To the President and Judges of the General Court of the European Union

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Observations on the Plea of Inadmissibility

(Article 130(4) of the Rules of Procedure of the General Court)

lodged by

SS and ST,[1] with no fixed domicile, represented by attorneys Mieke Van den Broeck and Loïca Lambert, with office at Chaussée de Haecht 55 in 1210 Saint-Josse-ten-Noode, Belgium

Applicants,

in Case T-282/21

against

The **European Border and Coast Guard Agency ('Frontex' or 'Agency')**, Plac Europejski 6, 00-844 Warszawa, Poland, ostensibly represented by Fabrice Leggeri,[2] as well as [redacted] acting as agents, and "assisted" by Me. [redacted]

Defendant,

Action against Frontex under Article 265 of the Treaty on the Functioning of the European Union ('TFEU'): Frontex failed to act, in infringement of the Treaties – notably the Charter of Fundamental Rights of the European Union ('Charter') – by not withdrawing the funding, suspending or terminating, in whole or in part, activities of the Agency in the Aegean Sea Region ('ASR') that are *related* to **serious *or* persistent violations of fundamental rights and international protection obligations**, within the meaning of Article 46 of Regulation 2019/1896 on the European Border and Coast Guard ('Regulation' or 'EBCG').

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[1] See the Decision of the Court dated 13.7.2021(T-282/21-19).
[2] See Paragraph 2 below.

I. Introduction

1. The Defendant requested, as a matter of 'exceptional circumstances', an extension of the time limit to lodge its defense (the 'Request') based on, *inter alia*, the '*technical* complexity of the case', the breadth of the Application and a need to consult with *operational* units.[3] The Request was *personally* signed by the Defendant's Executive Director, Mr. Fabrice Leggeri ('ED Leggeri' or 'ED'). To the best of the undersigned's knowledge, the ED in this case is neither an appointed Agent nor a representing lawyer before the General Court of the European Union.[4] It also follows *e contrario* from the fact the Defendant is 'represented by [redacted] *acting as agents*'.[5]

2. After three months during which experts from operational and legal units of the Defendant have given 'full consideration and thoroughly assessed both its admissibility ***and substance'***,[6] the Defendant used its right to remain silent on the substance of the case. The Defendant concluded that the present application is *manifestly* inadmissible, without going to the substance of the case. Although the term 'manifestly' implies that such legal characterization could have been made *prima facie*, the Defendant nevertheless had to exceed the habitual time limit to lodge a defense to formally set it forth.

3. Yet, as will be shown below, the Defendant has failed to comprehend the central matters of fact of the case at hand, their respective legal characterization and consider the stated personal circumstances of the Applicants in its Plea for Inadmissibility. Consequently, the lack of an effective, facts-based response to the content of the Application, impairs the Defendant's argumentations on inadmissibility, particularly in relation to the Defendant's second and third grounds.

4. Had the Defendant *sincerely* considered the facts and corroborated arguments in support of admitting the case and considering it on its merits, and thereafter properly addressed them, the Defendant inevitably would have understood the necessity of also addressing the substance of the case in order to effectively argue on its 'manifest' inadmissibility. Not responding to the substance and at the same time substantially arguing the Application 'has been lodged for **'no *objective* reason'**, arrogantly alleging that a legal action filed by victims of unprecedented violence, one of whom has been since granted a Refugee Status in Greece, amounts to '**instrumentalization'** of Court proceedings – is a cynical conjecture.[7]

5. In a nutshell, the Applicants remind the Defendant of the '**objective reasons'** on which, amongst others, their 'complex' Application relies upon:

   a) The Defendant is a Union's coercive law enforcement agency which is allegedly failing to act in compliance with Union law at virtually all levels of its operations. The absence of independent oversight and/or judicial review mechanism over its conduct along the endless external borders of the EU, deprives affected individuals of the ***possibility*** to

[3] See Request of Extension of Time Limit dated 9.7.2021 (T-282/21-20).
[4] See to that effect Article 19 of the Statute of the Court of Justice of the European Union (applicable to the procedure before the General Court by Article 53 of the Statue); Articles 51 and 53 of the Rules of Procedure of the General Court.
[5] Page 1 of the Plea of Inadmissibility. **All emphasis in this document were added, unless noted otherwise**.
[6] See Plea of Inadmissibility ('PoI'), page 2 (T-282/21-24).
[7] See PoI, Paragraphs 4, 73.

challenge contested inactions and actions of the Defendant ***prior*** – as opposed to *a posteriori* – to the infringement of their fundamental rights.[8]

b) The Application establishes that Frontex is a facilitator and a legitimizer of an unlawful policy of a systematic and widespread attack directed against specific civilian population which was introduced in March 2020. The operational, technical and financial contribution, alongside Frontex's aiding and abetting to the implementation of this *manifestly* unlawful policy is indispensable for the continuation of these practices.

c) Since 2020, the UNHCR has documented and formally reported to the Defendant on ***hundreds of cases*** of suspected collective expulsions in the ASR.[9] The NGO Mare Liberum counted **9,798 persons** abandoned at sea in 2020 alone.[10] The Defendant itself confirmed to the German Government its *involvement* in **132 'interception' operations**[11] *à-la-Frontex*, that is, interceptions regulated by an alternative legal dimension in which countless asylum seekers like ST, and countless refugees like SS, are summarily and collectively expulsed **without any form of individual assessment.**[12]

d) From the culmination of the well documented operations examined in detail in the Application, emerges a clear, convincing and essentially undisputed picture of persisting *and* serious violations of both fundamental rights and international protection obligations. Committed pursuant to the *Joint* Operation of Frontex and Greece, these violations are inherently *related* to the activities of the Defendant in the ASR. Information provided by IGOs, Governments and NGOs is listed in Article 46(6) of the Regulation as *relevant* information the ED *shall* take into account when taking a decision under Article 46(4) of the Regulation, as a part of the *requirement* to base his decision on *duly justified grounds*.

e) Each of the infringements in the Application occurred before the time the Applicants called upon the Agency to act pursuant to Article 265 TFEU. The Agency was therefore under the *obligation* to withdraw financing, or suspend, or terminate, in whole or in part, its operations in the ASR - in compliance with Article 46(4) of its founding Regulation. By failing to take *any* of the measures prescribed in Article 46(4) EBCG, the Agency has failed to act within the meaning of Article 265 TFEU.

f) The Applicants made numerous attempts to *seek* (as opposed to *enjoy*) asylum or other forms of international protection in Greece. Whether on EU soil or in EU waters, EU agents abducted, detained, forcibly transferred, collectively expulsed and abandoned them at sea in extreme conditions of distress and life-threatening situations, only to ultimately be trapped in Turkey in dire need of international protection.

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[8] Compare with Article 340 TFEU (Action for Damages).

[9] Spiegel Austria, "UN Refugee Agency Counts Hundreds of Alleged Pushbacks" 27.03.202, available at: https://tinyurl.com/3fnzyykh (last accessed 8.11.2021).

[10] Mare Liberum, "Pushback Report 2020- Violence is Increasing- In 2020 Mare Liberum Counted at Least 9,000 People Illegally Pushed Back", available at: https://mare-liberum.org/en/pushback-report/ (last accessed 8.11.2021).

[11] See **Annex A5** and **Annex A6** of the Application.

[12] For a daily and up-to-date documentation of the ongoing policy of which the Applicants were and ST is likely to be a victim of, see, e.g.: Agean Boat Report, available at: https://aegeanboatreport.com/ (last accessed 8.11.2021).

g) These violent operations constitute countless violations of the Applicants' rights under the Treaties and in particular the Charter, notably the right to **life**, the right not to be subjected to *refoulement* or **collective expulsion**, the right to ***seek* asylum**, the right to the integrity of the person, the right not be subjected to torture and **inhuman or degrading treatment or punishment**, the right to liberty and security, the rights of the child (with respect to ST), the right to human dignity and the right to **effective remedy**, in breach of protected principles such as equality before the law and non-discrimination.[13]

h) National courts are not competent to review the legality of the conduct of the Defendant through indirect action. The only legal avenue available for individual or other potential victims of the Defendant's acts and omissions is a direct action before the Court of Justice of the European Union.

i) Importantly, the present case is not about the *past*, i.e., what has already happened to the Applicants. What happened to the Applicants in the course of no less than 5 attempts to *seek* international protection in the EU is evidence, just like any other piece of evidence provided in the Application, be it from the German Government or the UNHCR.

j) The present case is about the *present*, i.e., what may happen to the Applicants[14] in the course of their inevitable attempt to traverse the ASR in pursuit of asylum in the EU, as long as Frontex fails to act in accordance with its positive obligations under the Charter, which are enshrined in Article 46 of its own founding Regulation.

6. The fact that the Defendant declined to contest the abundance of evidence and meticulous forensic analysis presented in the Application, in combination with its allegation that the Application amounts to a '**misuse of the legal remedy'** and was lodged for '**no objective reason'**, indicates the Defendant has based its Plea of Inadmissibility on an incomplete and inadequate review of the substance and facts of the case at hand. By omitting to address the substance of the case, the Defendant is *a priori* not able to respond to the Applicants' legal arguments in support of admitting the case and considering it on its merits.

