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ОБЩ СЪД НА ЕВРОПЕЙСКИЯ СЪЮЗ
 TRIBUNAL GENERAL DE LA UNIÓN EUROPEA
 TRIBUNÁL EVROPSKÉ UNIE
 DEN EUROPÆISKE UNIONS RET
 GERICHT DER EUROPÄISCHEN UNION
 EUROOPA LIIDU ÜLDKOHUS
 ΓΕΝΙΚΟ ΔΙΚΑΣΤΗΡΙΟ ΤΗΣ ΕΥΡΩΠΑΪΚΗΣ ΕΝΩΣΗΣ
 GENERAL COURT OF THE EUROPEAN UNION
 TRIBUNAL DE L'UNION EUROPÉENNE
 CÚIRT GHINEARÁLTA AN AONTAIS EORPAIGH
 OPĆI SUD EUROPSKE UNIJE
 TRIBUNALE DELL'UNIONE EUROPEA

EIROPAS SAVIENĪBAS VISPĀRĒJĀ TIESA
 EUROPOS SĄJUNGOS BENDRASIS TEISMAS
 AZ EURÓPAI UNIÓ TÖRVÉNYSZÉKE
 IL-QORTI ĠENERALI TAL-UNJONI EWROPEA
 GERECHT VAN DE EUROPESE UNIE
 SĄD UNII EUROPEJSKIEJ
 TRIBUNAL GERAL DA UNIÃO EUROPEIA
 TRIBUNALUL UNIUNII EUROPENE
 VŠEOBECNÝ SÚD EURÓPSKEJ ÚNIE
 SPLOŠNO SODIŠČE EVROPSKE UNIJE
 EUROOPAN UNIONIN YLEINEN TUOMIOISTUIN
 EUROPEISKA UNIONENS TRIBUNAL

- 1056100 -

ORDER OF THE GENERAL COURT (Ninth Chamber)

7 April 2022 *

(Actions for failure to act – Right to asylum – Invitation to act – Position taken by
 Frontex – Inadmissibility)

In Case T-282/21,

SS,

ST,

represented by M. Van den Broeck and L. Lambert, lawyers,

applicants,

v

European Border and Coast Guard Agency (Frontex), represented by
 H. Caniard, S. Drew and W. Szmidt, acting as Agents, and by B. Wägenbaur,
 lawyer,

defendant,

APPLICATION under Article 265 TFEU seeking a declaration that Frontex
 unlawfully failed to adopt, under Article 46(4) of 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), a decision suspending or terminating
 its activities in the Aegean Sea region,

THE GENERAL COURT (Ninth Chamber),

composed of M.J. Costeira (Rapporteur), President, M. Kancheva and P. Zilgalvis,
 Judges,

* Language of the case: English.

Registrar: E. Coulon,

makes the following

Order

Background to the dispute

- 1 The applicants, SS and ST, are two nationals, Burundian and Congolese, respectively, residing in Turkey.
- 2 On 15 February 2021, two non-governmental not-for-profit organisations, Front-Lex, established in Amsterdam (Netherlands), and Legal Centre Lesvos, established in Greece, sent a letter, under Article 265 TFEU, to the Executive Director of the European Border and Coast Guard Agency (Frontex), inviting him to suspend or terminate Frontex's activities in the Aegean Sea region, pursuant to Article 46(4) of 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 23 March 2021, the Executive Director of Frontex replied to that invitation to act by letter, in which he stated that Frontex's actions in the Aegean Sea region had been carried out in strict compliance with the applicable legal framework, including in accordance with the responsibilities stemming from fundamental rights.

Procedure and forms of order sought

- 4 By application lodged at the Registry of the Court on 21 May 2021, the applicants brought the present action, in which they claim that the Court should:
 - declare that, after Frontex was called upon to act in accordance with the procedure laid down in Article 265 TFEU, Frontex unlawfully failed to act, by refraining from taking the decision to withdraw the financing of all or of part of its activities in the Aegean Sea region, to suspend those activities or to terminate them in whole or in part, in accordance with Article 46(4) of Regulation 2019/1896, or by not providing duly justified grounds for failing to implement the relevant measure within the meaning of Article 46(6) of that regulation, and, further, that it did not take a view in response to the applicants' preliminary request.
- 5 By request annexed to the application, the applicants submitted a request for anonymity.
- 6 On 13 July 2021, the Court decided to grant the applicants' request for anonymity.

