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**URGENT**

*Preliminary Action Pursuant to Article 265 TFEU*

Letter of Formal Notice Before Action

**Ms. Aija Kalnaja**  
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Frontex  
Pl. Europejski 6  
00-844 Warsaw  
Poland

**06 June 2022**

**Subject: Immediate Suspension or Termination of Activities in the Aegean Sea Region**

1. This is a request for action on the part of the European Border and Coast Guard Agency ('Frontex' or 'the Agency'), pursuant to Article 265 of the Treaty on the Functioning of the European Union ('TFEU') (hereafter the 'Request' or 'Pre-action').
2. The present preliminary action is submitted on behalf of two asylum seekers, victims of abduction and forcible transfer, abandonment at sea, collective expulsion and enforced disappearance, in operations *related* to the activities of the Agency in the Aegean Sea Region ('ASR'). One asylum seeker understandably wishes to remain anonymous. The other is Mr. A. Hamoudi (hereafter 'the Applicants').
3. The Applicants are legally represented by *front*-LEX, a legal hub tasked with challenging EU migration policies through strategic litigation before international, European and EU Courts. *Front*-Lex is providing legal advice and representation to individual and organizational victims of violations of fundamental rights committed by the EU agencies and member states.<sup>1</sup>
4. In the face of corroborated violations of fundamental rights and international protection obligations *related* to the activities of the Agency in the Aegean Sea, which are of a serious nature and are likely to persist, we hereby call upon the Agency to consider its position vis-à-vis its activities in the host Member State Greece and to immediately suspend or terminate its activities in the Aegean Sea Region, in compliance with the

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Agency's obligations under Article 46 (4) of European Border and Coast Guard Regulation ('EBCG Regulation').<sup>2</sup>

5. We remind you that in taking a decision to suspend or terminate Frontex's activities in the Aegean Sea, you are obliged to provide duly justified grounds for your decision, within the meaning of Article 46 (6) of the EBCG Regulation.
6. A. Hamoudi, one of the Applicants, is a Syrian asylum seeker. On 28 April 2020, together with 21 other asylum seekers, Hamoudi made landfall on the island of Samos, Greece.<sup>3</sup> Later that day they were rounded up, abducted, detained, forcibly transferred to a life raft without any means of propulsion, and towed into the middle of the Mycale Strait by the Hellenic Coastguard ('HCG'), where they were 'pushed back' for hours by the HCG and pulled back by the tide, before they were abandoned and eventually recovered by the Turkish Coastguard ('TCG') in Turkish Territorial Waters ('TTW'). During the pushback operation directed against Mr. Hamoudi on **28–29 April 2020**, a **Frontex Surveillance Aircraft ('FSA') overflew the scene twice.**<sup>4</sup>
7. In his legal action for damages incurred as a result of Frontex's unlawful conducts and omissions, Mr. Hamoudi has managed to establish how the Agency, through its very own Executive Director Leggeri<sup>5</sup> and the Agency's Management Board's Working Group<sup>6</sup>, intentionally and inexcusably distorted evidence pertinent to his unlawful collective expulsion on **28–29 April 2020**, changing its position **7 times** with respect to a simple fact that was eventually easily proved in the application in **Case T-136/22** – the presence of Frontex Surveillance Aircraft in the crime scene.<sup>7</sup>
8. The collective expulsion operation directed against Mr. Hamoudi on **28–29 April 2020**, jointly executed by the HCG and Frontex, attributable to Frontex<sup>8</sup>, exemplifies how the Agency's systematic unlawful conducts and omissions in relation to its positive obligations reiterated in Art. 46(4) and (5) of its founding regulation, directly affect the lives and freedoms of Mr. Hamoudi and other asylum seekers placed in similar situation.
9. Moreover, the Agency's intentional and systematic *abuse of power* in distorting and concealing incriminating evidence pertinent to the pushback operation of **28–29 April 2020** or any other well-documented and corroborated violations *related* to its activities, i.e. the Agency's inability to adopt a "new culture in which **failure is acknowledged**"<sup>9</sup>, constitutes in itself yet another reason to consider that the widespread and systematic

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<sup>2</sup> REGULATION (EU) 2019/1896 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624.

<sup>3</sup> Bellingcat 'Samos And the Anatomy of a maritime Push-Back', 20 May 2020, <https://www.bellingcat.com/news/uk-and-europe/2020/05/20/samos-and-the-anatomy-of-a-maritime-push-back/>; for a first person account by Mr. Hamoudi, see <https://twitter.com/LexFront/status/1504389380856811524>

<sup>4</sup> Case T-136/22, Alaa Hamoudi v European Border and Coast Guard Agency, section 1.5 in the main application; Mr. Hamoudi is the applicant in the case.

<sup>5</sup> Ibid, paragraphs 145–147.

<sup>6</sup> Ibid, paragraphs 148–157.

<sup>7</sup> Ibid, paragraphs 158–160.

<sup>8</sup> Ibid, section 4.

<sup>9</sup> Ibid, paragraph 175. More from Commissioner Johansson: "I think it's important we have a culture that we learn from mistakes and [...] it's important to show that the Agency is listening to criticism".

violations taking place in the ASR “*are likely to persist*”, within the meaning of Art. 46(4).