II. Observations on 1st ground of inadmissibility: the Applicants are the same as the Parties to the pre-contentious procedure

7. The Applicants argue they had legitimate reasons not to be mentioned by name in the pre-contentious procedure and having the *same* NGO legally representing them in both the pre-contentious and litigation phases (Front-LEX) signing the Invitation to Act (the 'Legal Notice'); The Legal Notice specified that it is issued on behalf of the Applicants and provided sufficient information for the Defendant to be able to define its position on the desired measure; There is no mechanism available to anonymize Applicants at the pre-contentious phase under Article 265 TFEU; The grounds for anonymizing the Applicants at the pre- and litigation stages are the same, and the fact the Court accepted the Applicants' Anonymity Application attests these grounds were equally justified at all stages of the proceedings.

8. At the time the Defendant was issued with a 'Preliminary Action Pursuant to Article 265 TFEU', SS and ST were asylum seekers in dire need of international protection, deprived of

[13] See, respectively, Article 2, 19, 18 (which *inter alia* channels the rules of the Refugee Convention (1951), including, but not limited to, Article 31, prohibiting any form of penalization for *irregular entry or stay*), 3, 4, 6, 24, 1, 47, 20, 21 of the Charter.
[14] Today only relevant to ST; See Notification to the Court with respect to the situation of SS, dated 7/9/2021.

any legal status in the country to which they were collectively expulsed, with no access to a fair asylum system and effective legal remedy. Victims of *multiple* 'pushback' operations, they have already experienced serious violations of fundamental rights and international protection obligations *related* to the activities of the Defendant.

9. These *personal* experiences established the objective and subjective well-founded fear of SS and ST from all authorities including the Defendant, a fear for their life, safety, liberties and privacy, in case their identity would have been exposed already at the pre-litigation stage and prior to any possibility to reach out to the Court requesting to protect their identities.[15]

10. Subjectively, owing to the extreme violence inflicted on them in several occasions and the severe trauma they had gone through time and again, SS and ST have lost trust in all statal, regional and judicial institutions. Objectively, the Defendant is infamously known for its chronic incompliance with its fundamental rights and international protection obligations, as was meticulously presented in the different incidents examined in the Application.

11. The representation of natural persons in the pre-action was clear from its title ('Preliminary Action Pursuant to Article 265 TFEU'). Yet, in its response to the preliminary action at the pre-litigation phase, **the Defendant nowhere contested the fact that the representing organization, *front*-LEX, is not disclosing the identities of the natural persons it represents**. Being silent at the pre-litigation stage and raising this argument now, at the litigation stage, in order to avoid responding on the substance, is nothing but bad faith.

12. The reasons for remaining anonymous were adopted by the honourable Court's decision, following the Applicants' application for anonymity.[16] If the Applicants were authorized to remain anonymous during the litigation, they are authorized to be anonymous at the pre-litigation phase, let alone in the absence of any anonymity procedure at this preliminary stage. An obligation to be named at the pre-litigation phase fails the purpose for which applicants are entitled to remain anonymous during the litigation, and would effectively mean that only non-anonymized applicants can institute proceedings under Article 265.

13. The unlawfulness which permeates the Defendant's activities, at all levels of its operations, suggests that the Applicants' fear from the Defendant's retaliation against them was not far-fetched. By calling upon the Defendant to act, alleging its ongoing failure to act in accordance with its obligation under article 46(4) EBCG and specifying a measure the Defendant's ED Leggeri is exclusively responsible to adopt, SS and ST could have subjectively and objectively expected unlawful, personal, retaliation directed against them.

14. The Application exemplifies how the Defendant, under the leadership of ED Leggeri, characteristically acts in an unpredictable and arbitrary manner, inconsistent with rule of law principles of transparency, accountability, prohibition of arbitrariness and respect for fundamental rights: a *coercive* law enforcement agency with no effective oversight whose organizational culture promotes concealment through '***retaliation'*** *according to the* Defendant's very own Fundamental Rights Officer;[17] a Union agency whose measures concerning compliance with its fundamental rights obligations, enacted by its own ED, were ***'plain and simply unlawful'***, as DG Monique Pariat had put it; an EU agency whose ED provided the European Parliament, the organ to which under Union law the Defendant is

[15] ST had different views on his/her anonymity at the pre-contentious and litigation phases (see **Annex A.1**).
[16] See Court Decision dated 13/07/2021 (T-282/21-19).
[17] Paragraph 83 of the Application.

accountable, with statements relating to fundamental rights allegations that were ***'not true'***, as Commissioner Ylva Johansson put it; a Defendant whose ED allegedly went as far as to *destroying incriminating evidence* for a 'pushback' operation of *22* asylum seekers in order to obstruct justice;[18] a *law* enforcement agency whose organizational culture, according to Commissioner Johansson, needs to be replaced with a ***'new culture in which failure is acknowledged and addressed'***.[19] This 'across-the-board' reputation of the Defendant substantiates the fear of SS and ST from retaliation, in so far they will be under the Defendant's jurisdiction – as eventually was the case.[20] The Applicants' extreme anxiety the Defendant would find out their identities, as expressed by them time and again prior to the submission of the Legal Notice to the Defendant, is by no means unfounded.

15. Reassured by Front-LEX their identities will remain secured, SS and ST empowered the NGO to call upon the Defendant to act under the strict condition their anonymity would be maintained. And so, when issuing the Defendant with the Legal Notice, the representing organizations stressed at the very outset of the formal invitation to act they are providing legal aid to 'individual victims of violations of fundamental rights committed by the European Union (EU) and its Member States'.

16. By stating that at the outset of the Legal Notice, as a preliminary remark, it is evident that the representing organizations are also submitting the Legal Notice to the Defendant on behalf of 'individual victims of violations of fundamental rights'. SS and ST are, indeed, 'individual victims of violations of fundamental rights', and the representing organizations were simply acting on their behalf.

17. The Defendant laments that the terms 'migrants' and 'asylum seekers', when used in the formal invitation to act, 'do not allow to identify the names of the two applicants', which would lead to a 'total legal uncertainty'. According to the Defendant, 'literally any natural person who knows about the request lodged by the two NGOs could go to Court and claim to be meant by or part of the generic terms […]'.[21]

18. *Firstly*, the Defendant disregards the fact that the NGO signed on the legal notice is the *same* one initiating the subsequent legal action. The lawyers of the representing organization in the Legal Notice are now ascertaining before the Court that SS and ST *are indeed* the two individual victims of violations of fundamental rights who have empowered the NGO to initiate the pre-litigation phase. Same ascertainment by the representing organization should suffice, in similar situations, to establish identicalness between those represented in a legal notice and applicants in a legal action. In other words, not 'literally any person' could go to Court and *validly* claim to be the representee in the pre-litigation phase, but only the *actual* representee who is supported by the representing organization in the pre-litigation phase.

19. *Secondly*, and more importantly, claiming that a 'total legal uncertainty'[22] would result from the anonymity of the representees in the pre-litigation phase may be relevant in cases concerning for example economic matters, where the personal circumstances of the sender

[18] See, e.g., EU Observer, "Frontex chief accused of possible rights 'cover up'", 16.07.2021, available at: https://euobserver.com/migration/152459 (last accessed 8.11.2021).
[19] Paragraph 76, 78 and 79 of the Application.
[20] See Notification to the Court with respect to the situation of SS, dated 7/9/2021; Since the submission of the case, ST has made additional attempts to traverse the ASR for the purpose of seeking asylum in the EU.
[21] See PoI, paragraphs 21–23
[22] PoI, Paragraph 22.

of the legal notice constitute an indispensable, determining factor, in the institution's decision whether to adopt the desired measure. Being able to 'identify the names' of the authors of an invitation to act would be relevant, for example, where the desired measure is pertinent to a review procedure specifically in favour of certain persons or where the assessment of a complex economic situation is involved, or where the administrative regulation of specific categories of economic and social activities is concerned.

20. In the case at hand, whether the senders of the legal notice pursuant to Article 265 TFEU are of Burundi or Congolese nationals, or whether their asylum claims are based on gender or religion, is completely irrelevant considerations when the Defendant institution comes to decide on the adoption of a measure of general and abstract character such as the desired one.

21. In support of its first ground of inadmissibility the Defendant refers to cases whose factual and legal elements **differ significantly** from the ones on which the present Application relies on, almost to the point of misleading the Court. In *de Jorio v Council*[23] the defendant institution's ability to 'identify the name[s]' of the applicant is essential since the personal entitlement of the applicant to the desired measure is directly derived from his **personal characteristic, that is, of *him* being an appointed** member of the Economic and Social Committee.

22. Moreover, in *de Jorio v Council* the applicant **never addressed to defendant institution a request to act**. The applicant there suggested the pre-litigation procedure was correctly followed and fulfilled merely by the fact 'the *President* of the ESC constantly *reminded* the Council of Ministers of the need to take a decision'.[24]

23. As opposed the Applicants' preliminary request to act, which holds 35 pages of dense factual and legal analyses regarding the Defendant's alleged failure to act, the preliminary request to act in *de Jorio v Council* was an *oral* reminder of 'the need to take decision'. The more significant difference, however, is that in *de Jorio v Council* **the applicant *never claimed* the oral request to act of the President of the ESC was in fact done on his behalf**. Whereas in the present case the 35-pages' Legal Notice was submitted *by* the representing organization on behalf of the Applicants.

