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JUDGMENT OF THE GENERAL COURT (Sixth Chamber)

24 April 2024 (*)

(Access to documents – Regulation (EC) No 1049/2001 – Documents relating to an aerial surveillance operation carried out by Frontex in the Central Mediterranean Sea on 30 July 2021 – Refusal to grant access – Article 4(1)(a) of Regulation No 1049/2001 – Exception relating to the protection of the public interest in the field of public security – Obligation to state reasons)

In Case T-205/22,

Marie Naass, residing in Berlin (Germany),

Sea-Watch eV, established in Berlin,

represented by I. Van Damme and A. Matthaiou, lawyers,

applicants,

v

European Border and Coast Guard Agency (Frontex), represented by R.-A. Popa and H. Caniard, acting as Agents, and by B. Wägenbaur, lawyer,

defendant,

THE GENERAL COURT (Sixth Chamber),

composed of M.J. Costeira, President, M. Kancheva (Rapporteur) and U. Öberg, Judges,

Registrar: A. Marghelis, Administrator,

having regard to the written part of the procedure, in particular:

– the measure of organisation of procedure of 19 July 2023 and the replies of the parties at the hearing on 11 October 2023;

– the measure of inquiry of 19 July 2023 and Frontex's replies lodged at the Registry of the General Court on 4 August and 27 October 2023,

further to the hearing on 11 October 2023,

gives the following

Judgment

1 By their action under Article 263 TFEU, the applicants, Ms Marie Naass and Sea-Watch eV, seek annulment of Decision DGSC/TO/PAD-2021-00350 of the European Border and Coast Guard Agency (Frontex) of 7 February 2022 concerning a confirmatory application for access to documents ('the contested decision').

Background to the dispute

2 Frontex was established in 2004 and is currently governed by 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 2019 L 295, p. 1).

3 On 1 February 2018, Frontex launched Operation Themis, the operational area of which covers the Central Mediterranean Sea, which focuses on border surveillance while including search and rescue activities at sea. All actions carried out jointly with the EU Member States are coordinated by the International Coordination Centre ('the ICC'). Furthermore, that operation also includes a security component, which includes intelligence gathering and other measures aimed, in particular, at detecting terrorist threats at the external borders.

4 Sea-Watch eV is a non-profit humanitarian organisation with its registered office in Berlin (Germany) which carries out civilian search and rescue operations in the Central Mediterranean Sea.

5 By email of 21 October 2021 ('the initial application'), Ms Marie Naass, 'advocacy coordinator' within Sea-Watch, submitted a request for access to certain documents to Frontex under Article 6(1) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43). The initial application contained the following list of documents:

– (1) all serious incident reports for 30 July 2021 concerning Frontex's aerial operation in the Central Mediterranean Sea on the same date;

– (2) the ICC's daily report in connection with Frontex's aerial operation in the Central Mediterranean Sea for 30 July 2021;

– (3) the minutes of the Joint Coordinating Board of 30 July 2021 concerning Frontex's aerial operation in the Central Mediterranean Sea on the same date;

– (4) the daily reporting package for 30 July 2021 concerning Frontex's aerial operation in the Central Mediterranean Sea on the same date;

– (5) all communications between the fundamental rights officer and the executive director of Frontex regarding any incidents that took place on 30 July 2021 related to the aerial operation;

– (6) all other internal Frontex communications (between any and all units or staff) regarding the aerial operation in the Central Mediterranean Sea on 30 July 2021;

– (7) all communications between Frontex and the Libyan authorities, between Frontex and the Italian authorities, and between Frontex and the Maltese authorities related to the aerial operation in the Central Mediterranean Sea on 30 July 2021;

– (8) all pictures and videos related to the aerial operation in the Central Mediterranean Sea on 30 July 2021;

– (9) the list of all available documents related to the Frontex aerial operation in the Central Mediterranean Sea on 30 July 2021.

6 After Ms Naass provided further details on 29 October 2021 following a request to that effect sent by Frontex on 25 October 2021, the request for access to documents PAD-2021-00300 was registered on 3 November 2021.

7 By decision TO/PAD-2021-00300 of 1 December 2021 (‘the initial decision’), Frontex rejected the initial application.

8 In the initial decision, Frontex stated that it had identified 73 documents in its possession corresponding to the documents referred to in points 2, 3, 4, 6, 7 and 8 of the list contained in the initial application (‘the 73 identified documents’). It also stated that it had not identified any documents in its possession corresponding to the documents referred to in points 1, 5 and 9 of that list. According to Frontex, access to the 73 identified documents was precluded by the exceptions referred to in Article 4(1)(a), first indent, and (b) of Regulation No 1049/2001 and Article 4(3) of that regulation.

9 Thus, as regards the document referred to in point 2 of the list contained in the initial application (‘the ICC’s daily report in connection with Frontex’s aerial operation in the Central Mediterranean Sea for 30 July 2021’), Frontex identified a single document and considered that access to that document was precluded by the exception referred to in the first indent of Article 4(1)(a) of Regulation No 1049/2001.