10. In other words, the undisputable occurrence, nature and magnitude of violations *related* to the activities of the Agency in the Aegean, sufficiently constitute a compelling reason to consider that these violations “are of a serious nature” *or* “are likely to persist”. However, the Agency’s abuse of power in an intentional and systematic distortion of evidence and extensive attempts to cover up these violations, constitute in itself an independent compelling reason to consider these violations “are likely to persist”.<sup>10</sup>
11. Under EU Law, the ED is under an **ongoing obligation** to consider whether there are fundamental rights violations. Once the ED “considers that there are violations [...] related to the activity concerned that are of a serious nature or are likely to persist”, the ED **enjoys no discretion** regarding whether or not to activate Art. 46 and adopt at least one of the gradual and proportionate measures prescribed in Art. 46 (e.g. partial withdrawal of funds, temporary suspension and so on). The ED is obliged (“shall”) to adopt **at least one** of these proportionate measures. Her discretion comes into play only with respect to the *type* of response under Art. 46 adopted vis-a-vis these violations, not the response itself.
12. The Law has no sword and cannot be a ‘weapon’. What is ‘very blunt’ is a joint operation tasked with throwing children, women and men into the water by armed European agents, not its termination. Your recent statements before the European Parliament, reveal the same misunderstanding of former ED Leggeri and his rule of law defiance when it comes to the proper application of Art. 46(4). When asked about the recommended application of Art. 46(4) to Frontex’s activities in Greece, you stated –  
  
“On the article 46, again I will be very frank, **it is a very blunt weapon**, and you mentioned that it is important we are there, that we participate and we see... **article 46 means that Frontex would not be there**. So, we would like to see that this is the last resort that we apply”<sup>11</sup>.
13. First, we dispute the assumption that the Agency’s presence in the Aegean Sea or elsewhere “have a de-escalating and preventive effect”<sup>12</sup>, **as was previously argued by ED Leggeri and now is uncannily being echoed by you**. On the contrary, we suggest Frontex serves as a legitimizer and facilitator of unlawful conducts for the defiant host Member State.<sup>13</sup>
14. But more importantly, such a stance is completely irrelevant to the proper application of Art. 46. **The legislator simply did not contain such consideration within Art. 46**. It was the legislator who struck the balance, with a view to guaranteeing the protection of fundamental rights during the Agency’s activities, when prescribing **gradual and proportionate measures – not a “very blunt weapon”** - to be taken in the face of persisting *or* serious fundamental rights violations *related* to the Agency’s activities.

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<sup>10</sup> Ibid, paragraphs 15-22.

<sup>11</sup> European Parliament, ‘Committee on Civil Liberties, Justice and Home Affairs’, 30 May 2020, 18.45.25 – 18.47

<sup>12</sup> Letter from Fabrice Leggeri dated 23 March 2021 (CGO/LPU/HECA-RAPO/2630/2021)

<sup>13</sup> See, inter alia, paragraphs 56-58 herein.

15. If you wish the Agency – an administrative body - to take in consideration what is currently not contained in Art. 46(4), we suggest you pursue a career as a legislator. For the time being, we strongly endorse your opening remarks as the Agency’s acting Executive Director appearing before the European Parliament:

**“We have a mandate... we just have to implement it, without picking and choosing which parts we do implement”<sup>14</sup>.**

16. According to the Regulation **currently in force**, and to your fairly narrow margin of appreciation to consider whether “there are violations” in the meaning of Art. 46(4) - in the circumstances of the case at hand, **considering there are no such violations would constitute a manifest error of assessment**. As argued in both SS and ST v Frontex<sup>15</sup> and Alaa Hamoudi v European Border and Coast Guard Agency<sup>16</sup>, the last time the Agency’s Executive Director defined its position vis-à-vis the applicability of Art. 46(4) to the contentious activities in the Aegean, he had not only committed a manifest error of assessment, failing to fulfil his duty of diligence, but his decision has been taken to achieve an end other than guaranteeing the protection of fundamental rights, and as such, amounted to a *misuse of power*.<sup>17</sup>

17. As shown below, in a stark contrast to the findings of the Working Group of the Management Board of Frontex, OLAF did find Frontex is involved in ‘push back’ operations in the ASR and that this involvement implicates its most senior management including but not limited to the Executive Director of the Agency. The OLAF report reveals ED Leggeri and other agents were complicit in serious *and* persistent violations of fundamental rights within the meaning of art. 46 in the Aegean Sea Region. Leggeri resigned and one other person is on leave, but these violations are ongoing. They are ongoing because they were by no means limited to the conduct of Leggeri or reflected exceptional failures of Frontex’s policy. They were under Leggeri, and still are under your leadership, Frontex’s policy. The fact crimes continue to be committed means someone is committing them, that culprits other than Leggeri are still operating in your organization. EU law confers to you the responsibilities, obligations and powers to act under Art. 46. As long as you refrain from doing so, you too are culpable, no less than Leggeri was.

**I. The duty of the ED to act with diligence and in good faith when taking a decision under Art. 46(4)**

18. On a general note, this preliminary action is being submitted to you, Ms. Kalnaja, as you are currently deputising the vacant Executive Director function and assuming the lead of the Agency, owing to the European Anti-Fraud Office’s (OLAF) incriminating findings against a *number* of executive staff members of the Agency, including but not limited to its former ED Leggeri, and the latter’s consequent resignation.<sup>18</sup>

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<sup>14</sup> Supra, note 11, 18.16.50 – 18.17.00

<sup>15</sup> Case T-282/21, SS and ST v Frontex.

<sup>16</sup> Supra, note 4.

<sup>17</sup> Ibid, section 3.

<sup>18</sup> Management Board conclusions from the extraordinary MB meeting of 28-29 April 2022, <https://frontex.europa.eu/media-centre/management-board-updates/management-board-conclusions-from-the-extraordinary-mb-meeting-of-28-29-april-2022-nr08YV>.