24. In the other case the Defendant refers to, *Pescados Congelados Jogamar v Commission* [25], the appellant, an owner of the vessel *Albor Uno,* alleged that the failure of the defendant institution, the Commission of the European Communities, to act, specifically related to *his* vessel, the *Albor Uno*, and thus depicts the desired measure as concerning specifically his *own* commercial activities, rather than a measure of general or abstract character. It is apparent why in such case the defendant institution should be able to 'identify the name[s]' of the appellant as the owner of the vessel *Albor Uno*, given that without that information the defendant institution would not even have a clear idea of the content of the decision sought.

25. But more importantly, in the abovementioned case on which the Defendant chose to rely, **the identification of the appellant by his name was never an issue**, **simply because in that case the appellant has never called upon the defendant institute to act**: 'In those

[23] The Order of the Court of First Instance 6/2/1997, *de Jorio v Council*, Case T-64/96 ('*de Jorio v Council')*.
[24] *de Jorio v. Council*, Paragraph 40.
[25] The order of the Court of 18 November 1999, *Pescados Congelados Jogamar SLv Commission*, Case C-249/99 P ('*Pescados Congelados Jogamar v Commission'*).

circumstances, it cannot be found that the Court… was *excessively formalistic* in concluding… that the applicant did not duly follow the pre-litigation procedure […]'[26]

26. It follows that the case law the Defendant relied on does not support its first ground of inadmissibility, which should be dismissed as the Applicants clearly are the same as the parties of the pre-contentious procedure. Due to their need to remain anonymous, a need formally acknowledged at the litigation stage by this Court, they were represented in the pre-litigation stage by the *same* NGO bringing the legal action before the Court (Front-LEX).[27]

III. Observations on 2nd ground of inadmissibility: Frontex has not defined its position

A. Primary claim: the letter does not constitute a definition of position

27. The Applicants argue the Agency has not defined its position given that its letter of 21 March 2021 (**Annex A.3**) does not constitute a definition of position within the meaning of Article 265(2) TFEU; The Applicants are *not* challenging a defined position constituting refusal to adopt the desired measure; The present case is filed given the absence of a clearly, explicitly and sufficiently defined position on the **relevant** measure the ED was obliged to take.

28. The formal Legal Notice sent to the Defendant on 15 February 2021, the heading of which expressly states 'Preliminary Action Pursuant to Article 265 TFEU' and the title of which is 'Immediate Suspension or Termination of Activities in the Aegean Sea Region', clearly constitutes a preliminary procedure prior to potential legal proceedings. It was stressed that making a decision to suspend or terminate the contested activities obligates ED Leggeri to provide duly justified grounds for such decision, within the meaning of Article 46(6) EBCG.

29. The Applicants argued ED Leggeri's letter 'does not *explicitly*, *clearly*, or *sufficiently* constitute a definition of position'. The Defendant misinterpreted this statement as if the Applicants contest the *content* or the *nature* of a measure that was allegedly adopted. But the Applicants never argued that a *measure* was adopted. They argued that a *position* on the adoption of measures was never properly defined. The Defendant's argument that such a statement '*is ineffective'* is, at best, a misunderstanding of the Applicants' argument.

30. By stating that ED Leggeri's letter 'does not *explicitly*, *clearly*, or *sufficiently* constitute a 'definition of position',[28] the Applicants were merely alluding to *Cristina Pigui v European Commission*[29] from which it emerges that the criteria of sufficiency and clarity in relation to a formal notice pursuant to Article 265 TFEU also applies, with necessary adjustments, to a definition of position in response to such notice.

31. The labelling by ED Leggeri of the Applicants' pre-contentious Legal Notice prior to instituting proceedings before the Court under Article 265 TFEU as **"a proposal"**[30] and "**a letter**"[31] also evidences an insufficiently clear and/or explicit response that cannot, by any means, be considered as definition of position *on the matter at hand*, i.e., **specifically one of**

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[26] *Pescados Congelados Jogamar v Commission*, Paragraph 20.
[27] Represented by its lawyers as registered in the Court files.
[28] See in the Applicants' Application, Paragraph 268.
[29] The Order of the General Court of 9 July 2012, *Cristina Pigui v European Commission*, Case T-382/11, paragraph 25.
[30] See **Annex A4** of the Application.
[31] See **Annex A3** of the Application.

two alternative measures the ED was requested to take. Accordingly, ED Leggeri's *letter* lacks such clarity, is not sufficiently detailed and does not provide duly justified grounds. Consequently, the letter does not constitute a definition of position under the Art. 265 TFEU.

32. The abstract, peripheral and immaterial nature of the letter and the reluctance to even acknowledge the content and character of the *formal notice as a preliminary legal procedure*, reflects ED Leggeri's ongoing attempts to politically shield the Defendant and concerned Member State's authorities from the intensifying allegations[32] and to enable the Defendant to evade judicial review at all costs. The *letter* was evidently written for the sole purpose of achieving these two brazen objectives in lieu of addressing in good faith the relevant circumstances of the notice, and as such amounts to abuse of power.

33. The reluctance of ED Leggeri to *explicitly* and *clearly* acknowledge the form and content of the Applicants' invitation to act mirrors his aversion to define his position *explicitly, clearly and sufficiently*. The Applicants claim ED Leggeri intended to circumvent judicial review over the Defendant's unlawful conduct.

34. This avoidance from defining a position at the pre-contentious stage is consistent with the Defendant's motivation and conduct in the litigation itself. The Defendant refrains from addressing the **substance** of the Application and solely seeks to avoid judicial scrutiny at all costs. This is also consistent with the ED's conduct in non-judicial contexts, as detailed in the Application (e.g., monitoring, reporting, investigating).

Overlooking the form and essence of the Legal Notice, the subject matter of ED's letter reads

'Thank you for your ***letter*** of 15 February 2021 and for your ***interest*** in Frontex's activities.'

35. The first two pages of the three-page letter are dedicated to an immaterial presentation on the launching of RBI Aegean, touching upon Articles 37, 37(3), 38, 39, 39(2) EBCG, some of which are associated with the Defendant's fundamental rights and protection obligations, but none of which are remotely pertinent to the adoption of the desired measure the ED was invited to take. The ED then verbosely boasts about the SIR mechanism. Thereafter, ED Leggeri elaborates on the responsibility of the Defendant, under RBI Aegean, for various technical aspects such as the deployment of assets and the coordination of their operations. These are also not in dispute and not what the ED was requested to define his position on.

36. Finally, alluding to the desired measure he was invited to adopt, ED Leggeri states: 'You *refer* in your *letter* to Article 46 of the Regulation'. Again, ED Leggeri's reluctance to articulate what is the specific measure he was invited to adopt mirrors his reluctance and failure to explicitly, clearly and sufficiently define the Defendant's position. In the formal Legal Notice, the Applicants did not simply 'refer' to Article 46 EBCG, but rather, in a number of paragraphs, specifically requested the following:

> 'we hereby invite the Agency to consider its position vis-à-vis its activities in the host Member State Greece and to immediately *suspend* **or** *terminate* all its activities in the Aegean Sea Region, in compliance with The Agency's obligations under Article 46 (4) of European Border and Coast Guard (EBCG) Regulation […] We remind you that in taking a decision to *suspend* **or** *terminate* FRONTEX's activities in the Aegean

[32] See Section 4.3 of the Application.

> Sea, you are obliged to provide *duly justified grounds* for your decision, within the meaning of Article 46 (6) of the EBCG Regulation.'[33]

37. Given that the adoption of at least one of two desired measures was requested, and that each is different in essence, the Applicants emphasised the difference between the two:

> 'In these unfortunate circumstances it is necessary to *suspend* the Agency's activities in the Aegean Sea Region under Art. 46 (4) of the EBCG Regulation, as *suspension is a reversible measure* in operational terms and constitutes, under the existing circumstances, the threshold for the Agency's compliance with its fundamental rights obligations.'[34]

38. By not explicitly and clearly defining its position, let alone providing duly justified grounds for such within the meaning of Article 46(6) EBCG, the enigmatic *letter* of ED Leggeri makes it impossible for the Applicants to know whether the ED ever considered to either *suspend* **or** *terminate* the contested activities of the Defendant in the ASR.

39. A decision regarding either the *suspension* **or** *termination* of the Defendant's contested activities in the ASR under Art. 46(4) EBCG clearly requires duly justified grounds (including the facts, reasons and circumstances underpinning that decision) and is a key requirement to guarantee the effectiveness of judicial review enshrined in Article 47 of the Charter within the framework of different legal proceedings.[35]

40. In the Defendant's Plea of Inadmissibility, the communication sent by the ED is being alternately defined as a 'decision' ('…raised against the *decision* of the Agency not to adopt a *decision* […]'),[36] a 'letter',[37] and a 'reply' that 'merely *explains the position* of Frontex'.[38]

41. Regardless of the formal nature of the communication, in the context of legal proceedings for failure to act, ED's letter does not explicitly, clearly and sufficiently constitute a definition of position **on the requested suspension *or* termination** of the contested activities.

42. In the context of proceedings for annulment, the same lack of clarity and sufficiency would hamper the Court's ability to effectively exercise judicial review of the lawfulness of a contested act allegedly infringing, *inter alia*, the general principle of sound administration laid down in Article 41 of the Charter,[39] misuse of power and manifest error of assessment.

