

Brussels, 11 July 2016
SGS16/06071

TO THE PRESIDENT AND THE MEMBERS
OF THE GENERAL COURT OF THE EUROPEAN UNION

PLEA OF INADMISSIBILITY

lodged by the European Council,
pursuant to Article 130(1) of the Rules of Procedure of the General Court,

in Case T-193/16

NG,

represented by Paul O'Shea, Barrister at Law, and Brian Burns, Solicitor, Burns Kelly Corrigan Solicitors, 252 Harold's Cross Road, Harold's Cross, Dublin 6W, Ireland,

Applicant

against

EUROPEAN COUNCIL,

represented by Mr Krzysztof PLEŚNIAK, Ms Sonja BOELAERT and Mr Alvaro De ELERA, legal advisers in the Legal Service of that institution, as Agents, having agreed that service may be effected on them via e-Curia or, failing that, at fax No +32.2.281.56.56 and, where necessary, at the following address: Council of the European Union, Registry of the Legal Service, for the attention of Mr Krzysztof PLEŚNIAK, Ms Sonja BOELAERT and Mr Alvaro De ELERA, rue de la Loi, 175, 1048 Brussels,

Defendant

in proceedings brought against the European Council seeking annulment of the "EU-Turkey statement" of 18th March 2016¹.

¹ See Press Release 144/16, issued on 18 March 2016, publically available at the following link: http://www.consilium.europa.eu/press-releases-pdf/2016/3/40802210113_en.pdf.

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I. INTRODUCTION

1. On 31 May 2016, the European Council was notified of the application for annulment in Case T-193/16 lodged with the General Court on 22 April 2016 pursuant to the fourth paragraph of Article 263 TFEU.
2. The application is directed against the European Council and requests the Court to annul the "EU-Turkey Statement" (the "contested statement") which was issued following an international summit, held on 18 March 2016, between the Members of the European Council and their Turkish counterpart.
3. The application states that it is brought on behalf of an individual who is a national of Afghanistan and who is staying at the "The Onofiyta Refugee Camp", Athens, Greece. The Applicant claims that he seeks international protection because he was in fear of persecution and serious harm as "*he was the target and victim of direct attacks by the Taliban who attempted to kill him*"².
4. The Applicant states that he fled Afghanistan and that he ultimately arrived in Greece by sea from Turkey "*on some date subsequent to the 18th March 2016*"³.
5. The Applicant indicates that he did not wish to claim asylum or another form of international protection in Greece, but that "*it had [...] been his wish and hope to apply for asylum in Germany*"⁴. Nonetheless, the Applicant states that he "*felt compelled*" to apply for asylum in Greece, which he eventually did. He claims to have done so "*against his wishes*" and "*with grave reservations*" and that he would not have done so "*but for*" the contested statement⁵. He contends that under current Union law and the ECJ case-law he should not have been required to apply for asylum in Greece⁶.
6. With regard to the nature of the contested statement, the Applicant contends that it constitutes an act designed to be binding in law and intended to produce legal effects of such a nature as to affect adversely his rights and interests⁷. He further contends that the aforementioned statement constitutes an international agreement⁸ concluded with Turkey by the European Council, in breach of the procedure set out in Article 218 TFEU⁹ and of his fundamental rights¹⁰.

² See application, paragraphs 5 and 6.

³ See application, paragraph 6.

⁴ See application, paragraph 6.

⁵ See application, paragraphs 7, 10 and 11.

⁶ See application, paragraphs 9 and 11.

⁷ See application, paragraph 4 and 14.

⁸ See application, paragraph 4.

⁹ See application, paragraphs 15, 44 and 54.

¹⁰ See application, in particular paragraphs 16, 46, 48 and 51.