- 7 By a separate document lodged at the Court Registry on 27 September 2021, Frontex raised a plea of inadmissibility under Article 130(1) of the Rules of Procedure of the General Court. The applicants submitted their observations on that plea on 10 November 2021.
- 8 By letter of 18 January 2022, Frontex informed the Court that the applicants' representatives had disclosed on a website the content of the plea of inadmissibility raised by Frontex by separate document in the present case and the applicants' observations in response thereto.
- 9 By letter of 10 February 2022, the applicants submitted their observations on the letter of 18 January 2022. They informed the Court that they were not responsible for that publication and that they had no connection with the website at issue.
- 10 In the plea of inadmissibility, Frontex claims that the Court should:
 - dismiss the action as inadmissible;
 - order the applicants to pay the costs.
- 11 In their observations on the plea of inadmissibility, the applicants claim, in essence, that the Court should:
 - primarily, dismiss the plea of inadmissibility;
 - not order the applicants to pay the costs, even if they are unsuccessful, in accordance with Article 135 of the Rules of Procedure;
 - in the alternative, join the examination of the plea of inadmissibility to the substance of the case.

Law

- 12 Under Article 130(1) of the Rules of Procedure, where, by a separate document, the defendant applies to the Court to rule on inadmissibility or lack of competence, without considering the merits of the case, the Court must decide on the application as soon as possible, where necessary after opening the oral part of the procedure.
- 13 In the present case, the Court, finding that it has sufficient information from the documents in the case file, has decided to rule on that application without taking further steps in the proceedings.
- 14 In support of its plea of inadmissibility, Frontex raises, in essence, four grounds of inadmissibility, alleging, first, that the applicants are not the same as those participating in the pre-litigation procedure; secondly, because Frontex did define its position on the invitation to act addressed to it; thirdly, on account of the applicants' lack of standing and their lack of interest to bring proceedings;

fourthly, the fact that the present action cannot be reclassified as an action for annulment.

- 15 The Court considers it appropriate to begin the examination of that plea with the second ground of inadmissibility.
- 16 In that regard, Frontex submits essentially that, first, it defined its position on the invitation to act that had been addressed to it, within the meaning of the second paragraph of Article 265 TFEU, by responding on 23 March 2021 to the letter of 15 February 2021. Secondly, the applicants' claim that the Frontex letter of 23 March 2021 does not constitute the definition of a position is ineffective, since, according to the case-law, Article 265 TFEU refers to a failure to act in the sense of failure to take a decision or to define a position, and not the adoption of a measure different from that desired or considered necessary by the persons concerned.
- 17 The applicants submit, in essence, principally, that the letter of 23 March 2021 does not constitute the definition of a position by Frontex, within the meaning of the second paragraph of Article 265 TFEU, since it lacks clarity, is not sufficiently detailed and does not provide duly justified grounds for its position on the measures applied for, namely the suspension or termination of its activities in the Aegean Sea. In the applicants' view, the fact that Frontex refrained from addressing directly the actual and specific measures that it was explicitly invited to take and concluded ultimately that it had correctly complied with its obligations cannot constitute a definition of its position on those measures. Moreover, they submit that Frontex's reluctance to acknowledge explicitly and clearly the form and content of the applicants' invitation to act reflects its aversion to define its position in an explicit, clear and sufficient manner, in order to avoid any judicial review of its unlawful conduct. The applicants submit, in the alternative, that the Court should interpret the position defined under Article 265 TFEU as applying only to cases in which an institution agrees to adopt the measure requested.
- 18 In that regard, it should be recalled that, under the first paragraph of Article 265 TFEU, where, in infringement of the Treaties, the European Parliament, the European Council, the Council of the European Union, the European Commission, the European Central Bank (ECB) or a body, office or agency of the European Union fail to act, the Member States and the other EU institutions may bring an action before the Court of Justice of the European Union to have the infringement established.
- 19 The third paragraph of Article 265 TFEU provides, moreover, that any natural or legal person may bring an action before the Court of Justice of the European Union under the same conditions to complain to the Court that an institution, body, office or agency of the European Union has failed to address to that person any act other than a recommendation or an opinion.