43. Instead of addressing the measures the Applicants requested the ED to take, he touched upon other, immaterial, obligations of the Defendant, and addressed technical and operational responsibilities that are not mentioned in the invitation to act. **Refraining from *directly* addressing the actual and specific measure** (suspension *or* termination) the ED was *explicitly* called upon to take ('You *refer* in your letter to Article 46 of the Regulation'), and ultimately concluding 'the Agency has correctly observed the *obligations* it is under' without

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[33] **Annex A.2**, paragraphs 2–3.
[34] **Annex A.2**, paragraph 80.
[35] See, to that effect, Judgment of the Court of 28 November 2013, *Council v Fulmen and Mahmoudian*, C-280/12 P, paragraph 64.
[36] PoI, page 1, last paragraph.
[37] PoI, paragraph 2.
[38] PoI, paragraph 67.
[39] See, e.g., Article 41(2)(c) of the Charter on the obligation of the administration to give reasons for its decisions.

acknowledging the specific obligation the invitation to act is directed at, cannot constitute a definition of position on the relevant desired measure in the Applicants' invitation to act.

44. A *good faith* definition of position states what *is* the specific measure the Defendant is formally invited to take, *explicitly* defining the Defendant's position on *that* specific measure and providing *sufficiently* detailed grounds for the said position. However, in the present case the ED refrained from calling anything by its name, alluded to obligations that are, or may be, completely immaterial to the formal notice , and concluded that the Defendant 'observed the *obligations* it is under', leaving it to the confused reader to deduce whether he had in mind the stated *obligations* relating to the proper drafting of the operational plan for the RBI Aegean, its launching, the obligation to recruit 40 monitors by last year as the law commands, the functioning of the SIR mechanism or, as requested, the *suspension* or *termination* of the contested activities, as requested.

45. Apart from the lack of clarity and sufficiency permeating the *letter,* other circumstantial evidence suggest that ED Leggeri has not taken a decision or defined a position in relation to the invitation to either *suspend* or *terminate* the contested activities of the Defendant.

46. First, at the time the Defendant was called upon to act (and ostensibly to date), there were **no established rules** on the application of Article 46 of the Regulation.[40] In the absence of clear and transparent criteria for the adoption of a decision to *suspend* or to *terminate* contentions activities, the Defendant is *a priori* unable to take any decision whatsoever.

47. Second, in taking a decision on whether there is an obligation to trigger a measure under article 46(4) of the Regulation, the ED is required to first consult with the Defendant's Fundamental Rights Officer ('FRO'). In the case at hand the ED has not done so.[41]

48. Importantly, the absence of SOP on the applicability of Article 46(4) or the failure to consult with the FRO are not mentioned here to suggest that the Applicants submit a decision or a

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[40] See **Annex 2**, paragraph 84 of the Application.

[41] For the organizational failure being structural and cultural, it should be noted that consulting with the FRO neither guarantees compliance with EU Rule of Law. In lieu of strict compliance with EU law by triggering Article 46 EBCG, instead of explaining the ED that Art. 46 leaves no discretion irrespective of result or impact on the situation of fundamental rights, although nowhere the provision permits to use its prescribed measures in any manner other than their activation, and while being conscious in particular to the situation in the ASR (***"we will go to Greece since these are indeed… higher and heightened risk of fundamental rights violations")*** the FRO – a lawyer – advocates not to comply but to instrumentalize the applicable law, and specifically to use it as a 'leverage' on and a 'threat' towards the culprits: *"I think leverage is an important aspect. Leverage in the sense* ***that I have under the Regulation the possibility to… advise the executive director to pull out…*** *Which is of course a nice mandate,* ***a nice option maybe****. But… maybe that does not have necessarily the best impact on the situation... maybe not the best result or best situation for fundamental rights.* **I would like to use that threat as far as possible as a leverage** *and say that we need these additional safeguards to be in place,* ***otherwise we will have to use article 46, rather than simply pull out using the*** **same** ***provision."*** This is by no means particular to Article 46 of the Regulation or a one-time failure of the FRO of the Defendant. The FRO equally is "**not too worried"** by the Defendant being in an ongoing breach of EU law which commanded the agency to deploy 40 Fundamental Rights Monitors by "a clear deadline": **"there is a clear deadline on the recruitment of staff by a certain number and a certain date**. **Unfortunately**, **the agency did not deliver on that deadline**… And we have an advanced plan on how to get the other 20 of course, **and maybe this year we will be 30 and maybe early next year we will be 40**… **I am also not too worried about a bit of delay**… **maybe it is good that we have a bit of a staggered approach** with an incremental number of monitors so that we learn also in that context." See "2021 Odysseus Summer School: Discussion with Dr Grimheden New Fundamental Rights Officer of Frontex", 12.8.2021, available at https://www.youtube.com/playlist?list=PL5j0rT9PoY-SvHGndu1cESDs-XtmzrqpK (last accessed 7.11.2021); full transcript on file with the authors.

definition of position were made erroneously. Rather, they indicate that a decision or **a definition of position have *never* been made or adopted**.

49. Had the ED followed the SOP on the applicability of Article 46(4) of the Regulation, had he complied with the legally binding obligation to consult with the Defendant's own Fundamental Rights Officer, he would have been able to define his position. Having not done so, the **ED was *a priori* incapable of defining his position. At any rate, his response is not sufficiently explicit and clear as required and, consequently, he effectively did not take a position *with respect to the specific measures* the Applicants invited him to take**.

B. Secondary claim: Interpreting a Failure to Act as a Failure to Fulfil Obligations

50. According to the Court's settled case law, Articles 263 and 265 TFEU 'merely prescribe *one and the same* method of recourse', and '[t]he possibility for individuals to assert their rights should not depend upon whether the institution concerned has *acted or failed to act*.'[42] The function of Article 263, however, is limited to a review of the legality of an action, *not inaction*. Insofar the Court would find the ED's letter constitutes a definition of position, and in light of the above-cited case law on the *same* recourse prescribed by Articles 263 and 265, the Applicants submit *in the alternative* that the Court should interpret a definition of position under Article 265 to apply only to cases in which the defined position *accepts* to take the requested measure (in compliance with established legal obligation and ruling out further judicial proceedings). Interpretation of treaties, reconciling conflicting principles, is what Courts do on an ordinary basis. Also the concept of 'direct and individual concern' was developed to reconcile the restrictive wording of 'addressee' with the right to a legal remedy.

IV. Observations on the 3rd Ground of Inadmissibility: Standing

51. The prescribed Law (as opposed to the jurisprudence) permits only the *addressees* of the desired measure to submit claims under Art. 265 TFEU. Astonishingly, the Defendant **nowhere** identifies *who* are the addressees of the desired measure. The Defendant simply ignores this necessary point of departure, and instead performs a quantum leap to subsequent categories of claimants developed in the case law (direct and individual concern).

52. However, the Defendant's *own* position is that these alternative categories depend on the legal qualification of the addressee because they must be examined "in a manner *analogous* to that in which the addressee". But to be able to assess this analogy, one must first identify who (if any) the addressees are. To be clear, the Defendant's *states that*: "for an action for failure to act… the natural or legal person **must establish** either that he or she is **the addressee of the act** which the institution complained of allegedly failed to adopt in respect of that person, **or** that [the] act **directly and individually concerned** him, her or it **in a manner *analogous* to that in which the addressee** of such an act would be concerned".[43]

53. The Applicants argue below they are the addressees. They may be wrong. They may merely have a direct or individual concern in the compliance of the Agency with *erga omnes* obligations as literally their life and their most basic rights are affected by this compliance. To prevail in a plea for inadmissibility, the Defendant *must* provide its *own* account: *who* is

[42] Judgment of the Court of 26 November 1996, *T. Port GmbH & Co. KG v Bundesanstalt für Landwirtschaft und Ernährung*, Case C-68/95, paragraph 59; Judgment of the Court of 18 November 1970, *Amedeo Chevalley v Commission of the European Communities*, Case 15-70, paragraph 6.
[43] See PoI, paragraph 40

the addressee (if any) and who is *analogue* to an addressee (if any) of an inaction that infringes the Treaties. Failing that, the entire 'manifestly inadmissible' enterprise collapses.

A. Primary claim: the Applicants *are* the addressees of the desired measure

54. The Applicants claim, in the first instance, that they are the addressees of the requested act under Article 46(4) ECBG, to the effect that they are not required to be directly and individually concerned according to Article 265(3) TFEU.

55. In the Defendant's opening statement on the matter of standing asserts that 'in order for an action or failure to act to be admissible under Article 265 TFEU, the natural or legal person must establish either that he or she is the *addressee* of the act […] or that that act *directly* and *individually* concerned him, her or it […]'.[44]

56. Thereafter the Defendant refrains from addressing the question of who is the addressee of the required act under Article 46(4) EBCG, i.e., *suspension* or *termination* of the contested activities. As if the matter of the addressee is undisputable, the Defendant then circumvents the matter and directly moves to argue the Applicants are not directly concerned by such an act.

57. But if not the Applicants, who *are* 'the entities' to whom the desired measure is addressed?[45] Article 46(4) does not specify who is the addressee of the measures it prescribes. Evidently, there is no *prima facie* addressee of the two alternative desired measures. Nevertheless, to convincingly argue the case is inadmissible, the Defendant cannot simply ignore this essential and relevant, even if admittedly complex matter.

