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I

(Legislative acts)

REGULATIONS

REGULATION (EU) 2023/435 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 27 February 2023

amending Regulation (EU) 2021/241 as regards REPowerEU chapters in recovery and resilience plans and amending Regulations (EU) No 1303/2013, (EU) 2021/1060 and (EU) 2021/1755, and Directive 2003/87/EC

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 175, third paragraph, Article 177, first paragraph, Article 192(1), Article 194(2) and Article 322(1) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee ([1]),

After consulting the Committee of the Regions,

Having regard to the opinion of the Court of Auditors ([2]),

Acting in accordance with the ordinary legislative procedure ([3]),

Whereas:

(1) Since the adoption of Regulation (EU) 2021/241 of the European Parliament and of the Council ([4]), which established the Recovery and Resilience Facility (the 'Facility'), unprecedented geopolitical events triggered by Russia's war of aggression against Ukraine and their direct and indirect aggravation of the consequences of the COVID-19 crisis have considerably affected the Union's society and economy, its people and its economic, social and territorial cohesion. In particular, it is clearer than ever that the Union's energy security and energy independence are indispensable for a successful, sustainable and inclusive recovery from the COVID-19 crisis, as they are also major factors contributing to the resilience of the Union's economy.

(2) Due to the direct links between a sustainable recovery, building the Union's resilience and energy security, reducing dependence on fossil fuels, in particular from Russia, and the Union's role in a just and inclusive transition, the Facility is an instrument well suited to contribute to the Union's response to those emerging challenges. This is also the case in light of Union climate and environmental legislation and of the Union's international commitments, and in particular the Paris Agreement adopted under the United Nations Framework Convention on Climate Change ([5]).

([1]) OJ C 486, 21.12.2022, p. 185.
([2]) OJ C 333, 1.9.2022, p. 5.
([3]) Position of the European Parliament of 14 February 2023 (not yet published in the Official Journal) and decision of the Council of 21 February 2023.
([4]) Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility (OJ L 57, 18.2.2021, p. 17).
([5]) OJ L 282, 19.10.2016, p. 4.

(3) In the Versailles Declaration of 10 and 11 March 2022, the Heads of State and Government invited the Commission to propose by the end of May of the same year a REPowerEU plan to phase out the Union's dependency on Russian fossil fuel imports, which invitation was reiterated in the European Council Conclusions of 24 and 25 March 2022. That goal should be achieved well before 2030 in a way that is consistent with the European Green Deal, set out in the communication of the Commission of 11 December 2019, and with the climate objectives for 2030 and 2050 enshrined in Regulation (EU) 2021/1119 of the European Parliament and of the Council [6].

(4) The Facility's ability to support reforms and investments dedicated to diversifying energy supplies, in particular fossil fuels, as well as to increase the resilience, security and sustainability of the Union's energy system, thereby contributing to energy affordability and strengthening the strategic autonomy of the Union alongside an open economy, should be enhanced. To achieve those objectives, the Union needs to increase energy efficiency and the reliability and resilience of transmission and distribution networks, to promote system flexibility, to minimise congestions, including by means of increased grid and electricity storage capacity, to promote digitalisation, and to ensure resilient supply chains, cybersecurity and the protection and climate adaptation of all infrastructure, while reducing strategic energy dependencies.

(5) To maximise complementarity, consistency and coherence of policies and actions taken by the Union and Member States to foster independence, security and sustainability of the Union's energy supply, those energy-related reforms and investments should be established through a dedicated 'REPowerEU chapter' of the recovery and resilience plans.

(6) The effective transition towards green energy and the rapid reduction in dependency on fossil fuel energy in an inclusive way call for measures to boost energy efficiency and savings in buildings and related critical energy infrastructure and decarbonise industries faster. It is imperative to increase rapidly investment in energy efficiency measures, such as the uptake of sustainable and efficient heating and cooling solutions, which present an effective means to address some of the most pressing challenges of energy supply and energy cost. Therefore, support should also be given to reforms and investments increasing energy efficiency, decarbonising industry – including by the use of low-carbon fuels, such as low-carbon hydrogen, and by the uptake of renewable hydrogen and other renewable fuels of non-biological origin – and increasing energy savings of the Member States' economies, in line with the Union's energy and climate targets and legal framework. The Commission should, in particular, encourage Member States to include in their REPowerEU chapters measures supporting the decarbonisation of industry.

(7) The phasing out of the dependency on Russian fossil fuel imports is expected to lead to a reduction in the overall energy dependency of the Union. The REPowerEU chapters should contribute to increasing and strengthening the strategic autonomy of the Union without excessively increasing its dependency on imports of raw materials from third countries.