19. However, given Frontex’s refusal, including under your leadership, to provide its supervisory body, the European Parliament,<sup>19</sup> with access to the OLAF’s incriminating report,<sup>20</sup> and considering your senior managerial position within the Agency since 2018 and particularly as Deputy of ED Leggeri’s since 2021 and throughout the period examined by OLAF – **we consider that in appointing you acting Executive Director, the Agency’s Management Board has committed a manifest error of assessment.** No administrative authority that is exercising ordinary care and diligence would have nominated you, Ms. Kalnaja, to fulfil the position exclusively entrusted with the application of, *inter alia*, Article 46, which was conceived to be the Agency’s most efficient fundamental rights safeguard.
20. As will be demonstrated below, the OLAF’s report goes beyond its recommendation to take disciplinary measures against former ED Leggeri and *other* senior officials over their involvement in and covering up of ‘pushback’ operations *related* to the activities of the Agency in the Aegean. The report depicts an overreaching ‘*organizational culture*’ in which **failure to observe and to guarantee the protection of fundamental rights is intentionally not acknowledged**<sup>21</sup>, a *culture* of concealment and retaliation against decent officers, which most likely implicates you, Ms. Kalnaja, in your previous capacity as ED Leggeri’s Deputy.
21. As long as the Agency – especially since your appointment as acting Executive Director – refrains from providing the European Parliament with access to the 200 pages OLAF report, **there is a presumption of your unsuitability to perform in good faith the duties of the Agency’s Executive Director, exclusively in charge of the application of fundamental rights safeguards.**
22. The MB’s decision to appoint you, “as the most senior Deputy Executive Director”<sup>22</sup>, stems from a manifest error of assessment. In fact, being the most senior Deputy Executive Director of Mr. Leggeri must have been constructed against your appointment to the position of acting Executive Director. It is exemplified, *inter alia*, by the shady crusade ED Leggeri conducted against the Agency’s former FRO, Ms. Arnaez<sup>23</sup>, who already in 2016 called for the Agency to suspend or to terminate its activities in Hungary, in accordance with Art. 46(4)<sup>24</sup>, and who harshly criticised ED Leggeri’s unlawful launching of RBI Aegean, in breach of Art. 46(5).<sup>25</sup> As a consequence of former ED Leggeri’s unlawful attempts to discredit and marginalise FRO Arnaez, “**she has been mostly absent and not able to perform her duties**”.<sup>26</sup>
23. Former ED Leggeri did not target only specific senior officers who have shown observance of the Agency’s fundamental rights obligations, but he had also taken down a whole category of Fundamental Rights Monitors,<sup>27</sup> meant to be the Agency’s ‘eyes

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<sup>19</sup> EBCG Regulation, Art. 6.

<sup>20</sup> [https://twitter.com/Tineke\\_Strik/status/1512058595839561729?cxt=HHwWgsC-yYPS9PspAAAA](https://twitter.com/Tineke_Strik/status/1512058595839561729?cxt=HHwWgsC-yYPS9PspAAAA).

<sup>21</sup> Supra, note 9.

<sup>22</sup> Supra, note 18.

<sup>23</sup> Director-General Pariat’s letter to Executive Director Leggeri, 18 December 2020; Supra, note 11, paragraphs 55–59.

<sup>24</sup> Supra, note 4, paragraphs 16–18.

<sup>25</sup> Ibid, section 1.2 and 2.

<sup>26</sup> Supra, note 19.

<sup>27</sup> Supra, note 15, section 3.3.

*and ears*’ on the ground in monitoring the existence of violations *related* to the activities of Frontex within the meaning of Art. 46.

24. Conversely, senior officials who were either appointed by or otherwise have uncannily thrived in former ED Leggeri’s domain, such as Thibault de La Haye Jousselin, or even the Agency’s current FRO, **proved to be conformingly antagonistic toward the Agency’s international protection and fundamental rights obligations.**<sup>28</sup>
25. You, Ms. Kalnaja, as former ED Leggeri’s most senior Deputy and in your previous capacities within Leggeri’s orbit, was heavily involved, for example, in the Agency’s unlawful activities in Hungary, some of which have remained effective even after the CJEU’s judgment in Case C-808/18 *Commission v Hungary*, establishing, *inter alia*, structural, systematic and widespread violations of fundamental rights and international protection obligations clearly *related* to the activities of Frontex in Hungary.<sup>29</sup>
26. You, Ms. Kalnaja, are part and parcel of the organizational ‘culture’ that should have been replaced, as Commissioner Johansson put it.<sup>30</sup> Yet, it is a matter of fact you are currently deputising for the vacant Executive Director function, exclusively responsible for the application of Art. 46. **Since the last time the Agency’s Executive Director has considered its position vis-à-vis its activities in the Aegean and decided *not* to adopt the desired measures requested by SS and ST**<sup>31</sup>, several highly credible bodies, **including a UN and EU Agencies**, have managed to establish the occurrence of *both* persisting and serious violations related to the activities of Frontex in the Aegean, within their meaning in Art. 46(4). **Following these recent revelations**, and given your appointment was meant “to maintain the Agency’s ability to act”<sup>32</sup>, we are compelled to address to you this urgent preliminary action pursuant to Art. 265 TFEU.

## II. **Former decision of ED Leggeri under Art. 46(4)**

27. Following a preliminary action pursuant to Art. 265 TFEU, submitted to ED Leggeri on 15 February 2021,<sup>33</sup> **the Agency has lastly defined its position** and decided not to adopt the measures desired by SS and ST, two asylum seekers who were trapped in Turkey following multiple collective-expulsion operations directed against them and clearly related to the activities of Frontex in the Aegean.<sup>34</sup>
28. The preliminary action of **15 February 2021** was based on, *inter alia*, evidence that emerged from a joint investigation by Lighthouse Reports, Bellingcat, ARD, the Japanese broadcaster TV Asahi and Der Spiegel,<sup>35</sup> establishing that between April and

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<sup>28</sup> Supra, note 15; Observation of the Plea of Inadmissibility, note 44.

<sup>29</sup> Supra, note 4, paragraphs 15–20.

<sup>30</sup> Supra, note 9.

<sup>31</sup> Supra, note 12.

<sup>32</sup> Supra, note 18.

<sup>33</sup> Preliminary Action Pursuant to Article 265 TFEU, “Immediate Suspension or Termination of Activities in the Aegean Sea Region”, 15 February 2021.

<sup>34</sup> Supra, note 12.