58. Unlike the Defendant, the Applicants submit that **in so far as there is an addressee to the desired act, the addressees in the case at hand are the Applicants**. A number of indications support this conclusion.

    Article 46(4) ECBG does *not* indicate a specific addressee of the measures it prescribes. The provision only states that the adoption of a measure under Article 46(4) is to be taken by the ED 'after *consulting* the fundamental rights officer and *informing* the Member State concerned'. The right to be *informed* does not make the informed entity the addressee of such a decision. A systematic reading of Article 46 ECBG implies that the MS is simply *concerned* by the decision.

59. The provision, therefore, *does not allow* the ED to consider the interests of the Member State prior to a decision according to the provision. While the ED is required only to *inform* the concerned Member State of his or her decision after-fact, the ED is obliged to *consult* and to take in consideration the view of the Fundamental Rights Officer ('FRO') *but only prior* to the activation of Article 46(4) ECBG.

60. It follows that **the FRO and the concerned MS are not the addressees** of a measure prescribed by Article 46(4). The MS is *concerned* by and *informed* on the decision *a posteriori*, and the FRO's views are to be considered but only a *priori* to the decision.

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[44] See PoI, paragraph 40.
[45] Compare with PoI, paragraph 68.

61. The addressees of the desired measure can be learned from the objective of Article 46(4): to safeguard fundamental rights during the Defendant's activities to assure that a Union Agency is not complicit in, or a facilitator of, fundamental rights violations.

62. Clearly, the ED *is obliged* to base its decision on the interests of the Applicants or, more precisely, on the existence of persistent or systematic violations to which the Applicants may be exposed to whilst exercising their respective right to *seek* (as opposed to enjoy) asylum in the ASR within the meaning of Articles 18 and 19 of the Charter.

63. This is so because the Applicants are the *holders* of fundamental rights in the context of the Defendant's activities, alongside other asylum seekers and refugees whose fundamental rights are typically at stake during border control activities. Accordingly, Frontex's obligation corresponds to these specific rights.

64. It follows that, in the absence of an addressee explicitly stated by Article 46(4) ECBG, the *actual* addressees of a measure prescribed in a provision manifesting a positive obligation under the Charter are asylum seekers and refugees to whom this obligation is owed.

65. For the Applicants, a decision *to adopt* or *not to adopt* a measure under the provision serves as the only indicative factor and source of information on the Union's capability to protect their fundamental rights enshrined in the Charter and are related to activities of the Agency.

66. A decision to adopt or not one of the measures prescribed by Article 46(4) is based *solely* on a determination of whether 'there are violations of fundamental rights or international protection obligations related to the activity concerned that are of a serious nature or are likely to persist', regardless the effect, result or impact of the said measure.

67. It follows that when the Defendant declines to adopt one of the measures under Article 46(4) ECBG, the message to the Applicants is that no persisting or serious fundamental rights violations occur in relation to specific, geographically delineated, activity of the Defendant.

68. The inaction of the Agency gives rise to a legitimate expectation of the concerned asylum seeker or refugee that he or she can exercise their right to seek asylum without being subjected to serious fundamental rights violations.

69. The safeguards enshrined in Article 46(4) ECBG secures this legitimate expectation of the Applicants. By applying Article 46(4) ECBG, the Defendant sends a warning to asylum seekers or refugees trapped within the geographical area in which it operates, that it is unsafe to exercise rights related to their need of international protection given the occurrence of persisting and/or serious fundamental rights violation in the area.

70. To conclude, though not explicitly identified by their names or notified in writing, a coherent, systematic and teleological interpretation of Article 46 ECBG suggests that, in the absence of other named addressees, the Applicants are the primary addressees of the desired measure.

B. Secondary claim: the decision has no addressee and constitutes a regulatory act not entailing implementing measures (Article 263(4) TFEU)

71. Should the Court find the Applicants not to be the addressees, the Applicants argue, in the alternative, that a decision on the application of Article 46(4) ECBG has no addressee and

constitutes a regulatory act that does not entail implementing measures within the meaning of the third limb of the fourth paragraph of Article 263 TFEU. Consequently, the Applicants are only required to show direct, and not individual, concern.

72. According to the Court's standing case-law, Articles 263 and 265 TFEU 'merely prescribe one and the same method of recourse', and '[t]he possibility for individuals to assert their rights should not depend upon whether the institution concerned has acted or failed to act.' It follows that the principles regarding admissibility of individuals in cases of annulment are also applicable in cases of failure to act.[46] Just as the requirements of direct and individual concern are not written in but applied to Article 265 TFEU, the third limb of the fourth paragraph of Article 263 TFEU is applicable to the failure to adopt a regulatory act.[47]

73. A decision according to Article 46(4) ECBG constitutes a regulatory act in the meaning of Article 263(4) TFEU for the following reasons: 1) It is *not a legislative act* adopted following a legislative procedure according to the Treaties, but still *a binding act of general application* intended to produce legal effects vis-à-vis third parties;[48] 2) Should the Court considers the decision has no addressee, in the alternative it is argued that the decision constitutes a *sui generis* decision of *general application*; 3) A decision to take a measure according to Article 46(4) ECBG would constitute *a binding act* (see, to that effect, Article 288(4) TFEU); 4) A decision according to Article 46(4) ECBG *does not entail implementing measures* since it would be *self-executing* and does not require the adoption of implementing measures to become effective.

74. One of the objectives behind the amendment of Article 230(4) EC, which led to the expansion of access to direct action of Article 263(4) TFEU, was **to avoid the possibility that, in certain cases, 'the individual concerned would currently have to infringe the law to have access to the court**.'[49] This objective is relevant in the present case, where the Applicants must suffer fundamental rights violations to have standing. Even then, natural persons would face challenges, due to standing case law, in showing individual concern due to the general character of a decision according to Article 46(4) ECBG. In the case of the Applicants, the third limb of Article 263(4) TFEU could provide a similar function if the Court use it to guarantee **'a complete system of legal remedies' when it comes to granting access to a direct review in a context where no other reasonable remedies are available.**[50]

C. On the matter of Direct Concern

75. On the requirement of direct concern, the Defendant *partially* cites an introductory paragraph from the Application, *conveniently leaving out* and never again addressing the *substantial arguments* of the Applicants in that regard:

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[46] Judgment of the Court of 26 November 1996, *T. Port GmbH & Co. KG v Bundesanstalt für Landwirtschaft und Ernährung*, Case C-68/95, paragraph 59; Judgment of the Court of 18 November 1970, *Amedeo Chevalley v Commission of the European Communities*, Case 15-70, paragraph 6.

[47] Cf. Judgment of the Court of 26 November 1996, *T. Port GmbH & Co. KG v Bundesanstalt für Landwirtschaft und Ernährung*, Case C-68/95, paragraph 59.

[48] See, to that effect, Judgment of the Court of 3 October 2013, *Inuit Tapiriit Kanatami and Others v Parliament and Council*, C-583/11 P, paragraph 58–61.

[49] See Cover note from the Praesidium to the Convention of 12 May 2003, CONV 734/03, page 20.

[50] Cf. Judgment of the Court of 3 October 2013, *Inuit Tapiriit Kanatami and Others v Parliament and Council*, C-583/11 P, paragraph 92.

> ‘‘The Applicants contend that the failure of Frontex to adopt a measure under Article 46(4) of the ECBG Regulation is of direct concern to them, for two reasons ‘*First, for being asylum seekers in dire need of international protection, who, in the country to which they were collectively expelled, despite the 2016 ‘deal’ between the EU and Turkey,* [...] *are deprived of access to an efficient and fair asylum system and legal remedy, or to genuine and effective means of legal entry to the EU*’ (**paragraph 271**) and ‘*Second*, [....] *as victims of past serious violations of fundamental rights and international protection obligations related to the activities of Frontex*’ (**paragraph 275**).’[51]

76. The Applicants wish to draw the Court’s attention to the 3 paragraphs (**paragraphs 272-274**) **in between** the cited paragraphs 271 and 275, that the Defendant chose to carve out:

> **‘*It is in this context* that the Applicants are directly and individually concerned with the adoption of the desired measure. The desired measure counters violent, ongoing, widespread, systematic, and serious violations of fundamental rights in the ASR. The failure to adopt it directly concerns the Applicants, who were, are, and will be exposed to these violations. […] Conversely, had this measure been already adopted, the Applicants would have already crossed the Aegean Sea, arrived in Greece, and lodged their asylum request in the EU. The adoption of the desired measure, therefore, *would significantly reduce the Applicants’ exposure to mass violence and fundamental rights violations* upon their imminent re-traversing of the Aegean Sea in a search of a safe haven. […]**
>
> **The lack of alternative pathways that would enable the applicants to secure their rights to life and asylum renders the re-traversing of the Aegean Sea extremely *imminent* and *inevitable*. At the same time, it is affected by, and dependent upon the adoption of the desired measure: *as long as the failure to take the desired measure and to comply with EU law endures, the imminent and inevitable re-traversing of the ASR will be significantly more hazardous.*”**

77. The Applicants’ proposition in the omitted part may be rejected by the Defendant. But it is not unreasonable to expect the Defendant to at least be able to comprehend the argumentation, which can be summarized as follows: 1) The Applicants, at the time the Defendant was called upon to act, were in dire need of international protection; 2) Collectively expulsed back to and trapped in Turkey, they were also ‘deprived of access to an efficient and fair asylum system and legal remedy, or to genuine and effective means of legal entry to the EU’; 3) ‘the re-traversing of the Aegean Sea is extremely imminent and inevitable’; 4) The failure of the Defendant to act in accordance with its obligations under Article 46(4) ECBG renders their ‘imminent and inevitable re-traversing of the ASR […] significantly more hazardous.’