7. The European Council submits that the application is manifestly inadmissible on the following grounds, which will be analysed in further detail below:

- a) the European Council is not the author of the contested statement and the latter cannot be attributed to it, including for the purpose of the first paragraph Article 263 TFEU;
- b) in any event, the contested statement does not constitute an actionable act, in that it is not an "*act intended to produce legal effects vis-à-vis third parties*" within the meaning of the first paragraph of Article 263 TFEU;
- c) in any event, the Applicant has no interest in bringing proceedings for the annulment of the contested statement given that he does not fall within the temporal scope of its application;
- d) and finally, in any event, the Applicant has no standing pursuant to the fourth paragraph of Article 263 TFEU given that he is neither individually nor directly concerned, and given that the contested statement does not constitute a regulatory act not requiring implementing measures.

II. GROUNDS FOR INADMISSIBILITY

a) The European Council is not the author of the contested statement

8. In his application for the annulment of the contested statement, the Applicant has cited the European Council as defendant. This is erroneous because the European Council is not the author of the contested statement and the latter cannot be attributed to it.
9. In accordance with settled case-law, pursuant to the first paragraph of Article 263 TFEU, an action for annulment can be brought only against the institutions referred to in that provision, as well as against a body, office or agency of the Union which is competent to adopt the contested act and is the author of that contested act¹¹.
10. It should be also recalled that in an action brought under Article 263 TFEU, the Court does not have jurisdiction to rule on the lawfulness of an act of the Member States,¹² nor do the Courts of the Union have jurisdiction in such an action to rule on the lawfulness of a measure adopted by a national authority.¹³ The acts referred to in Article 263, first paragraph TFEU only concern

¹¹ See order in case Farage/Parliament and Buzek, T-564/11, ECLI:EU:T:2012:403, point 18; Order in case Ledra Advertising/Commission and BCE, T-289/13, ECLI:EU:T:2014:981, points 56, 58; Judgement in case Plantavis and NEM/Commission and EFSA, T-334/12, ECLI:EU:T:2015:376, point 20.

¹² See judgement in case Spain/Parliament and Council, C-146/13, ECLI:EU:C:2015:298, points 101-102.

¹³ See order in case Bonnamy/Council, C-264/94 P, ECLI:EU:C:1995:5, point 11; Judgement in case Kesko/Commission, T-22/97, ECLI:EU:T:1999:327, point 83; Judgment in case Liivimaa Lihaveis, C-562/12, EU:C:2014:2229, point 48 and the case-law cited; Order in case Tsitouras and others/Greece, C-285/90, ECLI:EU:C:1991:84, points 4 and 5.

the acts referred to in Article 288 TFEU, which the institutions must adopt under the conditions laid down by the Treaty in the exercise of their prerogatives as public authorities¹⁴.

11. Moreover, it is also a settled line of case-law that an action for annulment is inadmissible when it is directed against "an act" that is not adopted by the Council but by representatives of the Member States acting, not in their capacity as members of the Council, but as representatives of their governments, and thus collectively exercising the powers of the Member States which are not subject to judicial review by the Court.¹⁵
12. The same applies when the action for annulment is formally directed against the European Council whereas the act in question was approved, as in the present case, not by the European Council, but by Members of the European Council meeting with their Turkish counterpart outside the legal, institutional and procedural framework of the European Council.
13. As will be demonstrated below, the contested statement was issued on 18 March 2016 by the participants of an international summit held on that day between the Members of the European Council on the one hand, and their Turkish counterpart on the other, and not by the European Council.
14. Whilst it is true that the European Council met on 17 and 18 March 2016, its agenda did not include any reference to a meeting with third parties, let alone any meeting with Turkey. In fact, the provisional agenda included seven items, amongst which item 3 "Migration"¹⁶. The deliberations of the European Council started on 17 March 2016 and continued on 18 March 2016. At the end of its meeting, the European Council approved the conclusions on migration, jobs, growth and competitiveness¹⁷.
15. After the end of the European Council meeting, a new, separate meeting was held, on 18 March 2016, by members of the European Council, with a third party, the Turkish Prime Minister. As it can be seen from the first phrase of the contested statement, it was issued following the summit between "*the Members of the European Council and their Turkish counterpart*"¹⁸. This summit was a particularly important meeting and was referred to as an "international summit" (as demonstrated by the header of the press release containing the contested statement), but it was not a meeting of the European Council.

