 340, 24.9.2021, p. 525.