- 20 The second paragraph of Article 265 TFEU states, however, that that action is admissible only if the institution, body, office or agency concerned has first been called upon to act. If, within two months of being so called upon, the institution, body, office or agency concerned has not defined its position, the action may be brought within a further period of two months.
- 21 According to settled case-law, an invitation to act within the meaning of that provision is an essential procedural requirement, the effects of which are, first, to set in motion the two-month period within which the institution is required to define its position and, secondly, to delimit any action that might be brought should the institution fail to define its position. Whilst there is no particular requirement as to form, the notice must, nonetheless, be sufficiently clear and precise to enable the institution to ascertain in specific terms the content of the decision which it is being asked to adopt and it must make clear that its purpose is to compel the institution to state its position (see judgment of 21 July 2016, *Nutria v Commission*, T-832/14, not published, EU:T:2016:428, paragraph 43 and the case-law cited).
- 22 In that regard, it should be borne in mind that that provision refers to failure to act by the failure of the institution concerned to take a decision or to define its position. Thus, the conditions for admissibility of an action for failure to act, laid down by Article 265 TFEU, are not satisfied, in principle, where the institution called upon to act has defined its position on that call to act before the action was brought (see order of 17 July 2020, *Wagenknecht v European Council*, T-715/19, EU:T:2020:340, paragraph 29 and the case-law cited).
- 23 Consequently, where, supported by explanations, the institution refuses to act in accordance with such an invitation to act, that constitutes the definition of a position bringing the failure to act to an end and such a refusal, thus expressed in detail, constitutes an act open to challenge under Article 263 TFEU (see order of 17 July 2020, *Wagenknecht v European Council*, T-715/19, EU:T:2020:340, paragraph 31 and the case-law cited).
- 24 In the present case, by letter of 15 February 2021, Front-Lex and Legal Centre Lesvos invited Frontex, in accordance with Article 265 TFEU, to suspend or terminate its activities in the Aegean Sea region in accordance with Article 46(4) of Regulation 2019/1896.
- 25 By letter of 23 March 2021, Frontex informed them, in detail, that the conditions for the adoption of a decision to withdraw financing, to suspend or to terminate its activities in the Aegean Sea, under that provision of Regulation 2019/1896, were not satisfied in the present case.
- 26 In particular, in its letter of 23 March 2021, Frontex, after describing the operational plan for its activities in the Aegean Sea region, recalled that Article 46(4) of that regulation required, as regards its application, incidents of a

certain level of seriousness or likely to persist, such that isolated incidents cannot constitute a condition for the applicability of that article.

- 27 It also recalled that a decision to withdraw financing, to suspend or to terminate its activity must be taken in the context of integrated European border management.
- 28 It further stated that the incidents referred to in the letter of 15 February 2021 had been examined in the final report of the management board's working group on fundamental rights and the legal operational aspects of the operations.
- 29 Finally, Frontex pointed out that none of the incidents mentioned in that letter were capable of demonstrating the existence of infringements of fundamental rights, with the result that its activities in the Aegean Sea had been carried out in strict compliance with the applicable legal framework, including with Frontex's responsibilities stemming from fundamental rights.
- 30 Frontex concluded that its actions had been conducted in strict compliance with the provisions of the applicable legal framework, including the responsibilities stemming from fundamental rights.
- 31 It must be stated that, in its reply of 23 March 2021 to the letter of 15 February 2021, Frontex defined its position, within the meaning of Article 265 TFEU, on the invitation to act from Front-Lex and Legal Centre Lesvos. As is apparent from paragraphs 26 to 30 above, in that letter, Frontex explained in clear terms why it did not intend to suspend or to terminate its activities in the Aegean Sea region in accordance with Article 46(4) of Regulation 2019/1896. The applicants cannot therefore validly maintain that Frontex did not adopt a position on the invitation to act.
- 32 The fact that Frontex refused to act in accordance with the invitation to act has no bearing, in that regard, on the admissibility of the present action, since Article 265 TFEU concerns failure to act by failing to take a decision or to define a position.
- 33 Furthermore, irrespective of whether the applicants' plea is well founded – their complaint that Frontex's position lacks clarity, is not sufficiently detailed and does not provide duly substantiated reasons, could, where appropriate, have formed the basis of an action for annulment under Article 263 TFEU – it must, however, be stated that the applicants did not intend to bring the present action under that article. It is only in the context of an action for annulment that they could, if necessary, and subject to being able to demonstrate standing and sufficient legal interest to bring proceedings against that decision, dispute the reasons provided by Frontex to justify its decision not to take the measures requested in the invitation to act.
- 34 The same applies to the applicants' arguments that, first, at the time when Frontex was invited to act there were no rules laid down on the application of Article 46 of Regulation 2019/1896 and that, secondly, Frontex failed to consult first and foremost its fundamental rights officer.