¹⁴ See order in case Lito Maieftiko Gynaikologiko kai Cheirurgiko Kentro/Commission T-353/10, ECLI:EU:T:2010:449, point 23.

¹⁵ See judgement in case Parliament/Council and Commission, C-181/91 and C-248/91, ECLI:EU:C:1993:271, points 12-25.

¹⁶ See document EUCO 13/16 of 15 March 2016, publically available at the following link: <http://www.consilium.europa.eu/en/meetings/european-council/2016/03/17-euco-provisional-agenda/>.

¹⁷ See document EUCO 12/16 of 18 March 2016, publically available at the following link: <http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-european-council-conclusions/>.

¹⁸ See first sentence of the first paragraph of the contested statement, which reads as follows: "*Today the Members of the European Council met with their Turkish counterpart*".

16. As stated in the first sentence of the abovementioned press release, the summit of 18 March 2016 was the third in the series of international events, during which the representatives of Member States of the Union met with their Turkish counterpart to discuss Turkey-EU relations as well as the migration crisis. Before the 18th of March, the Heads of State or Government of the Member States had met with their Turkish counterpart on 29 November 2015 and on 7 March 2016, each time to discuss the same subject matters. Following each of these two previous meetings, a common statement, either referred to as an EU-Turkey statement or an EU-Turkey action plan, had been issued by the participants of these meetings¹⁹. In sum, the meetings of 29 November 2015 and of 7 and 18 March 2016 are all international events which are of an identical legal, diplomatic and organisational nature, and were not meetings of the European Council.
17. In contrast, insofar as the composition and the procedures applicable to the European Council are concerned, it is recalled that, in accordance with Article 15(2) TEU, that institution "*consist[s] of the Heads of State or Government of the Member States; together with its President and the President of the Commission. The High Representative of the Union for Foreign Affairs and Security Policy shall take part in its work.*"
18. It follows that a meeting between some or all of the members of the European Council with third parties external to the Union institutions can under no circumstance constitute a meeting of the European Council.
19. Even a meeting of all of the members of the European Council without an outside party being present does not constitute a meeting of that institution in accordance with the Treaties. For the European Council to be able to meet and exercise its prerogatives in accordance with the Treaties, it needs to be convened by its President in accordance with the procedure set out in Article 15(3) TEU and in Articles 1 to 4 of the rules of procedure of the European Council²⁰. Importantly, this includes a requirement that an official convocation accompanied by a provisional agenda, which should be adopted at the beginning of each of the meetings of the European Council. This shows that the contested statement was not adopted by the European Council.
20. It is further recalled that the European Council became an institution of the Union as a result of the Treaty of Lisbon (Article 13(1) TEU). It is presided by a fixed term President (as opposed to

¹⁹ See Press release concerning that action plan, issued on 29 November 2016, publically available at the following link: <http://www.consilium.europa.eu/en/press/press-releases/2015/11/29-eu-turkey-meeting-statement/>; see also Press release, issued on 8 March 2016, publically available at the following link: <http://www.consilium.europa.eu/en/press/press-releases/2016/03/07-eu-turkey-meeting-statement/>. For the broader context, see the European Council internet site containing the "Timeline - response to migratory pressures", publically available at the following link: <http://www.consilium.europa.eu/en/policies/migratory-pressure/history-migratory-pressure/>.

²⁰ European Council Decision 2009/882/EU of 1 December 2009 adopting its Rules of Procedure (JO L 315 du 2.12.2009, p. 51).

the previous system of six-monthly presidency) and, as set out in Article 15(1) TEU, "[...] *shall provide the Union with the necessary impetus for its development and shall define the general policy directions and priorities thereof.* [...]". More particularly, in one of the substantive fields related to the present case, the European Council, pursuant to Article 68 TFEU, "*define[s] the strategic guidelines for legislative and operational planning within the area of freedom, security and justice*".

