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

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FORMAL PLEA OF INADMISSIBILITY

(Article 130 (1) Rules of Procedure of the General Court)

lodged by

the **European Border and Coast Guard Agency (‘Frontex’**), with its headquarters established at Plac Europejski 6, 00-844 Warszawa, Poland, represented by [redacted] acting as agents, assisted by [redacted], member of the Hamburg and Brussels Bar, who accepts notification via e-Curia.

Defendant,

in Case T-282/21

submitted by

[redacted], represented by Me. Mieke Van den Broeck and Me. Loïca Lambert, with their office at Chaussée de Haecht 55 in 1210 Sainte-Josse-ten-Node, Belgium

Applicants,

Action based on Article 265 of the Treaty on the Functioning of the European Union (‘TFEU’), raised against the decision of the Agency not to adopt a decision on the basis of Article 46(4) of Regulation 2019/1896 on the European Border and Coast Guard (‘EBCG Regulation’) to suspend or terminate its activities in the Aegean Sea Region (Greece).

The Defendant has the honour of raising a formal plea of inadmissibility, based on Article 130 (1) of the Rules of procedure of the General Court, against the application, which was notified by e-Curia on 5 July 2021, the time-limit for lodging the defence having been extended until 29 September 2021.

The Defendant has given the application full consideration and thoroughly assessed both its admissibility and substance. As a result of this thorough assessment the Defendant has come to the conclusion that the application is manifestly inadmissible and that it is thus in the interest of the economy of the proceedings to limit the present submission to a formal plea of inadmissibility.

Should the General Court reject the present application or decide to adjudicate on it when assessing the substance of the application, the Defendant respectfully asks to be given the opportunity to lodge a statement of defence in which it would address the substance of the application.

I. Introduction

1. By the present application, the Applicants seek a declaration under Article 265 TFEU that Frontex, by failing to adopt a measure on the basis of Article 46, paragraph 4, of Regulation 2019/1896 on the European Border and Coast Guard ('EBCG Regulation') suspending or terminating its activities in the Aegean Sea Region (Greece), failed to uphold its obligations under EU law and international law.

2. The Applicants claim that, despite the letter of 23 March 2021 (Annex A.3) in which the Executive Director replied to the letter of 15 February 2021 inviting the Agency to act (Annex A.2), Frontex failed to define its position.

3. It is however evident from a mere reading of the application and its annexes that the two Applicants are neither the authors of the invitation to act (Annex A.2) nor are they mentioned at any stage during the pre-contentious procedure.

4. For this reason alone, but also further reasons set out in **III.** below, the present application is manifestly inadmissible and has been lodged for no objective reason.

II. Facts and procedure

5. The facts and procedure are only addressed in so far as they are relevant for the formal plea of inadmissibility.

6. On 15 February 2021, **Front-LEX**, a non-governmental organisation (hereafter: NGO) established in Amsterdam, The Netherlands, as a non-profit organization ("Stichting") and the **Legal Centre Lesvos**, an NGO established in Greece, a civil non-profit organisation, jointly addressed a letter to the Executive Director of Frontex inviting him to act in

accordance with Article 265 TFEU in order to take a decision to suspend or terminate the Agency's activities in the Aegean Sea Region under Article 46(4) of the EBCG Regulation (Annex A.2).

7. The Defendant replied by letter of 23 March 2021 (Annex A.3) and explained that the conditions for a measure to be adopted under Article 46(4) of the EBCG Regulation were not met.