<sup>35</sup> Nick Waters, Emmanuel Freudenthal and Logan Williams, ‘Frontex at Fault: European Border Force Complicit in ‘Illegal’ Pushbacks’, Bellingcat, 23 October, 2020, available at: <https://www.bellingcat.com/news/2020/10/23/frontex-at-fault-european-border-force-implicit-in-illegal-pushbacks>; Giorgos Christides, Emmanuel Freudenthal, Steffen Lüdke and Maximilian Popp, ‘EU Border Agency Frontex Complicit in Greek Refugee Pushback Campaign, Der Spiegel,, 23 October 2020, available at:

August 2020, **at least six** well-documented pushback-operations were carried out in the Aegean by vessels of the host Member State Greece, which in some instances was actively assisted by vessels of other Member States deployed to Frontex. It has been reported that all incidents occurred while Frontex assets – either surveillance planes flying overhead or vessels deployed in the Aegean – were present at the scene of a refugees pushback or within a certain range from which they were expected to be able to track the distinct signature of pushback operations.<sup>36</sup>

29. At the time of submission, the Frontex Management Board Working Group (‘MBWG’), established on 26 November 2020<sup>37</sup> “to inquire about the **true events**” with regard to the media outlets’ investigation, has already published its preliminary report<sup>38</sup>. However, without any justification, the MBWG has completely **declined to investigate 3 out of the 6** well-documented collective expulsion operations reported by the media outlets.
30. At the time **the Agency had lastly defined its position** and decided not to adopt the desired measures requested by SS and ST, on **23 March 2021**<sup>39</sup>, the MBWG had already published its final report.<sup>40</sup> In its **final** report, the MBWG concluded that in relation to **5 alleged collective-expulsion operations**, “it has not been possible to completely resolve the incidents beyond any reasonable doubt”.
31. However, when communicating his decision on the preliminary action of **15 February 2021**, ED Leggeri stated that “incidents you refer to in the letter have been examined and **clarified** in the FRaLO WG final report. **None of the incidents** included in the FRaLO WG final report **could substantiate fundamental rights violations**”.<sup>41</sup>
32. Notwithstanding the fact the MBWG’s **final** report could not have clarified **5** alleged collective expulsion operations, **an unknown Frontex official**, other than the MBWG, ‘cleared’ **4** out of the **5** cases the body that was assigned for the task failed to do. In a strange coincidence, the **4** cases were closed on **15 March 2021**, the very same day the Chairperson of the MB **Marko Gašperlin** was publicly questioned before the European Parliament: “*Regarding to the, this morning, yes, we have the meeting of the Executive Board, and we were **informed by the Executive Director** that the four pending serious incidents were cleared... it was just mentioned this morning that 4 are **somehow** close and that 1 is still pending*”<sup>42</sup>.
33. With time we have learned that the one remaining pending case – revolving around a *notorious* pushback operation that was live-streamed to Frontex HQ, taking place on

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<https://www.spiegel.de/international/europe/eu-border-agency-frontex-complicit-in-greek-refugee-pushback-campaign-a-4b6cba29-35a3-4d8c-a49f-a12daad450d7>

<sup>36</sup> Supra, note 33.

<sup>37</sup> The WG was established by decision No. 39/2020 of FRONTEX Management Board.

<sup>38</sup> The Fundamental Rights and Legal Operational Aspects of Operations in the Aegean Sea, Preliminary Report of the Frontex Management Board Working Group’, 19 January 2021.

<sup>39</sup> Supra, note 12.

<sup>40</sup> The Fundamental Rights and Legal Operational Aspects of Operations in the Aegean Sea, Final Report of the Frontex Management Board Working Group’, 1 March 2020

<sup>41</sup> Ibid; note 12.

<sup>42</sup> EP Frontex Scrutiny Group (FSWG) meeting of 15 March 2021, 14:40:06 – 14:40:29, 15:12:30 – 15:12:48

the **18–19th of April 2020**<sup>43</sup> and carried out jointly by the HCG and Frontex Surveillance Aircraft – had also been mysteriously cleared<sup>44</sup>.

34. Following ED Leggeri’s communication from **23 March 2021**, SS and ST, assisted by Front-Lex, presented a legal action for failure to act against Frontex before the CJEU.<sup>45</sup> In the main application, the applicants conducted a forensic analysis of selected incidents examined by the MBWG, the **six** incidents reconstructed and reported by the media outlets in **October 2020**, including the ones the MBWG uncannily declined to investigate, as well as additional incidents the MBWG also, without any explanation, decided not to inquire.
35. The analysis in the main application predominantly draw on the following sources: the Bellingcat investigation of **October 2020** and previous reports ; a leaked MB Note from **November 2020**; a leaked WG Preliminary Report dated **January 2021**; the WG Final Report dated **March 2021**; testimonies of ED Leggeri, the Chair of the MB and other Frontex officials before the LIBE committee and the Frontex Scrutiny Group of the European Parliament; and 60 GB of visual evidence of countless collective expulsions provided to the European Parliament by Turkey.
36. Among others, the applicants in Case T-282/21 have meticulously reconstructed and corroborated the occurrence of, *inter alia*, the following collective expulsion operations, all of which *related* to the activities of the Agency in the Aegean: The **2 March 2020** Incident<sup>46</sup>; the **30 October 2020** Incident<sup>47</sup>; the **10 August 2020** Incident<sup>48</sup>; the **28-29 April 2020** Incident<sup>49</sup>; the **4 June 2020** Incident<sup>50</sup>; the **5 June 2020** Incident<sup>51</sup>; the **19 August 2020** Incident<sup>52</sup>; the **8 June 2020** Incident<sup>53</sup>; the **15 August 2020** Incident<sup>54</sup>; the **18–19 April 2020** Incident<sup>55</sup>; the **27 July 2020** Incident<sup>56</sup>.
37. The applicants in Case T-282/21 demonstrated how in relation to these and other well-documented pushback operations, which are all *related* to the activities of the Agency in the Aegean, the MBWG simply declined to examine the incriminating evidence provided by the media outlets; distorted or ignored relevant information the Management Board itself was provided with; mistook dates and incidents numbers; absurdly applied the evidentiary standard of ‘beyond any reasonable doubt’, pertinent to criminal proceedings rather than to administrative procedure related to the protection of fundamental rights; allowed one key suspect, the host Member State Greece, to serve as a member of the supposedly impartial internal investigative body; allowed another key suspect, ED Leggeri, to serve as an ‘*expert*’ who participated in its online

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<sup>43</sup> Supra, note 15, section 3.4.10

<sup>44</sup> Supra, note 4, section 1.4 in the main application

<sup>45</sup> Supra, note 15.