21. In order to fulfil those functions, the European Council approves conclusions by consensus (Article 15(4) TEU). These conclusions cannot be the source of rights which individuals can invoke before the Court of Justice pursuant to Article 263 TFEU.
22. In addition, it should be noted that Article 15(1) *in fine* TEU provides explicitly that: "[The European Council] *shall not exercise legislative functions.*" This applies also to the common asylum policy, where the legislative competence lies with the Union legislator, on the basis of Article 78 TFEU.
23. Moreover, when it comes to external action, which is another field relevant for the present case, the European Council provides the strategic guidelines on the basis of which the Foreign Affairs Council, in accordance with the third subparagraph of Article 16(6) TEU, elaborates the Union's external action. It also identifies, in accordance with Article 26 TEU, "*the Union's strategic interests, determine[s] the objectives of and define[s] general guidelines for the common and foreign security policy (...)*". To that effect, the European Council "*shall adopt the necessary decisions*". However, the European Council has no powers to negotiate, let alone conclude international agreements binding upon the Union.
24. There are subject matters for which the Treaties do confer on the European Council the power to adopt²¹ certain important decisions, including for example, for the revision of the Treaties. In such cases the European Council adopts legally binding acts the validity of which is subject to the control of the Court of Justice, notably in accordance with Article 263 TFEU²². However, none of these provisions are relevant for the present case.
25. In the light of the foregoing, the application is manifestly directed against a contested act of which the European Council is not the author and which is not attributable to it. In addition, the contested act does not emanate from any of the other EU institutions, nor from any of the other entities mentioned in the first paragraph of Article 263 TFEU. Consequently, the Court does not have jurisdiction to examine the application and the European Council cannot legally be a defendant in the present case. The European Council respectfully submits that for these reasons alone the application must be dismissed as manifestly inadmissible.

²¹ The voting rule is specified in each legal basis: For example, Article 48(3) TEU foresees the adoption by simple majority, Article 15(5) TEU provides for qualified majority voting and Article 48(6) TEU requires unanimity.

²² See judgment in case Pringle, C-370/12, ECLI:EU:C:2012:756, points 31 and 35.

b) *The contested statement is not an actionable act within the meaning of the first paragraph of Article 263 TFEU*

26. Whether an action for annulment against an act is possible depends, according to the established case-law of the Court, on the nature of the act rather than its form.²³ Unlike under the previous version of the Treaties,²⁴ under the first paragraph of Article 263 TFEU, the Court has jurisdiction to review "acts", including of the European Council, provided that these are "*intended to produce legal effects vis-à-vis third parties*".
27. Leaving aside the question of whether the contested statement was issued by the European Council (which as explained in section a) above is not the case), the analysis of the content of the statement and of the intentions of its authors demonstrate that the contested statement does not constitute an act "*intended to produce legal effects vis-à-vis third parties*" for the purpose of Article 263 TFEU.
28. In accordance with settled case law, only a measure that produces binding legal effects capable of affecting an Applicant's interests by bringing about a distinct change in his legal position may be the subject of an action for annulment²⁵. In the light of the case-law, in order to determine whether an act is capable of having legal effects of such nature that an action for annulment under Article 263 TFEU can be brought against it, it is necessary to examine its wording and context, its substance and the intention of its author²⁶.
29. In line with these principles, the Court of Justice has rejected as inadmissible, for example, an action against a statement which reflected the intention of an institution to follow a particular line of conduct but could not be regarded as an act intended to produce legal effects in the sense of Article 263 TFEU.²⁷ The Court of Justice also rejected as inadmissible an action for annulment of a Code of Conduct, published in the *Official Journal*, concerning public access to Council and Commission documents. The Court held that the code, agreed between the Council and the Commission, reflected the agreement reached between these two institutions on the principles governing access to the documents of the two institutions, while inviting the institutions to implement those principles by means of specific regulations. But, in the Court's view, the Code of Conduct failed to produce legal effects because it merely foreshadowed subsequent decisions which might have legal effects. The Court concluded that the application

²³ See judgement in case Spain/Commission, C-135/93, ECLI:EU:C:1995:201, point 20; Judgement in case Air France/Commission, T-3/93, ECLI:EU:T:1994:36, points 57-59; Judgement in case Netherlands/Council, C-58/94, ECLI:EU:C:1996:171, point 24.