8. Against this background, on 21 May 2021, the Applicants, two natural persons, by the name of [redacted], a Burundi national residing in Turkey, and [redacted], a Congolese national residing in Turkey, who allege to be asylum seekers and victims of fundamental rights violations in Greece while seeking asylum, lodged the present application and ask the General Court:

> *'FORM OF ORDER SOUGHT: to admit the case and consider it on its merits*
>
> *(i); Declare that after the agency was called upon to act in accordance with the procedure specified in Art. 265 TFEU, it has failed to act by withdrawing the financing, suspending or terminating, part or whole of its activities in the ASR under Art. 46(4) EBCG Regulation, or by providing duly justified grounds for not activating the relevant measure in the meaning of Art. 46(6), or otherwise to define its position in response to the Applicants' preliminary request*
>
> *(ii); Declare this failure to act to be in infringement of the Treaties in the meaning of Art. 265 TFEU (iii).'*

III. Legal assessment

9. The application is manifestly inadmissible and should therefore be rejected as such because the conditions for lodging a legal remedy under Article 265 TFEU are not met (see **A.** below) and since were the Applicant to argue in that sense - which is currently not the case – the application cannot be requalified as an action for annulment under Article 263 TFEU (see **B.** below).

A. As to the action lodged under Article 265 TFEU

10. The present action is manifestly inadmissible, for several reasons:

11. According to the second paragraph of Article 265 TFEU, an action for failure to act

> '*shall be **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*.' (Emphasis added)

12. However, in the present case, the conditions laid down in Article 265 TFEU are manifestly not fulfilled:

1) First ground of inadmissibility: the Applicants are not the same as the parties of the pre-contentious procedure (Article 265(2) TFEU)

13. At the outset, the Defendant observes that the parties of the pre-contentious procedure are not the same as the Applicants, thus the procedure enshrined in Article 265, second paragraph of the TFEU was not complied with.

14. According to the jurisprudence (see *inter alia*, the order of the Court of 18 November 1999, *Pescados Congelados Jogamar v Commission*, Case C-249/99 P, paragraph 10):

> *'the action for failure to act is* ***admissible only*** *in so far* ***as the applicant*** *has duly* ***followed the pre-litigation procedure****, satisfying the* ***essential procedural requirement*** *of calling upon the institution concerned to act, within the meaning of the second paragraph of that provision'. (emphasis added)*

15. This implies that an action for failure to act must be brought, as emphasised e.g. in the Order of the Court of First Instance of 6 February 1997, *de Jorio v Council*, Case T-64/96, paragraph 40

> '***by the person who prior thereto had requested the defendant institution to act****'* (our emphasis)

16. The Applicants and/or their counsel clearly disregarded this, since the persons who lodged the request of 15 February 2021 addressed to the Executive Director (**annex A.2)** were legal persons (**Front-lex** and **Legal Centre Esvos**, represented by Omer Shatz, Anastasia Ntailiani and Iftach Cohen), while the Applicants in the present case are natural persons, thus by definition distinct from the former, as indicated in paragraph 8 above.

17. Also, it is clear from the first paragraph of the letter of 15 February 2021 which states '1.*!* [sic] ***Front-LEX*** *and the* ***Legal Centre Lesvos,*** *hereby submit this request for action* […]*' as well as* from the request on page 37 of said letter (*"We hereby invite you to act pursuant to Article 265 TFEU…"*) that both legal persons sent their joint request on their own behalf and name.

18. Thus, the two NGOs who jointly signed the letter of 15 February 2021 did not lodge their request in the name of or on behalf of anybody else.

19. Let alone does said letter mention the names of the Applicants of the present action.

20. This is not put into question by the fact that the application uses, on a number of occasions, terms such as "migrants" and "asylum seekers":

21. Firstly, these terms are generic and used in a generic way, i.e. as part of the substance of the application. Thus, these terms do not allow to identify the names of the two Applicants.

22. Secondly, if such generic reference to "migrants" and "asylum seekers" were to be considered as sufficient to make the present application admissible, *quod non*, this would result in a total legal uncertainty:

23. Because then 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 used in the NGOs' request.

24. In other words, despite such total lack of transparency the application based on Article 265 TFEU would be treated as being admissible, which is contrary to the principle of legal certainty, bearing in mind that pursuant to the case-law quoted above, "*the action for failure to act is admissible only in so far as* ***the applicant*** *has* ***duly followed the pre-litigation procedure****, satisfying the* ***essential procedural requirement*** *of calling upon the institution concerned to act…".* (emphasis added)

25. In the present case, it is manifest that the Applicants have not satisfied said essential procedural requirement.

26. Conclusion: For this reason alone, the present application is vitiated by a manifest procedural defect, which cannot be remedied and should thus be rejected as manifestly inadmissible.