10 As regards the document referred to in point 3 of the list contained in the initial application (‘the minutes of the Joint Coordinating Board [(JCB)] of 30 July 2021 concerning Frontex’s aerial operation in the Central Mediterranean Sea on the same date’), Frontex also identified a single document and considered that access to that document was precluded by the exception referred to in the first indent of Article 4(1)(a) of Regulation No 1049/2001 and by the exception referred to in Article 4(3) of that regulation.

11 As regards the documents referred to in point 4 of the list contained in the initial application (‘the daily reporting package for 30 July 2021 concerning Frontex’s aerial operation in the Central Mediterranean Sea on the same date’), Frontex identified six documents and considered that access to those documents was precluded by the exception referred to in the first indent of Article 4(1)(a) of Regulation No 1049/2001 and, in the case of five of those documents, by the exception referred to in Article 4(1)(b) of that regulation.

12 As regards the documents referred to in point 6 of the list contained in the initial application (‘all other internal Frontex communications (between any and all units or staff) regarding the aerial operation in the Central Mediterranean Sea on 30 July 2021’), Frontex identified 27 documents and considered that access to those documents was precluded by the exception referred to in the first indent of Article 4(1)(a) of Regulation No 1049/2001 and by the exception under Article 4(1)(b) of that regulation.

13 As regards the documents referred to in point 7 of the list contained in the initial application (‘all communications between Frontex and the Libyan authorities, between Frontex and the Italian authorities, and between Frontex and the Maltese authorities related to the aerial operation in the Central Mediterranean Sea on 30 July 2021’), Frontex identified 36 documents and considered that access to those documents was precluded by the exception referred to in the first indent of Article 4(1)(a) of Regulation No 1049/2001, but also by the exception referred to in Article 4(1)(b) of that regulation.

14 Lastly, as regards the documents referred to in point 8 of the list contained in the initial application (‘all pictures and videos related to the aerial operation in the Central Mediterranean Sea on 30 July 2021’), Frontex identified two documents, as well as raw data, and considered that access to those two documents and data was precluded by the exception referred to in the first indent of Article 4(1)(a) of Regulation No 1049/2001 and by the exception referred to in Article 4(1)(b) of that regulation.

15 As a result, Frontex refused to grant full access to the 73 documents identified in the initial decision.

16 Furthermore, Frontex refused the partial disclosure of those documents on the ground that the amount of information that would have to be redacted would be disproportionate to the residual information that could be disclosed and that such a process would undermine the principle of sound administration.

17 By email of 13 December 2021, the applicants submitted confirmatory application PAD-2021-00350.

18 By the contested decision, Frontex confirmed the initial decision of 1 December 2021.

Forms of order sought

19 The applicants claim that the Court should:

– annul the contested decision;

– order Frontex to pay the costs.

20 Frontex contends that the Court should:

– dismiss the action;

– order the applicants to bear, in addition to their own costs, those incurred by the Commission.

Admissibility of the action

21 Although it has not formally raised a plea of inadmissibility pursuant to Article 130 of the Rules of Procedure of the General Court, Frontex submits that the action is inadmissible in so far as it was brought by Ms Naass.

22 Frontex thus maintains that Ms Naass submitted the initial application and the confirmatory application as the legal representative of Sea-Watch and that the latter is the sole addressee of the contested decision. It follows that, in the present case, Ms Naass does not have *locus standi* under Article 263 TFEU.

23 In support of that assertion, Frontex points out that Ms Naass previously submitted applications for access to documents under Regulation No 1049/2001 and Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies (OJ 2006 L 264, p. 13), relying on a mandate to that effect signed by the chairperson of Sea-Watch. According to Frontex, that proxy, dated 8 April 2021, is generic in that it is not limited to one specific application for access and is not limited in time.

24 Frontex also asserts that Ms Naass did not give her private address in the initial application and the confirmatory application, instead providing the postal address of Sea-Watch. Furthermore, those applications do not state that Ms Naass was acting not only as the legal representative of Sea-Watch but also in her own name.

25 Furthermore, Frontex contends that, contrary to what the applicants claim, the fact that Ms Naass received the contested decision in her capacity as the legal representative of Sea-Watch does not have the effect of conferring on her the status of addressee of that decision within the meaning of the fourth paragraph of Article 263 TFEU.

26 In Frontex's submission, the fact that Sea-Watch has *locus standi* in the present case does not alter the fact that the action is inadmissible in so far as it was brought by Ms Naass.

27 The applicants claim that Ms Naass was the addressee of the initial decision and of the contested decision. Consequently, Ms Naass has standing to bring proceedings in the present action, in accordance with the fourth paragraph of Article 263 TFEU.

28 In any event, the applicants state that Frontex does not dispute the admissibility of the action in so far as it was brought by Sea-Watch. In those circumstances, in the absence of specific grounds of procedural economy and in accordance with settled case-law, there is no need to examine Ms Naass's *locus standi*.

29 It should be recalled that, under the fourth paragraph of Article 263 TFEU, any natural or legal person may, under the conditions laid down in the first and second paragraphs of that provision, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.

30 In that regard, it should be noted that it is apparent both from the initial decision and from the contested decision that they were addressed to Ms Naass and do not contain any mention of Sea-Watch. Furthermore, it must be pointed out that, although Ms Naass indicated in the initial application and in the confirmatory application, in addition to her personal email address, the postal

address of Sea-Watch, it is not apparent from the content of those applications that they were lodged in the name of or on behalf of Sea-Watch.