²⁴ See order in case Roujansky/Council, T-584/93, ECLI:EU:T:1994:87, points 12-14; Order in case Krikorian and others/Parliament, T-346/03, ECLI:EU:T:2003:348, point 17.

²⁵ See judgement in case Zunis Holding and others/Commission, T-83/92, ECLI:EU:T:1993:93, point 30; Order in case SGL Carbon/Commission, T-308/02, ECLI:EU:T:2004:119, points 39-40.

²⁶ See to that effect Order in case Belgium/Commission, T-721/14, ECLI:EU:T:2015:829 point 18, and the very rich case-law extensively cited therein.

²⁷ See judgement in case United Kingdom/Commission, 114/86, ECLI:EU:C:1988:449, points 12-15; Judgement in case Spain/Commission, C-443/97, ECLI:EU:C:2000:190, points 27-28 and 34.

was inadmissible in so far as it was directed against the Code of Conduct, holding that the Code was the expression of purely voluntary coordination and therefore was not intended in itself to have legal effects²⁸.

30. The European Council considers that the case-law set out above applies to the contested statement as well. The analysis below shows that it does not constitute an act or decision, but reflects the political will of the authors of the statement with regard to a number of operational action points²⁹.
31. The analysis shows that the intention of the authors of the contested statement is confined to the existing, established legal framework, and therefore includes political commitments regarding the operational coordination of the respective actions of the authors within the process of the implementation thereof, without creating new legal obligations for the authors of the statement. That intention is clearly reflected in the non-mandatory wording used throughout the contested statement (for example, the use of the auxiliary verb "will"), underlining the voluntary nature of the political commitments regarding planned operational action points, referred to in the contested statement³⁰.
32. The implementation of the contested statement by relevant actors in accordance with the political commitments entered into entail, *first*, the need for particular operational actions by the Greek government, within the continued implementation by the latter of the existing obligations incumbent on Greece under (existing) Union law, and *secondly*, particular actions by the Turkish government, in particular within the framework of the continued implementation of the existing bilateral agreement between Turkey and Greece on readmission and of the position in that bilateral agreement on the obligation of Turkey to readmit to its territory third country nationals who arrived in Greece via Turkey.
33. In addition, the contested statement should also be read together with the joint action plan of 29 November 2015 and with the EU-Turkey statement of 7 March 2016³¹. Importantly, the

²⁸ See judgement in case Netherlands/Council, C-58/94, ECLI:EU:C:1996:171, points 24-27.

²⁹ See the fourth paragraph of the press release which reads as follows: "[...] *In order to achieve this goal, they agreed on the following additional action points [...]*" (emphasis added).

³⁰ Under Union law, acts intended to produce legally binding effects, drafted in English, do not use the auxiliary verb "**will**". The latter is typical language for political statements. Normative acts of Union law systematically rely on the use of mandatory terms, and often use the auxiliary verb "**shall**". Mandatory Union acts use the term "should" in the preamble for the statement of reasons or to indicate a desired interpretation of certain normative elements.

³¹ See documents quoted in the footnote 19 above, to which the contested statement refers extensively, including in particular in the third paragraph, which reads as follows: "*Turkey and the European Union reconfirmed their commitment to the implementation of their joint action plan activated on 29 November 2015. Much progress has been achieved already [...]. On 7 March 2016, Turkey furthermore agreed to accept the rapid return of all migrants not in need of international protection crossing from Turkey into Greece and to take back all irregular migrants intercepted in Turkish waters. Turkey and the EU also agreed to continue stepping up measures against migrant smugglers and welcomed the establishment of the NATO activity on the Aegean Sea. At the same time Turkey and the EU recognise that further, swift and determined efforts are needed.*" (emphasis added).

combined reading shows that the contested statement builds on cooperation and coordination already agreed upon earlier and referred to in these documents, thus making it clear that it refers essentially to action points already agreed upon earlier. In addition to referring to actions agreed upon earlier, the contested statement provides elements of a political, operational and administrative nature.