2) Second ground of inadmissibility: Frontex took position

27. In any case, the present application is also inadmissible because in its reply to the request of the NGOs, Frontex did define its position:

28. The Applicants argue that Frontex failed to define its position despite the invitation to act on 15 February 2021. In particular, they claim that the letter of the Executive Director of 23 March 2021 '*does not constitute a definition of position and, consequently, does not terminate the Agency's failure to act'* (paragraph 2 of the Application).

29. Such view cannot be maintained:

30. Pursuant to the case-law (see Order of the General Court of 17 December 2020, *Wagenknecht v Commission***,** Case T-350/20, paragraph 35):

> '*where, supported by* ***explanations****, the institution refuses to act in accordance with such a call to act, that constitutes a definition of* ***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' (Emphasis added).

31. The Defendant also recalls that it is settled case-law *(see e.g.* judgment of 26 February 2003, Joined Cases T-344/00 and T-345/00, *CEVA et al. v Commission,* paragraph 83 and the case-law cited) that

> *"… Article 232 EC [now Art. 265 TFEU] addresses failure to act in the sense of failure to take a decision or to define a position,* ***not the adoption of a measure different from that desired or considered necessary by the persons concerned, and the fact that the position adopted by the Commission has not satisfied the applicants is of no relevance in this respect****"* (Emphasis added)

32. **Firstly**, by replying on 23 March 2021 (Annex A.3) to the letter of 15 February 2021 (Annex A.2), Frontex defined its position within the meaning of the second paragraph of Article 265 TFEU:

33. In his reply, the Executive Director indicated that the conditions to adopt a decision to withdraw financing, to suspend or to terminate any activity of the Agency pursuant to Article 46(4) of the ECBG Regulation are not met. He explained in particular that

- such decision supposes *'that the incidents have reached a certain minimum level of severity or it is expected that they would continue. This provision cannot be triggered based on isolated incidents'* and that it *'must be taken in the context of European integrated border management'* (page 41 of the continuous numbering, Annex A.3), *and*

- that the incidents referred to in the letter of 15 February 2021 have been examined in the final report of the Management Board Working Group Fundamental Rights and Legal Operational Aspects of Operations and on the basis of said report, none of the incidents could substantiate fundamental rights violations. It then concluded that *'Therefore, the Agency has correctly observed the obligations it is under.'*

34. Thus, Frontex did define its position.

35. **Secondly**, the Applicants' statement that '*The Letter does not explicitly, clearly, or sufficiently constitute a definition of position in response to our preliminary'* (see paragraph 268 of the application) is ineffective:

36. Article 265 TFEU relates to a failure to act in the sense of failure to take a decision or to define a position. As the case-law quoted above confirms, this legal remedy does not cover situations in which a party believes that the institution or agency failed to act because it did not adopt the measure which the party desired or considered necessary. In other words, an action under Article 265 TFEU is not an instrument by which a party may force the

institution or agency to adapt the contents of the reasoned position, it has adopted and communicated, to the position advocated or vindicated by the Applicants.

37. **Thirdly**, as to the argument that *'However, the Agency is under positive obligations to take any reasonable measure to guarantee the protection of fundamental rights'* (paragraph 270 of the application): it is inherent to the very concept of an invitation to act that the Applicants must clearly state which measure the Defendant should have adopted at the risk of rendering the pre-contentious procedure nugatory.

38. Conclusion: It is evident that under the present circumstances, the application based on Article 265 TFEU is not the appropriate judicial remedy, thus the application is inadmissible for that reason as well.