31 It must therefore be held that Ms Naass is the addressee of the contested decision and that she therefore has standing to bring the present action for annulment on the basis of the fourth paragraph of Article 263 TFEU.

32 Frontex's plea of inadmissibility concerning Ms Naass's lack of *locus stand*i must therefore be rejected.

33 Furthermore, in those circumstances, and in accordance with settled case-law, since one and the same action is involved, and in the absence of any opposing considerations of procedural economy, there is no need to examine whether Sea-Watch has standing to bring proceedings (see, to that effect, judgments of 24 March 1993, *CIRFS and Others* v *Commission*, C-313/90, EU:C:1993:111, paragraph 31; of 9 June 2011, *Comitato 'Venezia vuole vivere' and Others* v *Commission*, C-71/09 P, C-73/09 P and C-76/09 P, EU:C:2011:368, paragraphs 36 and 37; and of 11 December 2013, *Cisco Systems and Messagenet* v *Commission*, T-79/12, EU:T:2013:635, paragraph 40).

Substance

34 In support of their action, the applicants raise two pleas in law. The first plea alleges a failure to state reasons when applying the first indent of Article 4(1)(a) of Regulation No 1049/2001. The second plea alleges infringement of Article 4(6) of Regulation No 1049/2001 concerning partial access to the documents requested.

The first plea alleging failure to state reasons when applying the first indent of Article 4(1)(a) of Regulation No 1049/2001

35 The applicants claim that, according to settled case-law, when an EU institution or agency relies on the public security exception laid down in the first indent of Article 4(1)(a) of Regulation No 1049/2001 to justify refusing access to a specific document, it is required, in particular, to 'provide a statement of reasons from which it is possible to understand and ascertain, first, whether the requested document does in fact fall within the sphere covered by the exception relied on and, second, whether the need of protection relating to that exception is genuine'.

36 Furthermore, according to the applicants, that institution or agency is required to explain why disclosure of that document 'could specifically and actually' undermine public security. In that context, the applicants submit that the risk associated with that undermining must be 'reasonably foreseeable and not purely hypothetical'.

37 The applicants also argue that, under Article 114(2) of Regulation 2019/1896, Frontex is required, when handling applications for access to documents held by it, to take into account the security rules on protecting classified information and sensitive non-classified information which Frontex itself adopted pursuant to Article 92 of that regulation. Frontex failed to fulfil its obligation to explain how the contested decision complies with the rules in question.

38 The applicants also state that, in the past, Frontex has refused access to documents using generic wording that was essentially the same as the wording contained in the initial decision and the contested decision. That demonstrates that the statement of reasons provided by Frontex in those

decisions was generic in nature. In that regard, the applicants dispute Frontex's defence argument that it was their previous applications for access to documents that were generic.

39 Against that background, according to the applicants, the explanations provided by Frontex do not properly address the risks associated with disclosure of each of the requested documents. Frontex essentially uses the same generic statement to refuse access to all documents held by it, irrespective of the function of the document, its content or the scope of the application for access, which demonstrates that, contrary to what Frontex maintains, no individual examination of the documents was carried out.

40 According to the applicants, it follows that Frontex did not explain how disclosure of the requested documents could 'specifically and actually' undermine public security. Nor did Frontex explain how the disclosure of documents concerning historical data and a specific past event could pose a 'reasonably foreseeable and not purely hypothetical' risk to public security.

41 In those circumstances, the applicants submit that, based on the case-law, Frontex did not provide '… a statement of reasons from which it is possible to understand and ascertain, first, whether the requested document does in fact fall within the sphere covered by the exception relied on and, second, whether the need of protection relating to that exception is genuine'.

42 Frontex disputes the applicants' arguments.

43 It should be recalled that the obligation to state reasons is an essential procedural requirement which must be distinguished from the question whether the reasoning is correct, which goes to the substantive legality of the contested measure (judgments of 22 March 2001, *France* v *Commission*, C-17/99, EU:C:2001:178, paragraph 35, and of 26 October 2011, *Dufour* v *ECB*, T-436/09, EU:T:2011:634, paragraph 52).

44 As is clear from settled case-law, the statement of reasons required by the second paragraph of Article 296 TFEU must be appropriate to the measure in question and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure, in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the court having jurisdiction to exercise its power of review. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest that the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of that article must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see judgment of 27 February 2018, *CEE Bankwatch Network* v *Commission*, T-307/16, EU:T:2018:97, paragraph 80 and the case-law cited).

45 As regards the context in which the contested measure was adopted, where an institution's reply confirms the refusal of a request for access to documents on the same grounds as in the initial decision, it is appropriate to consider the sufficiency of the reasons given in the light of all the exchanges between the institution and the applicant, taking into account also the information available to the applicant about the nature and content of the requested documents. Whilst the context in which a decision is adopted may make the requirements to be satisfied by the institution as regards the statement of reasons lighter, it may, conversely, also make them more stringent in certain circumstances. That is the case where, in the confirmatory application, the applicant relies on factors capable of casting doubt on whether the first refusal was well founded. In those

circumstances, the obligation on the institution to state reasons requires it to reply to a confirmatory application by stating the reasons why those factors are not such as might warrant a change in its decision. Otherwise, the applicant would not be able to understand the reasons for which the author of the reply to the confirmatory application has decided to confirm the refusal on the same grounds (judgment of 6 April 2000, *Kuijer* v *Council*, T-188/98, EU:T:2000:101, paragraphs 44 to 46).