34. That is the case in particular, for the point on coordination of the operations of return to Turkey of "*irregular migrants crossing from Turkey into Greek islands*" not in need of international protection, referred to in third paragraph of the contested statement. That operational action had already been politically agreed during the meetings of the Heads of State or Government with Turkish Prime Minister Davutoğlu on 29 November 2015³² and on 7 March 2016³³.
35. Finally, the form of the contested statement and the conduct of its authors only serve to confirm the conclusions drawn above with regard to its content. As indicated already above, the contested statement was issued in a press release, following a summit meeting with no particular regard to any formalities. No document has been initialled or signed by the authors either during or after this meeting. Neither have the authors proceeded to exchange diplomatic notes, or to other formalities, and hence there is no indication whatsoever (rather the contrary) that their intention would have been, in addition to agreeing on a politically important statement, to conclude an international agreement binding those present at the meeting.
36. In the light of the foregoing, the European Council considers that the contested statement is not intended to produce legal effects (*vis-à-vis* third parties) of such a nature that the judicial control can be exercised in relation to it in accordance with Article 263 TFEU. Consequently, it fails to meet the fundamental requirement for an actionable act in accordance with the first paragraph of Article 263 TFEU. The European Council respectfully submits that for this reason alone the application must be dismissed as manifestly inadmissible.

³² See point 7 of the press release issued following that meeting, which reads as follows: Point 7 of this press release reads as follows: "*Turkey and the EU have decided to activate the Joint Action Plan that had been agreed until now ad referenda on 15 October 2015, to step up their cooperation for support of Syrians under temporary protection and migration management to address the crisis created by the situation in Syria. [...] As a consequence, both sides will, as agreed and with immediate effect, step up their active cooperation on migrants who are not in need of international protection, preventing travel to Turkey and the EU, ensuring the application of the established bilateral readmission provisions and swiftly returning migrants who are not in need of international protection to their countries of origin.* [...]" (emphasis added).

³³ See point 1 of the press release issued following that meeting, which reads as follows: "*Following their meeting with Prime Minister Davutoğlu, the EU Heads of State or Government addressed the migration situation, in particular as regards the Western Balkans route. They welcomed their discussion with the Turkish Prime Minister on EU-Turkey relations and on the progress made in the implementation of the Joint Action Plan. Turkey confirmed its commitment in implementing the bilateral Greek-Turkish readmission agreement to accept the rapid return of all migrants not in need of international protection crossing from Turkey into Greece and to take back all irregular migrants apprehended on Turkish waters.* The Heads of State or Government [...] agreed to work on the basis of the principles they contain:

- *to return all new irregular migrants crossing from Turkey into the Greek islands with the costs covered by the EU; [...]*" (emphasis added).

c) *The Applicant does not fall within the temporal scope of application of the statement and hence has no interest in bringing proceedings*

37. In accordance with settled case law, an applicant must demonstrate a vested and present interest in bringing annulment proceedings, which is an essential and fundamental prerequisite for any legal proceedings³⁴. That interest must, in the light of the purpose of the action, exist at the stage of lodging the action, failing which the action is inadmissible. The interest in bringing proceedings must continue until the final decision³⁵. An interest in bringing proceedings presupposes that the action is likely, if successful, to procure an advantage to the party bringing it³⁶.
38. In the present case, it is clear that the Applicant did not demonstrate his legal interest in lodging the application. He did not even claim that the contested statement applies to him *ratione temporis*.
39. The European Council notes that the Applicant states that he has arrived in Greece by sea from Turkey "*on some date subsequent to the 18th March 2016*" (see Application, point 6). This is likely to place him outside the temporal scope of application of the contested statement, because in accordance with the first operational action point of the contested statement, the latter only relates to "[a]ll new irregular migrants crossing from Turkey into Greek islands as from 20 March 2016".
40. It follows that, in that latter case, the Applicant, by definition, would not and could not be concerned by the application of the contested statement. Neither the continued implementation of that statement, nor its annulment, would be capable of affecting the Applicant's interests by bringing about any distinct change in his legal position or procuring him any advantage.
41. Bearing the foregoing in mind, the European Council respectfully submits that the Application must be dismissed as manifestly inadmissible.
42. Nonetheless, for the sake of completeness and given the expedited nature of the proceedings, the European Council will briefly address in the paragraphs below the remaining conditions of admissibility set out in the fourth paragraph of Article 263 TFEU.