<sup>46</sup> Ibid, section 3.4.1; see also, supra note 4, application in Case T-136/22, section 1.3.

<sup>47</sup> Ibid, section 3.4.2.

<sup>48</sup> Ibid, section 3.4.3.

<sup>49</sup> Ibid, section 3.4.4; see also, supra note 4, application in Case T-136/22, section 1.5.

<sup>50</sup> Ibid, section 3.4.5.

<sup>51</sup> Ibid, section 3.4.6.

<sup>52</sup> Ibid, section 3.4.7.

<sup>53</sup> Ibid, section 3.4.8.

<sup>54</sup> Ibid, section 3.4.9.

<sup>55</sup> Ibid, section 3.4.10; see also, supra note 4, application in Case T-136/22, section 1.4.

<sup>56</sup> Ibid, section 3.4.11.

consultations; systematically failed to properly analyze the evidence it has managed to obtain; refrained from taking a position regarding contradicting factual versions, also when Greece's version was found to be 'inconsistent'; deemed 'plausible' Greece's version, that individual assessments were somehow conducted while 'migrants' are being towed or forcibly transferred to 'life' raft and just before they were abandoned in Turkish Territorial Water, and that, out of thousands individuals collectively expelled, "no claims for asylum or international protection were brought forward, even though such".<sup>57</sup>

38. Reconstructing and analyzing the very same evidence that were at the disposal of the MBWG – albeit incomplete – as well as the Working Group's preliminary and final reports, the applicants in Case T-282/21, assisted by Front-Lex, have demonstrated both that the MBWG has manifestly failed to fulfil its duty to act with diligence and in good faith, and that there are *persistent* and *serious* violations *related* to the activities of the Agency in the Aegean, within the meaning of Art. 46(4).
39. **Frontex has not used its opportunity to lodge a statement of defense. While raising a formal plea of inadmissibility – which was upheld by the Court - it declined to address the substance of the application, to refute the factual and legal argumentation altogether, or to admit the account of facts, in whole or in part, and to refute their alleged legal characterization.**
40. The very same incidents the Agency's MB WG has failed to properly investigate, or was actively engaging in their cover up, were ultimately investigated by the EU own Anti-Fraud Agency (OLAF).<sup>58</sup>

### **III. The Incriminating Findings of OLAF's Investigation**

41. OLAF, an EU Agency, has corroborated both that there are serious and persisting violations in the meaning of Art. 46(4), related to the Agency's activities in the Aegean, and that the Agency's systematic distorting of pertinent evidence and covering up their commission – through ED Leggeri and the Management Board's Working Group – constitute in themselves such violations and an independent evidence they "are likely to persist".
42. With the good faith, professional competence and ethics the WG of the MB lacked, OLAF succeeded in obtaining the evidence that was fairly accessible all this time during which thousands human beings continued to be abducted, thrown into the water or abandoned at sea.
43. It has been reported that following its forensic analysis, OLAF's report "accuses three members of Frontex leadership of having violated EU Regulations. Furthermore, those

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<sup>57</sup> Supra note 15, Section 3.4 in the main application.

<sup>58</sup> Jacopo Barigazzi, 'EU watchdog opens investigation into border agency Frontex', Politico, 11 January 2021, <https://www.politico.eu/article/olaf-opens-investigation-on-frontex-for-allegations-of-pushbacks-and-misconduct/> ; Nikolaj Nielsen, 'EU anti-fraud office launches probe into Frontex', EU Observer, <https://euobserver.com/migration/150574>.

violations were allegedly severe enough that OLAF has recommended disciplinary measures” to be taken against the three.<sup>59</sup>

44. According to the OLAF’s report, former ED Leggeri and other high-ranking officials have been busy covering up serious and persisting violations of fundamental rights and international protection obligations of the Agency.<sup>60</sup>
45. While insistently hampering the European Parliament’s effective supervision of the Agency by declining to provide it with access to the OLAF’s report, the Agency, and yourself undoubtedly included, have had access to the 200 pages’ report, which is based on the unanimous testimonies of no less than 20 different witnesses. **You are therefore fully aware of the incriminating findings in the OLAF’s report** indisputably establishing that there are *prototypical*, serious and persisting violations related to the activities of the Agency in the Aegean in the meaning of Art. 46(4), which were previously absurdly ‘cleared’ by the MBWG.
46. The OLAF’s report also corroborate the factual and legal arguments that were set forth in the main application in Case T-282/21, which the Agency has declined to address.<sup>61</sup> The OLAF’s report not only corroborates the existence of violations which are in themselves serious and persisting in the meaning of Art. 46(4), but also the fact that the Agency’s engagement in their covering up constitutes an independent reason to consider they ‘are likely to persist’.
47. The Agency’s systematic engagement in the covering up of violations in the meaning of Art. 46(4) and **its reluctance – to date – to publicly acknowledge and endorse the finding of the OLAF’s report**, politically shield Greece and reinforce its ongoing execution of unlawful new ‘tactics’, ‘preventive measures’ of ‘early detection’ and ‘prevention of entry’, or any number of such codenames for pushback operations.<sup>62</sup>
48. The Agency’s repudiation of the findings of OLAF, a specialized investigative EU Agency, which constitute an undisputable evidence for the existence of serious and persistent violations *related* to the activities of the Agency in the Aegean, in the meaning of Art. 46(4), amounts to a manifest error of assessment, which an administrative authority, exercising ordinary care and diligence, would not have committed in similar circumstances.
49. Having access to the 200 pages OLAF’s report, you are fully aware of certain images obtained by OLAF which “are proof that Frontex leadership knew just a few weeks after the pushback commenced that Greek officials were violating EU law in the Aegean”.<sup>63</sup>