46 If an institution decides to refuse access to a document which it has been asked to disclose, it must, in principle, if it considers that the document concerns an interest protected by an exception provided for in Article 4 of Regulation No 1049/2001, explain how disclosure of that document could specifically and actually undermine that interest (judgments of 1 July 2008, *Sweden and Turco* v *Council*, C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 49, and of 7 February 2018, *Access Info Europe* v *Commission*, T-852/16, EU:T:2018:71, paragraph 37).

47 It should, however, be noted that, although the institution must provide sufficient explanations as to how access to the document in question could specifically and actually undermine the interest protected by the exception, laid down in Article 4 of Regulation No 1049/2001, relied on by that institution, the brevity of the statement of reasons may be justified by the need not to undermine the sensitive interests protected, in particular, by the exception to the right of access established by the first indent of Article 4(1)(a) of Regulation No 1049/2001, through disclosure of the very information which that exception is designed to protect (judgment of 1 February 2007, *Sison* v *Council*, C-266/05 P, EU:C:2007:75, paragraph 82).

48 The institution may not be in a position to give reasons justifying the need for confidentiality in respect of a document without disclosing the content of the document and thereby depriving the exception of its very purpose (judgments of 24 May 2011, *NLG* v *Commission*, T-109/05 and T-444/05, EU:T:2011:235, paragraph 82, and of 6 September 2023, *Foodwatch* v *Commission*, T-643/21, not published, EU:T:2023:519, paragraph 24).

49 The institution must therefore refrain from referring to matters which would indirectly undermine the interest protected by the exception, laid down in Article 4 of Regulation No 1049/2001, relied on by that institution (judgments of 1 February 2007, *Sison* v *Council*, C-266/05 P, EU:C:2007:75, paragraph 83, and of 6 September 2023, *Foodwatch* v *Commission*, T-643/21, not published, EU:T:2023:519, paragraph 25).

50 The present plea must be examined in the light of the considerations set out in paragraphs 43 to 49 above.

51 As a preliminary point, it should be noted that, as is apparent from the contested decision (see paragraph 8 above), Frontex justified the refusal to grant full access to 70 of the 73 identified documents on the basis of both the exception referred to in the first indent of Article 4(1)(a) of Regulation No 1049/2001 and the exception referred to in Article 4(1)(b) of that regulation.

52 It should also be noted that Frontex justified the refusal to grant full access to one of the remaining three documents on the dual basis of the exception referred to in the first indent of Article 4(1)(a) of Regulation No 1049/2001 and the exception referred to in Article 4(3) of that regulation.

53 It must be held that the applicants have not put forward any plea or argument challenging the reasoning or merits of the contested decision in so far as it refused full access to 70 of the 73 identified documents on the basis of the exception referred to in Article 4(1)(b) of Regulation

No 1049/2001 and to one of those 73 identified documents on the basis of the exception referred to in Article 4(3) of that regulation.

54 It follows that the first plea must be rejected as ineffective as regards Frontex's refusal to grant full access to those 71 documents.

55 By contrast, the present plea remains effective as regards Frontex's refusal to grant full access to the two documents in respect of which it based that refusal solely on the exception referred to in the first indent of Article 4(1)(a), namely, first, the document identified as corresponding to the document mentioned in point 2 of the list contained in the initial decision, entitled 'the ICC's daily report in connection with Frontex's aerial operation in the Central Mediterranean Sea for 30 July 2021' and, second, a document corresponding to the documents referred to in point 4 of that list, entitled 'the daily reporting package for 30 July 2021 concerning Frontex's aerial operation in the Central Mediterranean Sea on the same date'.

56 In that regard, it should be noted that, in the initial decision, Frontex refused to grant full access to the 'the ICC's daily report in connection with Frontex's aerial operation in the Central Mediterranean Sea for 30 July 2021' on the following grounds:

'[That document contains] details of the operational area of an ongoing operation which cannot be released as it would provide smuggling and other criminal networks with intelligence, enabling them to change their modus operandi, which would ultimately put the life of migrants in danger. Consequently, the course of ongoing and future operations of similar nature would be hampered by depriving the operations of any strategy and element of surprise, ultimately defeating their purpose to counter and prevent cross-border crime and unauthorised border crossings. In this light, the disclosure of documents containing such information would undermine the protection of the public interest as regards public security within the meaning of Article 4(1)(a) first indent of Regulation (EC) No 1049/2001.