78. This is therefore the link between the precarious situation of the Applicants and the desired measure that the Agency failed to take. This is why the Applicants are directly concerned with the compliance of Frontex with EU Fundamental Rights Law. This is why the interests of the Applicants would be affected once the desired measure is adopted.

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[51] PoI, Paragraph 42

79. The Applicants presented before the Court abundance of evidence, meticulous forensic analysis, undisputable facts and their legal characterization, with a view to establishing, *inter alia*, that the Defendant in its actions and inactions is a facilitator and legitimizer of an unlawful state policy of widespread and systematic attack directed against asylum seekers and refugees, and that without the Defendant's operational, coordinative, technical, financial and political support, the execution of this unlawful state policy would have been stopped.

80. The premise behind the Applicants' arguments on the admissibility of their case received further support after the submission of the Application: Greece urgently requested additional funding of 15.83 million EUR from the European Commission to enable it to execute its 'new border control tactics' in the ASR. It has been reported that the Commission – not the Defendant – conditioned Greece to set up an independent monitoring mechanism to counter pushback operations before additional financial support will be granted.[52]

81. Because of the causal link between the inaction of Frontex and its direct effect on their legal situation, the Applicants are directly concerned by the desired measure. The fact that Greece is already struggling to execute its 'new border controls tactics' without the Commission's financial support further substantiate this argument. Clearly, absent the extensive financial, operational and technical support of the Defendant upon suspension or termination of its activities in the Aegean Sea Region, the violations would no longer occur. This is further corroborated by the statements made by Greek officials cited in the Application.

82. At any rate, insofar the Defendant had wished to contest the Applicants' *substantial* argument, according to which the suspension or termination of the Defendant's activities in the ASR will cease the violations stemming from these 'new border controls tactics', the Defendant should have addressed the substance of the case.

83. The Defendant's failure to address the Applicants' arguments in support of admitting the Application is therefore multifaceted: **First**, the Defendant had to acknowledge and *comprehend* the Applicants' arguments. **Second**, the Defendant then had to go into the *substance* of the application to rebut these arguments.

84. Alas, the Defendant has failed to comprehend the Applicants' arguments in that regard, as is demonstrated by the following quote from its Plea of Inadmissibility:

> 'The first argument must be rejected. Indeed, the measure does neither affect nor *regulate* their *right to asylum* or *right to entry*. Thus, even if adopted, the decision would not bring about any distinct change in their legal situation.'[53]

85. As was explained in the Application and again herein, at stake are the Applicants' rights intimately associated with the right to *seek* asylum proclaimed in Article 18 of the Charter, a right with constitutional status as Union primary law. Article 18 of the Charter entails a right to *seek* asylum and the Defendant's failure to act directly infringes this right.[54]

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[52] Euractiv, "Commission asks Greece for transparency on pushbacks to release migration funds", 13.09.2021, available at https://www.euractiv.com/section/justice-home-affairs/news/commission-asks-greece-for-transparency-on-pushbacks-to-release-migration-funds/ (last accessed 8.11.2021); See also Section 3.2.1 of the Application.

[53] PoI, paragraph 43.

[54] According to Article 18 of the Charter 'The right to asylum *shall be guaranteed with due respect for the rules of the Geneva Convention* of 28 July 1951 and the Protocol of 31 1967 relating to the status of refugees' (the 'Refugee Convention'). The Refugee Convention is grounded in Article 14 of the Universal Declaration of Human

86. The Defendant evidently lacks competence to 'regulate' or in any other manner limit the right to *seek* asylum of Article 18 of the Charter which can only be done by amendment to Union primary law. Indeed, the desired measure cannot, *a priori*, limit the right of anyone *to seek* asylum, since every person embodies this *human* right.

87. As detailed below, SS has already proven that both her right to *seek* asylum in the EU and her subsequent right to *enjoy* one have been compromised. **The Applicants' right to seek and, at least in the case of SS, also enjoy asylum, was severely and directly affected by the Defendant's failure to act by either *suspending* or *terminating* its contested activities**. At the time the Defendant was called upon to act, therefore, the Applicants' right to *seek* asylum, as well as other fundamental rights associated with it, were severally jeopardized by the Defendant's failure to act.

88. As for the *right to entry*, which the measure 'does neither affect nor regulate', the Applicants observe that the Application sufficiently addresses this point:

> 'Acknowledging that much does not preclude the right of Member States to perform border control at EU external borders, *nor does it grant any person the permission to enter the territory of EU Member States* […]
>
> By acknowledging that much, the Court would merely reiterate one admittedly banal truism: that both *the right to enter* for the purpose *of seeking asylum* and the right to control this entry are subjected to and regulated by the same one law...[55]

89. The change in the personal circumstances of SS who on her *third* attempt to enter the EU for the purpose of *seeking* asylum was lucky enough not to be '*intercepted'* by the Defendant or other forces operating under the aegis of *Joint* Operation Poseidon, does render inapplicable the Applicants' first argument in favor of admitting the case - but *only* to her and only to her *now* – as opposed to the time the case filed – given her modified situation.[56]

90. At the same time, the fact that SS – at last effectively protected from *refoulement* on EU territory – was promptly recognized as and granted *refugee status* under EU law, indeed the *highest* existing form of international legal protection, retrospectively reaffirms that the Applicants could not, at the time the Defendant was called upon to act, exercise the right *to seek* asylum and, in the case of SS also the right to *enjoy* asylum, in Turkey.

91. Moreover, the prompt recognition of SS as a refugee reflects poorly on the Defendant's statements regarding SS, 'who *allege* to be *asylum seekers*';[57] the motive of '[…] the present action does not aim *to defend the interests of the Applicants* but to address and challenge Frontex's actions',[58] amounts to 'an *instrumentalization* if not *misuse* *of the legal remedy*

Rights (1948), which explicitly recognizes the right of persons to seek asylum (see, to that effect, introductory note and recital 1 of the preamble of the Refugee Convention). Considering the *effet utile*, object and purpose of the right to asylum, a precondition for exercising it and the rights of the Refugee Convention is the right to have access to the asylum procedure and *seek* asylum in the first place.

[55] Paragraphs 277—278 of the Application.

[56] See Notification to the Court with respect to the situation of SS, dated 7/9/2021.

[57] PoI, paragraph 8.

[58] PoI, paragraph 50.

provided in Article 265 TFEU';[59] and it reflects especially poorly on the **Defendant's request that SS, a *refugee* who cannot even bear the cost of half liter of milk in Greece, '*should bear all the costs of the proceedings*, including the costs of the Defendant.'**[60]

92. It must be stressed that the second argument on admissibility as was set forth in the Application remains highly relevant and equally applies to the situations of both ST and SS. Since the Defendant seems to have failed to take into account also this argument, it will be reiterated here in full:

> 'Second, the desired measure *is capable of directly* and individually *affecting the interests of the Applicants* by bringing about a distinct change in their position as *victims of past serious violations of fundamental rights* and international protection obligations *related to the activities of Frontex*. As the Factual Section details, the Applicants are victims of multiple 'pushback' operations. These defining experiences *per se*, i.e., the continuous and ongoing process of victimization and deprivation of fundamental rights with no effective legal remedy alone gives rise to feelings of injustice, frustration, and distress. […]
> '*A corrective measure by which the Rule of Law is restored* may very well *re-establish* the *victims' human dignity* and facilitate their rehabilitation. The termination of the inhuman and degrading treatment that the Applicants are still suffering from would not repair, but at least reduce, their suffering and restore, to some extent, *their sense of dignity and worthiness*. This is, therefore, *another independent reason* why *the Applicants have direct* and individual interest in the adoption of a measure that is pertinent to them and is capable of bringing about a distinct change in their positions.'[61]

93. The following section from the Plea of Inadmissibility demonstrates the defense's failure to properly assess and address the Applicants' second argument:

> 'As to the second argument, the measure sought cannot influence their status as victims: *It would not be capable as such to recognize the Applicants as victims of human rights violations* nor *could it lead to damages* […] the Applicants disregard the fact that *the TFEU does provide legal remedies* and that the obligation to comply with the rules governing the admissibility of said legal remedies is not an undue restriction to their effective right of access to justice.'[62]

94. *First*, **the Applicants do not seek and have never sought, in the framework of this case, to get recognition of their status as victims of human rights violations**. *Second*, had the Defendant wished to rebut the Applicants' corroborated claims of being victims, it should have at least gone into the substance of the case. *Third*, **such factual question is clearly impertinent to the admissibility of the case but rather to its substance**.

95. In the context of admissibility, the inquiry should depart from and be limited to the *presumption* the Applicants *are* victims of serious or persistent fundamental rights violations

[59] PoI, paragraph 73.
[60] PoI, paragraph 74.
[61] Paragraphs 275–276 of the Application.
[62] PoI, Paragraph 44.

related to the activities of the Defendant, and focus on whether the desired measure could be of direct concern to them.