3) Third ground of inadmissibility: lack of locus standi and no legitimate interest in bringing proceedings

39. In addition to the two reasons of inadmissibility set out above, the Applicants lack *locus standi* and have failed to demonstrate a legitimate interest in bringing proceedings.

a) Lack of standing

40. Concerning first the lack of standing, the Defendant recalls that in order for an action for 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 which the institution complained of allegedly failed to adopt in respect of that person, or that that 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 (see, e.g. Order of the General Court of 17 December 2020, *Wagenknecht v Commission*, Case T-350/20, paragraph 29).

41. As to the condition of direct concern, it is settled case-law that this concept supposes that the contested measure *directly* affects the legal situation of the individual and leaves no discretion to its addressees (Judgment of the Court of 2 May 2006, *Regione Siciliana/Commission*, Case C-417/04 P, paragraph 28).

42. 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).

43. 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.

44. 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. Indeed, when stating in paragraph 275 of their application that "the continuous and ongoing process of victimization and deprivation of fundamental rights with no effective legal remedy also gives rise to feelings of injustice, frustration, and distress" 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.

45. Consequently, the adoption of a measure under Article 46(4) would have no bearing on the legal or material situation of the Applicants.

46. Moreover, the Applicants are <u>not *individually* concerned:</u>

47. The Defendant recalls that this requirement supposes that the decision affects them by reason of certain attributes which are specific to them or by reason of circumstances in which they are differentiated from all other persons and, by virtue of those factors, distinguishes them individually just as in the case of the person addressed (Judgment of the Court of 15 July 1963, *Plaumann v Commission*, Case 25-62, page 107, last paragraph).

48. The Applicants failed to demonstrate '*certain attributes'* that would distinguish them as if they were the addressees of the decision would it be adopted.

49. The application itself refers to *'the Applicants, as well as* ***other*** *individuals trapped in similar life-threatening situations'* (paragraph 269 of the application) (Emphasis added).

50. This again demonstrates that the present action does not aim to defend the interests of the Applicants but to address and challenge Frontex's actions.

51. Finally, as to the Applicants' statement in paragraph 288 that '*The conditions for the admissibility of legal actions before the Community Court must be interpreted in light of the principle of effective judicial protection'* - a view which reveals the Applicants' doubts, if not awareness, as to the inadmissibility of their application - it is settled case-law (see e.g. Judgment of the Court of 3 October 2013, *Inuit Tapiriit Kanatami and Others v Parliament and Council*, C-583/11 P, paragraph 81)

> *"that the Courts of the European Union may not, without exceeding their jurisdiction, interpret the conditions under which an individual may bring an action for annulment of a regulation in a way which has the effect of setting aside those conditions, expressly laid down in the Treaty,* ***even in the light of the principle of effective judicial protection****."* (emphasis added)

52. Conclusion: The Applicants have a lack of standing.

b) Lack of interest of the Applicants in bringing proceedings

53. Moreover, the Applicants failed to demonstrate their interest in bringing proceedings, i.e, that the action must be liable, if successful, to procure an advantage to the party bringing it (See inter alia, order of the General Court of 17 December 2020, *Wagenknecht v Commission***,** Case T-350/20, paragraph 30).

54. Indeed, in the present case, a measure pursuant to Article 46(4) of the EBCG Regulation, even if adopted, would bring no advantage to the Applicants:

55. **First**, and as already mentioned above, the measure is not capable of modifying their request for asylum or of facilitating their entry.

56. **Second**, it would in no way remedy any prejudices they may have suffered, even if these were to be established. Again, the Defendant stresses that a measure under Article 46(4) of the EBCG Regulation could not in any event lead to the conclusion that the applicants had been victims of a human rights violation.

57. General conclusion: The present application, based on Article 265 TFEU, is manifestly inadmissible and should thus be rejected as such.