[It also contains] information regarding the technical equipment deployed in the operational area by Frontex and Member States. Disclosing such information would be tantamount to disclosing the exact type and capabilities of the equipment and would enable third parties, e.g. by combining this information with other sources, to draw conclusions regarding usual positions and movement patterns. This would open way for abuse, as numbers and types of equipment used in operations are indicative of similar numbers and types for succeeding years. Releasing such information would thus benefit criminal networks, enabling them to change their modus operandi and, consequently, result in hampering the course of ongoing and future operations of a similar nature. This would ultimately obstruct the purpose of such operations: to counter and prevent cross-border crime and unauthorised border crossings. In this light, the disclosure of information regarding the technical equipment deployed would undermine the protection of the public interest as regards public security within the meaning of Article 4(1)(a) first indent of Regulation (EC) No 1049/2001.'

57 In that initial decision, Frontex justified the refusal to grant full access to the identified documents corresponding to the documents referred to in point 4 of the list contained in the initial application, inter alia, by the fact that those documents contained information relating to the operational area and the technical equipment deployed, as well as crucial details concerning situational awareness at the external borders of the European Union, by referring to the explanations already given in that regard in that decision.

58 In the confirmatory application, Ms Naass claimed that Frontex's reliance on public security in order to justify the refusal to grant full access to the identified documents was insufficiently

precise and incompatible with the case-law. Ms Naass thus stated that Frontex had not proved how disclosure of the information ‘regarding the technical deployment’ would actually undermine future operations, but merely mentioned that possibility without providing specific arguments. She also claimed that, in accordance with the case-law, Frontex was required to explain how the alleged risk to public security was foreseeable and not purely hypothetical, which it had failed to do in the present case.

59 Frontex responded to those arguments in the contested decision, reiterating that, in the same way as information on reporting tools and mechanisms, information on technical equipment deployed in the operational area, in itself, but also in combination with other sources, would allow criminals to adapt their modus operandi accordingly in order to circumvent border surveillance in current and future operations or to inflict harm on the officials and assets in question. Frontex added that it was not possible to provide further information on the technical equipment deployed in the operational area without jeopardising the interest which the exception provided for in the first indent of Article 4(1)(a) of Regulation No 1049/2001 was specifically designed to protect, since disclosure of that information would deprive that exception of its very purpose.

60 Frontex also referred, as regards, more specifically, the complaint that it had not provided a specific example of the risk of undermining public security on which it relies, to the considerations relating to reporting tools and mechanisms. According to Frontex, those considerations were also valid as regards the information relating to the equipment deployed.

61 In that regard, it should be noted that, in the initial decision, it was stated that the disclosure of information on the reporting tools and methods contained in the identified documents corresponding to the documents referred to in point 6 of the list contained in the initial application would hamper the course of ongoing and future operations and would thus facilitate irregular migration and trafficking in human beings, as the effectiveness of law enforcement measures would be significantly reduced.

62 Frontex added in the contested decision that, having regard to the nature of the operations carried out which entail a certain degree of continuity, disclosure of the requested information would, with ascertainable likelihood, affect the effectiveness of ongoing and future operations in the area in question.

63 It must be held that the explanations provided by Frontex in the contested decision and in the initial decision set out in a sufficiently precise manner the reasons why disclosure of the two identified documents corresponding, respectively, to the document referred to in point 2 of the list contained in the initial application and to one of the documents mentioned in point 4 of that list could specifically and actually undermine the interest protected by the first indent of Article 4(1)(a) of Regulation No 1049/2001.

64 Furthermore, while it is true that Frontex used a common statement of reasons to justify the refusal to grant full access to the two documents at issue, it should be noted that those documents have a similar purpose, in that they are reports concerning Frontex’s air operation in the Mediterranean on 30 July 2021. Those documents therefore have similar substantial characteristics from which it may be concluded, in the absence of any evidence adduced by the applicants demonstrating the need for a differentiated statement of reasons, that the common statement of reasons thus adopted is sufficient (see, to that effect, judgment of 14 December 2017, *Evropaïki Dynamiki* v *Parliament*, T-136/15, EU:T:2017:915, paragraph 48).

65 It follows from the considerations set out in paragraphs 56 to 64 above that Frontex stated to the requisite legal standard the reasons for its refusal to grant full access to the two identified documents corresponding, respectively, to the document referred to in point 2 of the list contained in the initial application and to one of the documents referred to in point 4 of that list, on the basis of the first indent of Article 4(1)(a) of Regulation No 1049/2001.

66 That finding is not called into question by the other arguments put forward by the applicants.

67 Thus, first, as regards the applicants' argument that Frontex was required to take into account, in the statement of reasons for the contested decision, the security rules on protecting classified information and sensitive non-classified information which it has itself laid down pursuant to Article 92 of Regulation 2019/1896, it should be noted that, under Article 114(1) of that regulation, where, as in the present case, Frontex deals with requests for access to documents, Frontex is subject to Regulation No 1049/2001.

68 The information requested by the applicants in the context of the request for access cannot be equated with that which Frontex is required to communicate to the public, on its own initiative, concerning matters falling within its tasks and mandate under Article 114(2) of Regulation 2019/1896.

69 In any event, it must be borne in mind that, although Frontex is required, pursuant to Article 10(2) and Article 114(2) of Regulation 2019/1896, to ensure such communication by providing the public with accurate, detailed, timely and comprehensive information about its activities, that communication must be made without revealing operational information which could jeopardise attainment of the objectives of operations if it were made public.