96. The Applicants do not seek recognition of their *victimhood*, but rather of their human dignity, a protected and *allegedly* infringed right under the Treaties, an allegation the Defendant has chosen not to respond to.

97. The stories of the Applicants and other refugees and asylum seekers, victims of violent operations *related* to the activities of the Defendant, are being documented and reported on a daily basis by credible NGOs, IGOs, MEPs and investigative journalists. Yet, the Defendant – an EU Agency – remains in a constant state of failure to act in accordance with its legal obligation to guarantee their rights.

98. It is this contrast between the awareness of countless EU actors and the denial and failure to act of the EU border agency that infringes the Applicants' human dignity, yet another protected right under the Treaties of the EU. And it is this infringement, among others, which makes the Applicants directly concerned in a measure that is capable, to some extent, to restore their sense of worthiness.

99. As a response to the Defendant's focus on the importance of possibilities for recognition of 'victim status' for the matter of direct concern, the Applicants stress they are within their full right to pursue **Article 265 TFEU as a remedy for fundamental rights violations with the objective to simply ask the Court to declare a failure to act**. Whatever the possibilities for a recognition of 'victim status' are, they are not a determining factor for the matter on direct concern.

100. As for damages, to which the Defendant explicitly refers, **the Applicants clearly do not seek and have never sought damages in the present case**. As for specific legal action for damages under the TFEU, to which the Defendant alludes ('the TFEU does provide legal remedies'),[63] it should be noted that action for damages is only capable of providing compensation, **it cannot compel the Community institution or body to act**.

101. Moreover, in the context of the admissibility of the case, the Applicants need to demonstrate, where appropriate, that they are directly concerned by the desired measure. **They do not need to prove their sought objective could be achieved *only* by *this* legal action** for a failure to act nor that there are no other legal avenues for such action to be adjudicated. According to the Court's standing case law, 'The action to establish liability is an autonomous form of action, with a particular purpose to fulfil within the system of legal remedies and subject to conditions of use dictated by its specific purpose.'[64]

D. On the matter of Individual Concern

102. Should the Court consider that a decision according to article 46(4) ECBG does not constitute a regulatory act according to Article 263(4) TFEU, or find that the decision have addressees other than the Applicants, or that the Applicants are not directly concerned, in the alternative the Applicants will argue below they have an individual concern in the desired measure.

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[63] PoI, paragraph 44.
[64] Judgment of the Court of 23 March 2004, *European Ombudsman v Frank Lamberts*, Case C-234/02 P, paragraph 59.

103. When fundamental rights and values are at stake, the Union's primary law compels the Court to make a less restrictive interpretation. In the present case, at stake are the Union's foundational value of rule of law and its principles established as general,[65] the inviolable human dignity,[66] the peremptory absolute prohibition on *refoulement*[67] and the right to life which together constitute the most fundamental rights and basic values of democratic societies,[68] the right to asylum[69] and the prohibition on collective expulsions.[70] All the above values and fundamental rights are highlighted as having particular importance in the ECBG.[71] In addition, procedural rights and general principles are at stake, particularly the principle of effective judicial protection and the right to an effective remedy.[72]

104. The Defendant argues, based on the *Plaumann* test,[73] that the Applicants have failed to demonstrate certain attributes that would distinguish them *just as in the case of the person addressed*[74]. But should the Court consider that a decision according to Article 46(4) ECBG has *no addressee*, it follows that the Applicants are not required, according to the *Plaumann* test, to be distinguished as an addressee since, well, there is no one to be compared to. As argued above, **the Defendant itself has failed to address who this addressee is in its view, which is a precondition for arguing the Applicants failed to demonstrate 'certain attributes' distinguishing them *as an* addressee**.

105. Should the Court consider the decision would have an addressee other than the Applicants, such as the concerned host Member State, in the alternative the Applicants underline the unreasonable outcome of such a conclusion: a successful Applicant would need, according to this logic, to be concerned by the decision in the same manner as the host Member State according to the *Plaumann* test, a practically unattainable requirement.

106. Consequently, the host Member State would be the only potentially successful non-privileged Applicant (in terms of standing), while at the same time having no interest or incentive to challenge the Agency's failure to act in terms of not suspending or terminating an activity related and contributing to its own.[75]

107. In addition, such an outcome is unsatisfactory in light of the *effet utile* of the Union fundamental rights acquis, as the Applicants must be considered *more* individually concerned than the concerned Member State by a decision under Article 46(4) ECBG, based on its objective to safeguard the fundamental rights of those seeking international protection.

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[65] See, e.g. Article 2 TEU; Judgment of the Court of 23 April 1986, *Parti écologiste "Les Verts" v European Parliament*, Case 294/83, paragraph 23.
[66] Article 1 of the Charter.
[67] Article 19(2) of the Charter; Article 3 ECHR.
[68] Article 2 of the Charter; Article 2 ECHR; Regarding its status as the most fundamental rights, see, *inter alia*, *McCann and Others v. the United Kingdom* [GC] (18984/91), 1995-09-27, § 147, relevant to the scope of to the Charter by Article 52(3) of the Charter.
[69] Article 18 of the Charter.
[70] Article 19(1) of the Charter; Protocol No. 4, Article 4 ECHR.
[71] See, e.g., paragraph 103 of the ECBG preamble; Articles 43(4), 81(2) ECBG.
[72] Article 47 of the Charter; Article 13 ECHR.
[73] Judgment of the Court of 15 July 1963, *Plaumann v Commission*, Case 25-62, page 107, last paragraph.
[74] PoI, paragraphs 47–48.
[75] Cf. Judgment of the Court of 23 April 1986, *Parti écologiste "Les Verts" v European Parliament*, Case 294/83.

108. Consequently, the Applicants ask the Court to decide to what extent it is appropriate to apply the traditional *Plaumann* test in the context of serious and systematic human rights violations in the area of forced migration.

109. The Defendant argues that the present action does not aim to defend the interests of the Applicants due to the fact that other individuals are trapped in similar life-threatening situations.[76] *Firstly*, the Defendant's failure to act is the cause of the violation of the Applicants' fundamental rights. It follows that the Applicants have genuine legal interest in the outcome of an action challenging this failure. *Secondly*, the Defendant's argument is based on a logic derived from current case law according to which '***the greater the number of persons affected the less likely it is that effective judicial review is available'***.[77]

110. The fact that violations caused by the contested and *ongoing* failure to act legally affect a large group of asylum seekers, whose number is now estimated at 20,000 in 2020-2021 alone, should be an argument *in favor* of granting standing to the Applicants who belong to this group, *not against*, as the 'closed category' approach as held by the case law. The result of this case law is that the more widespread and systematic the fundamental rights violations are, the less likely it is that the victims can access effective judicial review.

111. **The logic of the *Plaumann* test is ill-adapted for the context of forced migration since it is based on the context of commercial activity** where actors are concerned 'by reason of a commercial activity which may at any time be practiced by any person […]',[78] as opposed the context of forced migration where it is not a matter of choice to be a person subjected to fundamental rights violations. Instead, in this context **the Applicants should be held individually concerned where a decision has, or is liable to have, a substantial adverse effect on their interests**, as suggested by AG Jacobs in *UPA*,[79] or by similar test more adapted to the realities of the context of forced migration.

112. The Defendant relies on a passage of the case *Inuit* regarding the Court's view that it may not depart from its restrictive interpretation of individual concern without exceeding its jurisdiction and setting aside the conditions laid down in the Treaty.[80]

113. The Applicants argue that in the particular circumstances of the present case, the Court is well within its jurisdiction to make a more expansive interpretation of 'individual concern'. Article 263(4) TFEU only provides the wording 'individual concern', a wording that the Court has filled with its own meaning. A different interpretation of the meaning of the wording – especially when applied to a completely different and admittedly specific context – does not require any change of the letter of the Treaty and would be in line with established rules, customary law and principles of Treaty interpretation.[81]

114. The Applicants stress that the Court is not unfamiliar with interpreting the requirement of 'individual concern' by taking special considerations when called for, particularly in the

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[76] PoI, paragraphs 49–50.
[77] Opinion of Mr Advocate General Jacobs delivered on 21 March 2002, *Unión de Pequeños Agricultores v Council of the European Union* ('*UPA*'), Case C-50/00 P, paragraphs 59, 102(4), who refers to this logic as an 'anomaly under the current case-law'.
[78] Judgment of the Court of 15 July 1963, *Plaumann v Commission*, Case 25-62, page 107, last paragraph.
[79] Opinion of Mr Advocate General Jacobs in *UPA*, paragraphs 59–60, 102(4).
[80] PoI, in paragraph 51. Also see Judgment of the Court of 3 October 2013, *Inuit Tapiriit Kanatami and Others v Parliament and Counci*l, C-583/11 P, paragraph 81.
[81] See, e.g., the Vienna Convention on the Law of Treaties (1969).

areas of anti-dumping, competition and state aid.[82] Consequently, it is within the Court's jurisdiction and ambit, indeed it is its everyday work and art, to adequately interpret the law where both the realities and Union primary law so require.