B. Subsidiary reason of inadmissibility: Application may not be requalified as an action for annulment under Article 263 TFEU

58. For the sake of completeness, the Defendant recalls that the Applicants explicitly and exclusively base their application on Article 265 TFEU (see *"2. Subject matter of the dispute"*, *"2.1 Type and Basis of the Action"* where they indicate *"the present Application is now submitted to the Honourable Court pursuant to Article 265 TFEU",* and paragraph 14 of the application *"Form of order sought"*). Also, and consequently, the Applicants' entire line of arguments (see paragraphs 264 to 289 of the application) is based on Article 265 TFEU.

59. Therefore, the present action is clearly not an action for annulment within the meaning of Article 263 TFEU, directed against the letter of 23 March 2021.

60. That said, while the Applicants have not argued in any way in that sense, it would not be admissible to convert or otherwise reinterpret their application into an action for annulment within the meaning of Article 263 TFEU, for the following reasons:

1) A requalification in an action for annulment within the meaning of Article 263 TFEU is not possible

61. The General Court has consistently held that it is not possible to substitute a claim for annulment for the claim for a declaration of failure to act initially brought before the Court in the course of proceedings as it would modify their subject-matter. In particular, the Applicants may not rely on [the then] Article 48(2) of the Rules of Procedure to introduce a new plea at this stage of the proceedings (see, inter alia, Order of the General Court of 9 July 2009, *infeurope v Commission*, T-176/08, paragraph 42).

62. Accordingly, the Applicants may not at this stage convert their initial claim into a claim for annulment.

63. This means that their court application may not be requalified from an action for failure to act under Article 265 TFEU to an action for annulment pursuant to Article 263 TFEU and therefore remains manifestly inadmissible.

2) The letter of 23 March 2021 does not constitute a challengeable act

64. In any case, even if such requalification would be possible, *quod non*, an action for annulment would be inadmissible as it would be directed against the letter of 23 March 2021 which is not a challengeable act under Article 263 TFEU.

65. In that regard, the Defendant recalls that an action for annulment based on Article 263 TFEU is available against all measures adopted by the EU institutions, whatever their nature or form, **which are intended to have binding legal effects capable of affecting the interests of the applicant by bringing about a distinct change in his legal position** (Order of 14 July 2020, *Sasol et al v ECHA*, Case T-640/19, para 28 and the case-law cited)).

66. The letter of 23 March 2021 lacks such effect. Said letter does not purport, based on its wording, subject-matter and context, to be an act intended to produce **binding legal effects capable of affecting the interests of <u>the Applicants</u> by bringing about a distinct change in the legal position** of the Applicants:

67. **First**, the reply of Frontex has no *intention of having* binding legal effects but merely explains the position of Frontex with respect to the request in Annex A.2.

68. **Second**, and in any event, said reply is not capable of affecting the interests of the Applicants by bringing about a distinct change in their legal position. As already indicated above, the reply of the Executive Director does not concern the Applicants – as it is addressed to entities which are not the Applicants – nor did the invitation to act even mention the Applicants.

69. Consequently, the letter does not produce binding legal effects as regards the Applicants within the meaning of the jurisprudence.

3) Lack of locus standi

70. For the same reasons as described above, the Applicants do not fulfil the condition for an action for annulment under Article 263 TFEU as they are neither directly nor individually concerned by the letter of 23 March 2021.

71. In conclusion: the Applicants could not introduce an action on the basis of Article 263 TFEU.

C. As to the costs of the proceedings

72. The Defendant notes that the orders sought indicated in paragraph 14 of the application do not contain any order sought about the costs of the proceedings, nor do the Applicants express any views on this matter elsewhere in their application.

73. Moreover, the present application not only turns out to be manifestly inadmissible, but amounts, in the Defendant's view, to an instrumentalization if not misuse of the legal remedy provided in Article 265 TFEU.

74. Thus, the Applicants should bear all the costs of the proceedings, including the costs of the Defendant.

In view of the foregoing, the Defendant respectfully requests the General Court:

1. to reject the application as manifestly inadmissible,

2. to order the Applicants to pay all the costs, including those of the Defendant.

[redacted] [redacted]

Agents

[redacted] LL.M.
Rechtsanwalt