70 In those circumstances, it is necessary to reject the applicants' argument that Frontex should have taken account of the security rules laid down in Article 92 of Regulation 2019/1896 when it set out the reasons why the request for access to the documents had to be refused on the basis of the first indent of Article 4(1)(a) of Regulation No 1049/2001.

71 Second, in the light of the finding made in paragraph 65 above, the applicants' argument that the failure to state reasons in the contested decision demonstrates that Frontex did not carry out an individual examination of the identified documents must be rejected. Furthermore, in accordance with the case-law referred to in paragraph 43 above, such an argument, which relates to the assessment of the merits of that decision, is irrelevant in support of an action alleging breach of the obligation to state reasons. In addition, it should be noted that, contrary to what the applicants maintain, an alleged failure to state reasons for the contested decision would not lead to the conclusion that there was no individual examination of the identified documents, but only that it was impossible to verify whether Frontex's assessment was well founded.

72 Third, the applicants' argument that the generic nature of the grounds relied on by Frontex in the initial decision and in the contested decision is demonstrated by the similarity of Frontex's responses to earlier requests for access, must also be rejected. It should be noted that, in accordance with the case-law referred to in paragraph 44 above, the adequacy of the statement of reasons for an EU measure must be assessed in the light of the measure itself and the context in which it was adopted.

73 Fourth, the applicants' argument that the statement of reasons for the contested decision does not refer to a foreseeable risk, but only to a hypothetical risk, must also be rejected. It should be noted that such an argument does not relate to compliance with the obligation to state reasons, but

to the merits of the contested decision (see, to that effect, judgment of 3 July 2014, *Council* v *in 't Veld*, C-350/12 P, EU:C:2014:2039, paragraph 52).

74 In the light of the considerations set out in paragraphs 43 to 73 above, it must be concluded that the first plea is unfounded, in so far as it alleges infringement of Frontex's obligation to state reasons when applying the first indent of Article 4(1)(a) of Regulation No 1049/2001 to the document identified in the initial decision.

75 However, it must be borne in mind that compliance with the obligation to state reasons constitutes an essential procedural requirement that the Courts of the European Union must examine of their own motion.

76 It must be pointed out that, following the measure of inquiry adopted on 19 July 2023 pursuant to Article 91(c) of the Rules of Procedure, Frontex sent to the Court 73 documents and their annexes, to which it attached a table containing a brief description of the content of each of those documents, as well as the correspondence between those documents and those mentioned in the list contained in the initial application. In accordance with Article 104 of the Rules of Procedure, those documents were not disclosed to the applicants.

77 It is apparent from the documents sent by Frontex that, contrary to what is stated in the initial decision, 'all pictures and videos related to the aerial operation in the Central Mediterranean Sea on 30 July 2021', referred to in point 8 of the list contained in the initial application, do not appear only in the two documents identified by Frontex.

78 The General Court was thus itself able to identify such photographs in 29 other documents. Those documents were as follows: 2 documents identified as corresponding to the documents referred to in point 4 of the list contained in the initial application, 13 documents identified as corresponding to the documents referred to in point 6 of that list and 14 documents identified as corresponding to the documents mentioned in point 7 of that list. The Court notes that those documents contain, in total, more than 100 photographs.

79 However, it must be stated that Frontex did not mention the existence of the photographs in question in the initial decision or in the contested decision. By failing to mention the existence of those photographs, no justification for the refusal of access was communicated to the applicants. It follows that the contested decision does not, by definition, contain any statement of reasons making it possible to understand how full access to those photographs held by Frontex and identified by the Court could specifically and actually undermine an interest protected by an exception laid down in Article 4 of Regulation No 1049/2001, in accordance with the case-law referred to in paragraph 46 above. Consequently, the contested decision must be annulled in so far as it refused access to 'all pictures and videos related to the aerial operation in the Central Mediterranean Sea on 30 July 2021'.

Second plea, alleging that the contested decision infringes Article 4(6) of Regulation No 1049/2001 by refusing partial access to the documents

80 The applicants submit that the contested decision infringes Article 4(6) of Regulation No 1049/2001 because Frontex manifestly erred in assessing the administrative burden likely to result from redacting the documents and thus unlawfully refused to grant partial access to them.

81 Thus, first, the applicants claim that, in view of the reasons relied on by Frontex to justify the refusal to grant full access to the identified documents, that agency cannot claim that partial

disclosure of those documents would have constituted a disproportionate administrative burden. The applicants thus emphasise that the information covered by the exceptions relied on by Frontex under Article 4(1)(a), first indent, and (b) of Regulation No 1049/2001, and Article 4(3) of that regulation, concerns only a few elements relating to technical equipment, the area of operation and some relevant details regarding situational awareness and risk assessment. Indeed, it would be neither impractical nor disproportionate to redact, in a communication relating only to the day of 30 July 2021, the geographical coordinates of the operation, the references to the technical equipment used by the authorities, the references to the reporting tools and methods, and the other details mentioned by Frontex. The same applies to documents containing personal data. It is not apparent from the statement of reasons for the contested decision that the redaction of those elements could, after a specific and individual examination of each document, represent a disproportionate administrative burden.