³⁴ See judgment in case T-276/13, Growth Energy and Renewable Fuels Association/Council, ECLI:EU:T:2016:340, point 155; Judgment in case T-277/13, Marquis Energy LLC/Council, ECLI:EU:T:2016:343, point 115; and judgment in case GRP Security/Court of Auditors, T-87/11, ECLI:EU:T:2013:161, point 44.

³⁵ See judgment in case Wunenburger/Commission, C-362/05 P, ECLI:EU:C:2007:322, point 42 and the case-law cited therein.

³⁶ Judgment in case T- 276/13, cited above, point 159; Judgment in case T-277/13, cited above, point 116; Judgments in case Council/Zhejiang Xinan Chemical Industrial Group, C-337/09 P, ECLI:EU:C:2012:471, point 46 and the case-law cited, and judgement in case Shanghai Excell M&E Enterprise and Shanghai Adepteck Precision/Council, T-299/05, ECLI:EU:T:2009:72, point 43 and the case-law cited therein.

d) *The Applicant lacks standing under the fourth paragraph of Article 263 TFEU*

43. The European Council notes that the application does not address the question of the Applicant's standing to bring these proceedings, let alone demonstrate that the Applicant has such standing, in accordance with the fourth paragraph of Article 263 TFEU. For the reasons set out below, the European Council considers, in any event, that the Applicant clearly does not meet the standing requirements of any of the three hypotheses referred to in the fourth paragraph of Article 263 TFEU.
44. Given that there is no act addressed to the Applicant, the first hypothesis is not relevant for the present case and will not be further addressed.
45. Insofar as the second hypothesis ("*an act which is of direct and individual concern to him*") and the third hypothesis ("*a regulatory act which is of direct concern to him and does not entail implementing measures*") are concerned, the Applicant does not meet these either. As will be set out below, the chief reason is that the Applicant does not meet the requirement of "direct concern", which in accordance with settled case law, is applicable in an identical manner for the second and third hypotheses³⁷.
46. For the sake of completeness, the European Council adds that the Applicant does not fulfil the criterion of "individual concern" for the purpose of the second hypothesis either and that, moreover, the challenged statement does not constitute a regulatory act not requiring implementing measures within the meaning of the third hypothesis. In the following paragraphs, each of these elements will be addressed in turn.
47. According to settled case law, the concept of direct concern referred to in second and third hypotheses of the fourth paragraph of Article 263 TFEU requires two cumulative criteria to be met, namely, first, that the act whose annulment the Applicant is seeking directly affects its legal situation and, second, that that act leaves no discretion to the addressees entrusted with the task of implementing it, such implementation being purely automatic and resulting from the Union law without the application of other intermediate rules³⁸.
48. In the light of the conclusion reached in point 40 above, it is uncontestedly clear that the Applicant, who arrived in Greece on 19 March 2016, could never be concerned by the contested statement, which relates only to persons having arrived to Greece as from 20 March 2016. *A fortiori*, and for the same reason alone, the Applicant cannot be considered to be directly concerned by it.

³⁷ See judgment in case T-277/13, cited above, point 43; see also order in case European Coalition to End Animal Experiments/ECHA, T-673/13, ECLI:EU:T:2015:167, point 67.

³⁸ Judgement in cases C-463/10 P and C-475/10 P, ECLI:EU:C:2011:656, point 66; Order in case Municipio de Gondomar/Commission, C-501/08 P, ECLI:EU:C:2009:580, point 25; and Order in case T-18/10 Inuit Tapiriit Kanatami and Others/Parliament and Council, ECLI:EU:T:2011:419, point 72 and the case-law cited; the latter judgement was upheld in appeal by judgement in case C-583/11 P, ECLI:EU:C:2013:625.