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<sup>59</sup> Giros Christides, Steffen Lüdke, Maximilian Popp and Tomas Stadius, ‘Pressure Growing on Frontex Chief from Pushback Investigations’, Der Spiegel, 21 March 2022, <https://www.spiegel.de/international/europe/we-have-a-lot-of-evidencepressure-growing-on-frontex-chief-from-pushbacks-investigation-a-047934ed-5f94-44c8-8474-df974644f002>.

<sup>60</sup> Ibid.

<sup>61</sup> Supra, paragraph 33.

<sup>62</sup> Supra, note 4, section 1 and 4 in the main application.

<sup>63</sup> Supra, note 59.

50. You are also fully aware that these images were produced by a Frontex Surveillance Aircraft (FSA) that was jointly executing an attempted murder and collective expulsion of 22 asylum seekers, taking place on **18–19 April 2020**.
51. In fact, the Agency, through its MBWG, was already aware of these findings even prior to the publication of the images obtained by OLAF: The MBWG was aware of the “*Structured Facts Capture*” pertaining to this pushback operation as it appeared in the MBWG’s preliminary report<sup>64</sup>, rendering the telling images produced by the FSA superfluous.
52. The Agency was already aware of the undisputed facts OLAF corroborated because they were at the disposal of the MBWG already as early as **January 2021**. The MBWG had the same unambiguous picture of an illegal ‘pushback’ operation, jointly executed for 15 hours by the Hellenic Coast Guard and Frontex, while being livestreamed to the agency’s HQ.
53. The MBWG was fully aware of the towing of an engineless rubber boat towards TTW; of 22 asylum seekers first being transferred on board of the HCG’s vessel and then retransferred to the unseaworthy rubber boat; of the dubious instructions issued to the FSA, time and again, to divest its usual route; of the undisputable abandonment of 22 asylum seeker drifting on an engineless rubber boat as part of “Search and Rescue case”.
54. Despite the undisputed evidence emerging from the “Structured Fact Capture” pertaining to the pushback operation of **18–19 April 2020**, the MBWG concluded in its preliminary report that “it cannot be ruled out completely that there might have been a violation of international legal obligations”, but also that “in view of the outstanding lack of verifiable evidence *at the time*, it is not clear whether the Agency could have deployed additional efforts to make sure that the reported course of actions did not result in a serious violation [...] related to the Agency’s activities”.<sup>65</sup>
55. The reasoning of the MBWG was extremely absurd, insofar as the lengthy pushback operation of **18–19 April 2020** was livestreamed to Frontex HQ in Warsaw “*at the time*” of its occurrence, i.e., in real-time, the Agency had an “outstanding” amount of direct, external, objective clear-and-convincing evidence of a pushback operation of 22 asylum seekers.
56. Only an investigative body that despite sufficient incriminating evidence could not positively establish a violation and instead suggests a violation “cannot be ruled out completely”, goes further down the Newspeak-road saying that such an incredible amount of evidence directly broadcasted to Frontex in real-time constitutes an “**outstanding lack of verifiable evidence**”.
57. According to evidence on file with the undersigned, OLAF has heard *multiple* witnesses and obtained *multiple* evidence suggesting the **18–19 April 2020** pushback operation was only one among several *prototypical* collective expulsion operations related to the

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<sup>64</sup> Supra, note 38, pages 6–7.

<sup>65</sup> Ibid, page 8

activities of the Agency in the Aegean. *Prototypical* both in relation the *modus operandi* of their execution and the Agency's *modus operandi* of their covering up.

58. **Our evidence shows that OLAF's report established the involvement of Frontex in at least 6 cases similar to the one of 18–19 April 2020. Also, the Bellingcat investigation from October 2020 have reconstructed exactly 6 cases of 'pushback' operations in which Frontex vessels were either in proximity or directly at the scene. These cases were either never examined by the MBWG or *somehow* 'cleared' by the Agency.**
59. Our evidence suggests that OLAF's report reaffirms the allegations presented in the main application in Case T-282/21, which were never addressed by the Agency: **that there are serious and persisting violations related to the Activities of the Agency in the Aegean, in the meaning of Art. 46(4)**; that Frontex's executive management was aware of the complicity of its assets and agents in illegal 'pushback' operations that were seriously and persistently endangering the lives of vulnerable persons; that information and evidence related to these crimes were handled in a manner that would fail the proper monitoring, reporting and investigation of these incidents as EU law commands; that this systematic, intentional and **politically-motivated** cover up heavily affected the operation of Frontex's assets and agents on the ground and imposed a *modus operandi* that triggers not only organizational but also criminal individual responsibility.
60. As was already argued herein, the OLAF's report constitutes a sufficient evidence for the existence of both serious and persisting violations *related* to the activities of the Agency in the Aegean Sea, in the meaning of Art. 46(4). However, the Agency's continuous unwillingness to acknowledge the existence of these violations, when presented by the media outlets, when argued in Case T-282/21 and most recently when reported by the EU Anti-Fraud Agency, **constitutes in itself a compelling evidence these violations "are likely to persist"**.
61. The Greek authorities use Frontex's decision not to apply Art. 46(4), and the implication there are **no** violations *related* to its activities in the Aegean, as the utmost alibi defence against the mounting allegations of the widespread and systematic attack directed against asylum seekers in the Aegean Sea:

“[...] **Frontex is there as well, so you cannot accuse Greece so easily**”.<sup>66</sup>

62. As long as the Agency categorically and publicly denies there are violations related to its activities in the Aegean, notwithstanding such violations were established by an EU Agency, OLAF, these violation *"are likely to persist"*. Frontex's uninterrupted activities in the region confer on Greece a presumption of regularity, legality and legitimacy. Most recently, Frontex's uninterrupted activities in the Aegean served the Greek National Transparency Authority, in finding there was no basis whatsoever for the allegations that collective expulsion operations are systematically taking place in

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<sup>66</sup> The Greek Minister of Citizen Protection's statement in response to accusations of fundamental rights violations taking place in the Aegean, European Parliament, 'LIBE Committee meeting', 6 July 2020, 17:46:25 – 17:46:55.

the Aegean.<sup>67</sup> Basing its conclusion on the ‘perception’ of police officers, border guards, religious leaders and chairs of local associations, the Greek National Transparency Authority ‘cleared’ all allegations like the Agency did before, in harsh contrast with the incriminating findings of an investigative EU Agency, OLAF.

#### **IV. Incriminating Evidence Produced by the United Nations High Commissioner for Refugees**

63. Since the last time the Agency, through its former ED Leggeri, considered its position and took a decision under Art. 46(4), the UNHCR has provided yet another compelling evidence for the existence of serious and persisting violations related to the activities of Frontex in the Aegean, in the meaning of Art. 46(4).
64. In his statement from **February 2022**, the **UN High Commissioner for Refugee Filippo Grandi** stated that, at the same period OLAF was conducting its investigation into allegations related to the activities of Frontex in the Aegean, “**at least three people are reported to have died in such incidents since September 2021 in the Aegean Sea, including one most recently in January**”.<sup>68</sup> According to the High Commissioner, “UNHCR has recorded almost **540 reported incidents of informal returns by Greece** since the beginning of 2020”.
65. In accordance with Art. 46(6) of the EBCG Regulation, when taking a decision under Art. 46(4), the ED shall take in account, *inter alia*, reports of relevant international organisations. The UNHCR’s findings from **February 2022**, establishing there are serious and persisting violations *related* to the activities of the Agency in the Aegean, should be taken in account when you consider the applicability of Art. 46(4) to the case at hand, and to compel you to suspend or terminate the Agency’s activities in the Aegean.
66. When in **March 2021** the UNHCR provided the Agency with evidence for the commission of several hundred cases of alleged pushbacks related to the activities of the Agency in the Aegean,<sup>69</sup> not only your predecessor, ED Leggeri, declined to take these findings into account, but he had misled the European Parliament in stating “Frontex is not aware of the exact information observed by UNHCR [...] Frontex has no exact information [...] and thus is not in the position to further consult on it”.<sup>70</sup> Setting the record straight, a spokeswoman of the UNHCR told der Spiegel that information about these incidents at sea were made available to Frontex.<sup>71</sup>

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<sup>67</sup>AP, ‘Greek Independent Authority Rejects Migrant Pushback Claims’, 29 March 22, <https://apnews.com/article/europe-middle-east-greece-turkey-migration-fe45b9140430d870c3b509490c4ba9dc>.

<sup>68</sup> <https://www.unhcr.org/neu/75259-un-refugee-agency-warns-of-increasing-violence-and-human-rights-violations-at-european-borders.html>

<sup>69</sup> Spiegel Austria, “UN Refugee Agency Counts Hundreds of Alleged Pushbacks”, 27 March 2021, <https://tinyurl.com/3fnzyykh>; UNHCR, ‘UNHCR calls on Greece to investigate pushbacks at sea and land borders with Turkey’, 12 June 2020, <https://www.unhcr.org/news/briefing/2020/6/5ee33a6f4/unhcr-calls-greeceinvestigate-pushbacks-sea-land-borders-turkey.html> .

<sup>70</sup> Written questions to Frontex following the LIBE Committee meeting of 16 March 2021, (supra n 24), page 1.

<sup>71</sup> The limited Times, Pushback scandal in the Aegean Sea: Internal documents burden Frontex boss Leggeri, 26 May 2021, <https://newsrnd.com/news/2021-05-26-pushback-scandal-in-the-aegean-sea--internal-documentsburden-frontex-boss-leggeri.ByK1P5jKu.html> ;Der Spiegel, (supra n 113); <https://twitter.com/bellingcat/status/1415600639015596032>;

67. We call you to refrain from breaching your duty to act with diligence, to refrain from committing a misuse of power like your predecessor did in similar circumstances, and to take in account the evidence produced by UNHCR in **February 2020**, establishing there are violations related to the activities of Frontex in the Aegean, in the meaning of Art. 46(4) and in accordance with Art. 46(6).

#### **V. Self-incriminating Evidence Produced by the Greek Authorities**

68. According to the Greek Minister of shipping and Island Policy, Ioannis Plakiotakis, the Hellenic Coast Guard ('HCG') has 'saved' 29,000 refugees and migrants in 2021. But only 3,900 arrivals were registered that year. A similar discrepancy of circa 18,000 individuals between those 'rescued' at sea and those registered on shore also exists in 2020.<sup>72</sup> What happened to 43,000 human beings, who were last seen in EU territory, detected and/or intercepted by EU agents?

69. We suggest each one of these **43,000** 'serious and persistent' tragedies taking place in **2020-2021**, reported by the Greek authorities themselves, oblige you, Ms. Kalnaja, to suspend or terminate any existing operations and activities in the Aegean, to which these tragedies are clearly related.

70. Another self-incriminating 'statistics' was provided only a few days ago by the Greek authorities: According to the Greek Minister of Civil Protection, "In the first 4 months of 2020 about **40,000** illegal immigrants have tried to enter the country illegally. The police have not allowed this".<sup>73</sup> Again, we suggest these **40,000** 'serious and persistent' tragedies taking place since the beginning of **2022**, oblige you, acting Executive Director Kalnaja, to suspend or terminate any existing operations and activities of in the Aegean, to which these tragedies are clearly *related*.