- 35 It follows that the plea of inadmissibility raised by Frontex must be upheld, without there being any need to examine further the other grounds of inadmissibility put forward.
- 36 Consequently, the action must be dismissed as inadmissible.

Disclosure of the parties' pleadings on the internet

- 37 As indicated essentially in paragraphs 8 to 9 above, Frontex informed the Court by letter of 18 January 2022 that the content of the plea of inadmissibility which it had raised by separate document in the present case and the applicants' observations in response to it had been disclosed on a website. According to Frontex, the applicants' representatives were responsible for that publication. It therefore considered that that publication undermined the principles of equality of arms, a fair hearing and the sound administration of justice. It thus requested that the Court remind the applicants of their obligations of confidentiality and invite them to withdraw that information from the public domain.
- 38 By letter of 10 February 2022, the applicants informed the Court that they were not responsible for that publication and that they had no connection with the website in question, with the result that they were not in a position to put an end to that publication.
- 39 Under the rules which govern the handling of cases before the General Court, parties are entitled to protection against the misuse of pleadings and evidence. Thus, under Article 38(2) of the Rules of Procedure, no third party, private or public, may have access to the file in a case or to procedural documents without the express authorisation of the President of the General Court, once the parties have been heard.
- 40 Those provisions reflect a general principle in the sound administration of justice according to which parties have the right to defend their interests free from all external influences and particularly from influences on the part of members of the public (see, by analogy, judgment of 17 June 1998, *Svenska Journalistförbundet v Council*, T-174/95, EU:T:1998:127, paragraph 136).
- 41 It follows that a party who is granted access to the procedural documents of other parties is entitled to use those documents only for the purpose of pursuing their own case and for no other purpose, including that of inciting criticism on the part of the public in relation to arguments raised by other parties in the case (see, by analogy, judgment of 17 June 1998, *Svenska Journalistförbundet v Council*, T-174/95, EU:T:1998:127, paragraph 137).
- 42 In the present case, in so far as the applicants have not confirmed, in their observations on that incident, that they were responsible for that publication and that no evidence was provided by Frontex corroborating its allegation that the applicants' representatives were responsible for that publication, Frontex's

requests must be dismissed. Moreover, that incident cannot be taken into account for the purposes of apportioning the costs.

Costs

- 43 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.
- 44 However, under Article 135(1) of those rules, the Court may, if equity so requires, decide that an unsuccessful party is to bear its own costs but is to pay only part of the costs incurred by the other party or even that it is not to be ordered to pay any costs.
- 45 In the present case, the applicants have been unsuccessful. Moreover, Frontex has expressly sought an order that the applicants pay the costs. However, having regard to the circumstances of the present case, and in particular to the personal circumstances of the applicants, equity requires, in accordance with Article 135(1) of the Rules of Procedure, that each party shall bear their own costs.

On those grounds,

THE GENERAL COURT (Ninth Chamber)

hereby orders:

- 1. The action is dismissed as inadmissible.**
- 2. SS, ST and the European Border and Coast Guard Agency (Frontex) shall bear their own costs.**

Luxembourg, 7 April 2022.

E. Coulon

M.J. Costeira

Registrar

President