115. As the Court itself held in *Plaumann* regarding the interpretation of the wording of Article 173(2) of the EEC Treaty [current 263(4) TFEU], **standing requirements must not be interpreted restrictively when the wording does not define nor limit the scope of the words**.[83] Accordingly, the Applicants ask the Court to interpret the notion of 'individual concern' in a manner consistent with the Court's own general principles and Union primary law.

116. The Applicants argue that the Court must give weight to the principle of effective judicial protection and right to an effective remedy in its interpretation of standing, since a legal action under Article 265 TFEU is the Applicants' only available and effective remedy for the violations of fundamental rights resulting from the inaction of a Union agency.

117. Action for damages according to Articles 268 and 340(2) TFEU is not relevant since it only *compensates* for a violation and therefore is incapable of ending the infringements. In addition, action for damages presuppose that the applicants must have their fundamental rights violated before being able to successfully pursue an action, an unreasonable expectation, particularly in relation to the right to life.[84]

118. Contrary to the *Inuit* case relied on by the Defendant,[85] where the Court relied on the appellants having access to remedies in the national legal system,[86] the Applicants do not have access to a national legal system by means of preliminary rulings according to Article 267 TFEU. The failure to act of the Defendant, a Union agency, can only be reviewed by the Court of Justice of the European Union since national courts lack jurisdiction to review the legality of a Union agency's failure to act.

119. In conclusion, in the alternative to the above grounds of admissibility, the Applicants are arguing that they are individually concerned. Any other conclusion would amount to a denial of justice and put into question two foundational assumptions of the **Union's system of legal remedies:** 1) that 'the Treaty established a complete system of legal remedies', and 2) that the Union is based on the rule of law according to which none of its institutions (nor agencies) can avoid legal review.[87]

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[82] See, e.g. *inter alia*, Judgment of the Court of 20 March 1985, *Timex Corporation v Council and Commission of the European Communities*, Case 264/82; Judgment of the Court of 16 May 1991*, Extramet Industrie SA v Council of the European Communities*, Case C-358/89; Judgment of the Court of 23 April 1986, *Parti écologiste "Les Verts" v European Parliament*, Case 294/83.

[83] Judgment of the Court of 15 July 1963, *Plaumann v Commission*, Case 25-62, page 106, last paragraph – page 107, first paragraph.

[84] Cf. with the logic behind the amendment of Article 230(4) EC, that in certain cases 'the individual concerned would currently have to infringe the law to have access to the court.' See the *travaux préparatoires* relating to that provision, Cover note from the Praesidium to the Convention of 12 May 2003, CONV 734/03, page 20.

[85] PoI, paragraph 51.

[86] See Judgment of the Court of 3 October 2013, *Inuit Tapiriit Kanatami and Others v Parliament and Council*, C-583/11 P, paragraphs 90–104, where Court held that its position would be different in the case there was 'no remedy making it possible, even indirectly, to ensure respect for the rights which individuals derive from European Union law […]' (paragraph 104).

[87] Judgment of the Court of 23 April 1986, *Parti écologiste "Les Verts" v European Parliament*, Case 294/83, paragraph 23.

120. Any other conclusion would also be contrary to the **Union's foundational values**, values that must be given a concrete expression, one which does not undermine the Union's credibility. The present case obliges the Court to put an end to a regime of impunity and safeguard the rule of law and fundamental rights acquis of the Union legal order.

V. Observations on the Subsidiary Reason of Inadmissibility

121. According to the Defendant, neither an action of failure to act nor an action of annulment is a legal avenue available for the Applicants. According to this logic, the Applicants are left to sleep 'under the *legal* bridge' in Luxembourg with no effective remedy whatsoever despite multiple and serious infringements of both the Treaties and their own fundamental rights.

122. Under a number of the *alternative* legal arguments raised above, a refusal to activate Article 46(4) of the Regulation has a legally binding act capable of affecting the interests of the Applicants by bringing about a distinct change in their legal position within the meaning of Article 288(4) TFEU.[88] Insofar the Court would nonetheless reject the Applicant's position, according to which the Defendant has not defined its position, therefore, the Court can certainly parse the matter under Article 263 TFEU, let alone given the inconceivable consequences on the right to access judicial review and remedy if deciding otherwise.

VI. Costs

123. **SS**, a woman and a recognized refugee, is knocking on the Court's door empty-handed. **ST**, an unaccompanied minor and asylum seeker, is also entirely destitute, trapped in a foreign country where he has no family, no social ties, no legal status. Both Applicants are struggling to physically survive. Needless to say, they are being represented pro-bono.

124. The Defendant is a coercive law enforcement agency whose budget for 2021-2027 is **11 billion EUR.**[89] Without going to the substance of the case nor addressing the most important admissibility ground, the Defendant argues the Application is "...manifestly inadmissible" and amounts to "an **instrumentalization if not misuse of the legal remedy".**[90] The Defendant clearly failed to understand the facts and law of the Application. But it got *one* fact straight: "… **the application do[es] not contain any order sought about the costs**… nor do the Applicants express any views on this matter".[91]

125. For its part, however, whilst ignoring the unprecedented *human* costs by not addressing the *substance* of the case, the Defendant is going after the poor man's lamb: "**the Applicants should bear all costs of the proceedings, including the costs of the Defendant**".[92]

126. Accountable to the European Parliament in accordance with Article 6 of the Regulation, on 28 April 2021 the European Parliament decided to not approve the Defendant's accounts for 2019, considering, *inter alia*, **the intensifying allegations of serious and persisting fundamental rights violations related to its activities in the Aegean Sea**. As part of the decision not to sign off the Defendant's budget, the European Parliament (EP) requested the Defendant, in an unprecedented move, "**to withdraw its demand for recovering of the costs**

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[88] Order of 14 July 2020, *Sasol et al v ECHA*, Case T-640/19, paragraph 28.

[89] European Court of Auditors, "Audit preview - Frontex", 01.2020, available at: https://www.eca.europa.eu/lists/ecadocuments/ap20_02/ap_frontex_en.pdf (last accessed 8.11.2021); See also: EU Observer, "Frontex spent €94,000 on a dinner in Warsaw", https://euobserver.com/institutional/150625

[90] PoI, paragraph 73.

[91] PoI, paragraph 72.

[92] PoI, paragraph 74.

in this case and to refrain from seeking to recover the costs… in court cases based on access to information requests in the future".[93]

127. The EP was "deeply concerned that the Agency has ordered **to recover legal fees in the amount of EUR 23,700 from two individuals in the General Court** … **charging civil society with excessively high legal fees has a chilling effect on civil society's access to justice in the field of access to documents which is a fundamental right… and undermines their right to an effective remedy under… the Charter**".[94] If a FOIA case triggered such unprecedented call by the EP, it goes without saying the same principles should be applied to applicants who are not legal but natural persons, let alone the actual **victims for whom the Court of Justice is the first, last and only resort.**

128. In case T-31/18, the Court ordered to reduce the amount requested by Defendant to 10,520 EUR.[95] Despite the calls by the EP, the only democratically elected body in the EU, the Defendant again ignored its supervising body and pursued the Applicants in that case until the last dime was collected.[96] The ED explained the EP that he could not comply with its request because he had to follow this Court's order. The Defendant's request in the present case evidences ED's statement to the Parliament was, once again, "**not true**":[97] in the present case there is no Court *order*. Rather, it is the Defendant that *requests* the Court to so order. By doing so, the ED not only ignores the call of the EP not to recover costs in "**future cases**", given the chilling effect on **"access to justice …right to an effective remedy under…the Charter**",[98] but also instrumentalizes this Court's orders for his parliamentary needs.

129. Based on the Applicants' personal circumstances and lack of any legal avenue capable of establishing the infringement of the Treaties other than the present proceedings, it seems self-evident that equity requires that even if unsuccessful, the Court will order the Applicants to bear *no* costs, let alone those of the Defendant, in accordance with Article 135(3) of the EGC Rules of Procedure.

VII. Conclusion

The Applicants respectfully ask the Court to reject the Defendant's Plea of Inadmissibility and consider the case on its merits.

In the alternative, the Applicants request the Court to reserve its decision on admissibility until it rules on the substance of the case.[99]

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[93] See paragraph 44, European Parliament decision 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 - available at: https://www.europarl.europa.eu/doceo/document/TA-9-2021-0191_EN html (accessed 8.11.2021).

[94] See Supra Note 93.

[95] The Order of the General Court (Fith Chamber) of 26 March 2021, *Izuzquiza and Semsrott v Frontex*, Case T-31/18, available at https://curia.europa.eu/juris/document/document.jsf?text=&docid=239744&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=3052952 (last accessed 8.11.2021).

[96] See, e.g.,Frag Den Staat, "Frontex steps over European Parliament, makes final push for legal fees", 1.10.2021, available at: https://fragdenstaat.de/en/blog/2021/10/01/frontex-costs/ (last accessed 8.11.2021).

[97] See supra, paragraph 14.

[98] See ED Leggeri's statement before the European Parliament, LIBE Working Group on Frontex Scrutiny, 11 November 2021, Available at (08:23-08:51): https://multimedia.europarl.europa.eu/en/libe-working-group-on-frontex-scrutiny_20211111-1600-COMMITTEE-LIBE_vd

[99] Compare with Article 130(7) of the Rules of Procedure of the General Court ("…where special circumstances so justify, reserve its decision until it rules on the substance of the case").