82 Second, the applicants claim that it is not for Frontex to assess whether or not the parts of the documents that could be disclosed are useful to the applicants. Frontex should therefore assess only whether the redacting of sensitive information is disproportionate in relation to the public interest in obtaining partial access to those documents. The applicants emphasise that although the position of Frontex is that 'it rightly balanced all interests', it should be noted that Frontex was not in a position to fully assess the interests of the applicants and thus could not reach the conclusion that partial access would be meaningless because parts of documents that could be disclosed would be of no use to the applicants.

83 Frontex disputes the applicants' arguments.

84 As a preliminary point, it should be noted that, in accordance with Article 4(6) of Regulation No 1049/2001, if only parts of the requested document are covered by any of the exceptions referred to in that article, the remaining parts of the document are to be released.

85 It is clear from the very wording of Article 4(6) of Regulation No 1049/2001 that an institution is required to consider whether it is appropriate to grant partial access to requested documents and to confine any refusal to information covered by the relevant exceptions. The institution must grant partial access if the aim pursued by that institution in refusing access to a document could be achieved if the institution merely struck out the passages which might harm the public interest to be protected (see judgments of 7 February 2018, *Access Info Europe* v *Commission*, T-851/16, EU:T:2018:69, paragraph 118 and the case-law cited, and of 7 February 2018, *Access Info Europe* v *Commission*, T-852/16, EU:T:2018:71, paragraph 111 and the case-law cited).

86 Moreover, that provision requires a specific, individual examination of the content of each document. Indeed, only such an examination can enable the institution to assess the possibility of granting the applicant partial access. An assessment made by reference to categories rather than on the basis of the actual information contained in those documents is, in principle, insufficient, since the examination which must be undertaken by an institution must enable it to assess specifically whether an exception invoked actually applies to all the information contained in those documents (see, to that effect, judgments of 6 July 2006, *Franchet and Byk* v *Commission*, T-391/03 and T-70/04, EU:T:2006:190, paragraph 117, and of 23 September 2015, *ClientEarth and International Chemical Secretariat* v *ECHA*, T-245/11, EU:T:2015:675, paragraph 230).

87 In that regard, Article 4(6) of Regulation No 1049/2001, like the regulation as a whole, does not require the person requesting documents to show that the document requested is 'useful' to him or her. In addition, in any event, what is meaningful or meaningless to the applicant cannot be

determined by the institution charged with replying to his or her request. Furthermore, that provision cannot be interpreted in such a way as to amount to exempting the institution concerned from an obligation which is expressly envisaged in Regulation No 1049/2001, namely disclosure of the parts of the document not covered by the exceptions provided by that regulation (see judgment of 5 December 2018, *Falcon Technologies International* v *Commission*, T-875/16, not published, EU:T:2018:877, paragraphs 98 and 102 and the case-law cited).

88 However, it should be borne on mind that an applicant may make a request for access, under Regulation No 1049/2001, relating to a manifestly unreasonable number of documents, perhaps for trivial reasons, thus imposing a volume of work for processing his or her request that could very substantially paralyse the proper working of the institution (judgment of 10 September 2008, *Williams* v *Commission*, T-42/05, not published, EU:T:2008:325, paragraph 85; see also judgment of 15 March 2023, *Basaglia* v *Commission*, T-597/21, not published, EU:T:2023:133, paragraph 51 and the case-law cited).

89 That is why, according to the case-law, it flows from the principle of proportionality that the institutions may, in particular cases in which the volume of documents for which access is requested or in which the number of passages to be redacted would involve an inappropriate administrative burden, balance the interest of the public in having access to documents against the workload resulting from the processing of the application for access in order to safeguard the interests of sound administration (see judgment of 15 March 2023, *Basaglia* v *Commission*, T-597/21, not published, EU:T:2023:133, paragraph 52 and the case-law cited).

90 In the present case, it should be noted that, in the initial decision, Frontex gave the following reasons for refusing to grant partial access to the identified documents:

‘[The redaction of data covered by the exceptions referred to in Article 4(1) and Article 4(3) of Regulation No 1049/2001] would be disproportionate in relation to the parts that are eligible for disclosure, simultaneously undermining the principle of sound administration. More specifically, the administrative burden necessary to identify and redact the releasable elements would be disproportionate to the interest in the disclosure exercise itself, while the released documents would not convey any informative value due to their significantly reduced form.’

91 In the contested decision, Frontex added that it ‘had rightly balanced all interests and concluded “the administrative burden of blanking out the parts that may not be [disclosed,] proves to be particularly heavy, thereby exceeding the limits of what may reasonably be required”’ and that ‘this consideration is combined with the fact that a “partial access would be meaningless because the parts of the documents that could be disclosed would be of no use”’.

92 It must be held that it is apparent from the contested decision, read in conjunction with the initial decision, that Frontex did not justify the refusal to grant partial access to the identified documents by arguments relating to the volume of those documents, but by reference to the large volume of the passages of those documents which had to be redacted as compared with the volume of passages of those documents which could be disclosed, taking the view that, in the present case, such redaction would be both particularly burdensome and pointless, thereby infringing the principle of sound administration.