49. In addition, the European Council submits that it has not been demonstrated that the addressees of the contested statement have "no discretion" as to the implementation of the action points referred to therein in a way that such implementation would be purely automatic and resulting from the rules of the Union law without the application of other intermediate rules.
50. On the contrary, as already stated above, the responsibility for the implementation of the actions referred to in the contested statement lies with the competent administrations and authorities of the relevant EU Member States and Turkey. For example, it will be the task of the Greek administrative authorities to determine the legal status of the Applicant in Greece. This will require examining whether he is entitled to asylum or another form of international or humanitarian protection or, in case he is not entitled to such protection, an examination of whether his right to stay on the Greek territory should be terminated or whether he should eventually be subject to a return decision. All this goes to show that such determinations entail a range of consecutive administrative processes in the Applicant's individual case and a range of individual administrative decisions that will need to be adopted in respect of the Applicant, in compliance with all the steps and verifications prescribed by Greek and Union law. Needless to say, such national administrative proceedings, for which Union directives only define a general framework³⁹, involve a wide margin of discretion on the part of the competent national authorities. They constitute beyond any reasonable doubt, implementing measures within the meaning of the fourth paragraph of Article 263 TFEU.
51. Furthermore, as regards the concept of "individual concern", it is settled case-law that persons other than those to whom an act is addressed may claim to be individually concerned only if that act affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of those factors the decision distinguishes them individually just as in the case of the person addressed.⁴⁰ It is clear from settled case-law that the possibility of determining more or less precisely the number, or even the identity, of the persons to whom a measure applies by no means implies that it must be regarded as being of individual concern to them as long as that measure is applied by virtue of an objective legal or factual situation defined by it⁴¹.

³⁹ See in particular, Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (OJ L 337, 20.12.2011, p. 9), Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (OJ L 180, 29.6.2013, p. 60) or Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (OJ L 348, 24.12.2008, p. 98).

⁴⁰ See judgment in case T-277/13, cited above, point 45; Judgments of 15 July 1963 in *Plaumann/Commission*, 25/62, ECLI:EU:C:1963:17, point 7, and judgement in case *Commission/Aktionsgemeinschaft Recht und Eigentum*, C-78/03 P, ECLI:EU:C:2005:761, point 33.

⁴¹ Judgement in case C-456/13 P, *T & L Sugars Ltd and Sidul Açúcares Unipessoal Lda/Commission*, ECLI:EU:C:2015:284, point 64 and case law referred to therein.

52. In the light of the abovementioned case-law, even if, assuming for the sake of argument, the Applicant had been directly concerned by the first operational action point, *quod non*, he would not have met the requirements of "individual concern". Rather, his legal situation would still have been indistinguishable from that of all other migrants who travelled irregularly from Turkey to Greece and who do not possess Syrian nationality⁴².
53. In any event, according to the settled case law of the General Court, confirmed by the Court of Justice, if a regulatory act requires an implementing measure, even of a mechanical nature, the condition set out in the last limb of the fourth paragraph of Article 263 TFEU is not fulfilled⁴³.
54. As already explained in point 50 above, the contested statement requires a whole range of implementing measures by a series of actors. Consequently, the contested statement cannot be considered as not requiring implementation and therefore, in any event, regardless of whether it could be considered a regulatory act⁴⁴, it fails to meet the conditions of the abovementioned Treaty provisions.

III. CONCLUSION

55. For all the reasons set out above, the European Council respectfully submits that the Applicant's action should be rejected as manifestly inadmissible and that the Applicant should bear the costs of these proceedings.

Respectfully submitted,



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⁴² That latter category falls within the scope of third operational action point of the "EU-Turkey Statement".

⁴³ It is further noted that the question of whether the contested regulatory act allows a degree of discretion to the authorities responsible for its implementation is irrelevant for the purpose of the fourth paragraph of Article 263 TFEU. See, to that effect, judgement in case T-279/11, T&L Sugars Ltd and Sidul Açúcares, Unipessoal Lda/Commission, T-279/11, ECLI:EU:T:2013:299, points 51-53; confirmed in appeal by judgement in case C-456/13 P, ECLI:EU:C:2015:284, points 40-42.

⁴⁴ The European Council considers that there is no need to address the question of "regulatory act" but does not concede that the EU-Turkey Statement constitutes a regulatory act.