#### **VI. Interim Measures of the ECHR constitute an Evidence for the Existence of violations related to the activities of the Agency in the Aegean**

71. Since the beginning of the year, the ECHR has issued **13 interim measures** concerning allegations of pushbacks related to the activities of the Agency in the Aegean and Evros<sup>74</sup>. The Greek authorities chronically fail to respect, or otherwise persistently circumvent, the ECHR's protective measures. Both the mounting interim measures of the ECHR and the Greek authorities' contempt of Court constitute a sufficient, independent evidence for the existence of violations related to the activities of the Agency in the Aegean, in the meaning of Art. 46(4).

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<sup>72</sup> "Coast Guard has saved this year 29,000 refugees and migrants [...] But only 3,900 arrivals of refugees and immigrants were recorded this year", Efsyn, '25 000 people rescued in the Aegean sea and lost and lost at sea' Dimitris Angelidis, 25 December 2021, [https://www.efsyn.gr/stiles/ypografoyn/325192\\_25000-diasothikan-stoaigaio-kai-exafanistikan-sti-steria](https://www.efsyn.gr/stiles/ypografoyn/325192_25000-diasothikan-stoaigaio-kai-exafanistikan-sti-steria).

<sup>73</sup> Skai, 20 May 2022, <https://www.skai.gr/news/greece/evros-theodorikakos-40000-metanastes-epixeirisan-na-perasoun-apo-ton-evros>

<sup>74</sup> See, for example, <https://aegeanboatreport.com/2022/03/11/groundbreaking-decision-in-our-first-pushback-case-before-the-european-court-of-human-rights/>.

## VII. Observation of the United Nation Committee on Enforced Disappearances

72. On 12 April 2022, the Committee on Enforced Disappearances ('CED') published its observations on Greece.<sup>75</sup> Enforced disappearances are Crimes Against Humanity under the Rome Statute and are prosecutable by the International Criminal Court ('ICC'). On a general note, this is perhaps the context of the reluctance of your employees to show up to work and their alleged post-trauma you reported to the Parliament about. Frontex agents now comprehend the grave consequences of their acts and omissions, namely that Frontex's joint operations in the Aegean Sea Region triggers not only organizational (Frontex) and State (Greece) responsibility, but also the **individual criminal responsibility** of *every* Frontex agent complicit in this policy, from the Fundamental Rights Monitor on the ground to the Acting Executive Director in Warsaw. This is not a theoretical scenario or an academic argument. Every Frontex agent should know, while complying with the confidentiality rules of the Office of the Prosecutor ('OTP'), that a case on the matter is currently being processed by the OTP.<sup>76</sup>
73. Until that happens, the CED has already expressed its concerns about the **“high number of migrants who have disappeared in Greek waters of the Mediterranean and the Evros river attempting to reach Greece”**, about the obstacles “family members of disappeared migrants face in order to search for and locate their loved ones”, about the **“high number of unaccompanied migrant children that have disappeared upon their arrival”** to Greece, about reports of **“children have disappeared from migrant reception centres**, in particular the so-called “hotspots”.<sup>77</sup>
74. Despite the non-cooperation of the Greek government with the work of the UN, the CED is aware of **“violent “pushbacks” and summary expulsions of migrants to Turkey, including of asylum-seekers and refugees, according to which migrants, after being confiscated their phones, personal belongings and clothes, are forced into life-rafts insufficiently dressed and abandoned adrift by Greek authorities in open waters and the Evros River, without undertaking the necessary prior individual assessment to evaluate and verify their risk of being subjected to enforced disappearance”**, of “refusals to receive or examine asylum applications at the border and cases where persons **in the State territory** were unable to lodge an asylum application”, as well as of **“migrants, including children, have routinely been held in secret detention, incommunicado and without being registered before being pushed back”**.<sup>78</sup>
75. The CED observed Greece has “to prevent and investigate the disappearance of migrants, **including in the context of pushbacks and vessels arriving by sea or via the Evros River**, and to ensure that **those responsible are prosecuted**, to **“return the remains of disappeared migrants, including unaccompanied minors”** to their relatives, and ensure “[n]o one is held in secret detention and that all allegations in this respect are investigated, **perpetrators are prosecuted** and, if found guilty, sanctioned **in accordance with the gravity of their acts**, and victims receive adequate reparation.”<sup>79</sup>

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<sup>75</sup> CED/C/GRC/CO/1

<sup>76</sup> List of suspects related to this case is on file with the authors.

<sup>77</sup> CED/C/GRC/CO/1

<sup>78</sup> CED/C/GRC/CO/1

<sup>79</sup> CED/C/GRC/CO/1

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76. The aforementioned abundance of clear-and-convincing evidence for the existence of both serious *and* persistent violations *related* to the activities of the Agency in the Aegean Sea, within the meaning of Art. 46(4), leaves you, acting ED Kalnaja, with no other legal possibility but to take at least one of the proportionate and gradual measures provided by Art. 46(4) of the Agency's founding regulation.
77. The extensive and compelling evidence presented herein were gathered and/or produced after the last time the Agency has taken a decision under Art. 46(4) of its founding regulation in relation to its contentions activities in the Aegean Sea. The aforementioned evidence was provided by **Frontex** itself, the **EU Anti-Fraud Office** OLAF, the United Nations **High Commissioner for Refugees**, the **Greek authorities**, the **European Court of Human Rights**, and the United Nation **Committee on Enforced Disappearances**.

**We hereby call upon you to act, pursuant to Article 265 TFEU, and to suspend or terminate Frontex's activities in the Aegean Sea, in compliance with your obligations under Article 46 (4) of EBCG Regulation.**

*omer shatz*

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Mr. Kharim KHAN, Prosecutor of the ICC (Case OTP-CR-61/21)