93 The applicants claim that, contrary to what Frontex asserts in the contested decision, the redaction of the information covered by the exceptions under Article 4(1)(a), first indent, and (b) of Regulation No 1049/2001, and under Article 4(3) of that regulation, does not represent an administrative task which is disproportionate to the public interest in having access to the requested

documents, which is to ensure that Frontex and the authorities of certain Member States did not participate in any infringement or possible circumvention of obligations arising, at international and EU level, from the principle of non-refoulement in the Central Mediterranean Sea on 30 July 2021. They invite the Court to ascertain for itself whether the redaction of the information referred to in the exceptions under Article 4(1)(a), first indent, and (b) of Regulation No 1049/2001, and under Article 4(3) of that regulation, entailed a disproportionate administrative burden by ordering the production of the documents requested.

94 In that regard, in the first place, it should be noted that, although the applicants do not dispute that Frontex may weigh the public interest in sound administration against the public interest in having access to documents in order to decide whether partial access should be granted to the documents requested, they wrongly equate the public interest in having access to documents with their particular interest in having access to the documents requested in the present case. In accordance with the case-law referred to in paragraph 87 above, it is not for the institution to determine what is or is not useful to the applicant. It follows that, in the present case, Frontex was not required to take into account the usefulness to the applicants of the documents requested in balancing the public interest in sound administration against the public interest in access to documents.

95 In the second place, it should be borne in mind that, when an applicant challenges the lawfulness of a decision refusing him or her access to a document on the basis of one of the exceptions provided for by Article 4 of Regulation No 1049/2001, claiming that the exception relied on by the institution concerned was not applicable to the document requested, the Court is obliged to order production of the document and to examine it, if it is to ensure the applicant's judicial protection. Indeed, if it has not itself consulted the document concerned, the Court will not be in a position to assess in the specific case whether access to that document could validly be refused by that institution on the basis of the exception invoked and, consequently, to assess the legality of a decision refusing access, even partial, to that document (see, to that effect, judgment of 28 November 2013, *Jurašinović* v *Council*, C-576/12 P, EU:C:2013:777, paragraph 27 and the case-law cited).

96 However, it must be stated that, in the present action, the applicants have not put forward any plea calling into question the applicability to the documents requested of the exceptions relied on by Frontex in the contested decision, based on Article 4(1)(a), first indent, and (b) of Regulation No 1049/2001, and Article 4(3) of that regulation. The applicants have merely raised a plea alleging infringement of the obligation to state reasons when applying the first indent of Article 4(1)(a) of Regulation No 1049/2001. In those circumstances, the applicants cannot require the Court to examine the merits of the contested decision in so far as it refused to grant them partial access to the documents requested. Such an examination would necessarily require the Court to verify of its own motion the applicability of the exceptions relied on by Frontex in the contested decision to the documents requested, even though the applicants chose not to challenge that applicability in the context of the present dispute.

97 In the third place, and in any event, the Court finds that it is apparent from the documents produced by Frontex following the measure of inquiry of 19 July 2023 that, first, almost all of the information they contain is such as to fall within the three exceptions relied on by Frontex, namely those referred to in Article 4(1)(a), first indent, and (b) and Article 4(3) of Regulation No 1049/2001, the applicability of which to that type of information has not been disputed by the applicants in the present action and, second, that that information is presented in the form of graphs, maps, geographical coordinates and tables of technical characteristics. It follows that the redaction

of the information in question, assuming that it was well founded, would have made the documents produced by Frontex largely unintelligible.

98 In those circumstances, the Court considers that Frontex was right to take the view that, in accordance with the case-law referred to in paragraph 89 above, the partial disclosure of the documents requested represented a disproportionate administrative burden in the present case.

99 In the light of the considerations set out in paragraphs 84 to 98 above, the second plea in law must be rejected as unfounded.

100 It follows from all the foregoing considerations that, first, the action against the contested decision must be upheld in part in so far as it refused access to 'all pictures and videos related to the aerial operation in the Central Mediterranean Sea on 30 July 2021' and, second, the action must be dismissed as to the remainder.

Costs

101 Under Article 134(3) of the Rules of Procedure, the parties are to bear their own costs where each party succeeds on some and fails on other heads. However, if it appears justified in the circumstances of the case, the Court may order that one party, in addition to bearing his or her own costs, pay a proportion of the costs of the other party. In the present case, the applicants must be ordered to bear, in addition to their own costs, half of Frontex's costs. Frontex must be ordered to pay half of its own costs.

On those grounds,

THE GENERAL COURT (Sixth Chamber)

hereby:

1. **Orders that Decision DGSC/TO/PAD-2021-00350 of the European Border and Coast Guard Agency (Frontex) of 7 February 2022 be annulled in so far as it refused access to 'all pictures and videos related to the aerial operation in the Central Mediterranean Sea on 30 July 2021'.**

2. **Dismisses the action as to the remainder;**

3. **Orders Ms Marie Naass and Sea-Watch eV to bear, in addition to their own costs, half of Frontex's costs.**

4. **Orders Frontex to pay half of its own costs.**

Costeira Kancheva Öberg

Delivered in open court in Luxembourg on 24 April 2024.

V. Di Bucci M. van der Woude

Registrar President

* Language of the case: English.