(8) In the preparation of the recovery and resilience plans as well as of the REPowerEU chapters, Member States should coordinate their economic policies in such a way as to attain the objectives on economic, social and territorial cohesion set out in Article 174 of the Treaty, aiming to reduce disparities between the levels of development of the various regions and the backwardness of the least favoured regions, paying particular attention to remote, peripheral and isolated areas and islands, which already experience additional constraints.

(6) Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law') (OJ L 243, 9.7.2021, p. 1).

(9) To maximise the scope of the Union's response, all Member States which submit a recovery and resilience plan after the entry into force of this Regulation, requesting the use of additional funding in the form of loans, or, in accordance with new rules to be established under this amending Regulation, from auctioning of allowances from the emissions trading system under Directive 2003/87/EC of the European Parliament and of the Council [7] or from transfers from the Brexit Adjustment Reserve established by Regulation (EU) 2021/1755 of the European Parliament and of the Council [8], should be required to include a REPowerEU chapter in their recovery and resilience plan. In line with the existing possibility, under Regulation (EU) 2021/241, of submitting a draft recovery and resilience plan, and in order to ensure proper preparation of the REPowerEU chapters, Member States can submit a draft REPowerEU chapter before the submission of a modified recovery and resilience plan. Unnecessary administrative burden should be avoided.

(10) REPowerEU chapters should include new reforms and investments, starting from 1 February 2022, contributing to the REPowerEU objectives and tackling the crisis caused by recent geopolitical events. However, measures included in the already adopted Council implementing decision that contribute to the REPowerEU objectives can be included in the REPowerEU chapter if, following the update of the maximum financial contribution, the Member State concerned is subject to a decrease of its maximum financial contribution. In that case, the Member State should be able to include such measures in its REPowerEU chapter up to an amount of estimated costs equal to the decrease in the maximum financial contribution.

(11) A Member State should be able to include in its REPowerEU chapter the scaled-up part of measures included in the already adopted Council implementing decision, together with the corresponding milestones and targets. Such scale-up should introduce a substantive improvement in the level of ambition of the measures, as reflected in the design or level of the corresponding milestones and targets, while building on the measures included in the already adopted Council implementing decision.

(12) A Member State should submit its REPowerEU chapter in the form of an addendum to its recovery and resilience plan. A REPowerEU chapter should contain an explanation of how the measures included therein are coherent with the efforts of the Member State concerned to achieve the REPowerEU objectives, taking into account the measures included in the already adopted Council implementing decision, as well as an explanation of the overall contribution of those measures and other nationally funded and Union-funded complementary or accompanying measures to the REPowerEU objectives.

(13) REPowerEU chapters should inter alia contribute to increasing the share of sustainable and renewable energies in the energy mix and to addressing energy infrastructure bottlenecks. As regards natural gas infrastructure, the reforms and investments in the REPowerEU chapters to diversify supply away from Russia should build on the needs currently identified through the assessment conducted and agreed by the European Network of Transmission System Operators for Gas, established in the spirit of solidarity as regards security of supply, and take into account strategic energy security needs of the Member State concerned and the reinforced preparedness measures, including energy storage, taken to adapt to new geopolitical threats, without undermining the long-term contribution to the green transition.

(14) An appropriate assessment criterion should be added to serve as a basis for the Commission to assess reforms and investments in the REPowerEU chapters and to ensure that those reforms and investments are fit to achieve the specific REPowerEU objectives. An A rating should be required under that new assessment criterion for the relevant recovery and resilience plan to be positively assessed by the Commission.

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[7] Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Union and amending Council Directive 96/61/EC (OJ L 275, 25.10.2003, p. 32).

[8] Regulation (EU) 2021/1755 of the European Parliament and of the Council of 6 October 2021 establishing the Brexit Adjustment Reserve (OJ L 357, 8.10.2021, p. 1).

(15) Investments in infrastructure and technologies alone are not sufficient to ensure a reduction in dependency on fossil fuels in view of existing labour and skill shortages. In that context, it is already possible to dedicate resources to the reskilling and upskilling of people, to further equipping the workforce with green skills as well as to the research and the development of innovative solutions linked to the green transition. Member States are encouraged to further invest in reskilling and upskilling, especially for green and related digital skills and technologies, to ensure that no one will be left behind throughout the green transition. Where a Member State includes in its REPowerEU chapter measures related to reskilling and upskilling of people, the Commission should consider whether such measures significantly contribute to supporting a requalification of the workforce towards green and related digital skills.

(16) In light of the economic and social impact of the current energy crisis, where persistently high and volatile energy prices are aggravating the impact of the COVID-19 crisis by further increasing the financial burden for consumers, in particular for the most vulnerable, including households with low income, and for vulnerable companies including micro-, small and medium enterprises, and in recognition of the principles of the European Pillar of Social Rights, it should be possible to include, in the REPowerEU chapters, measures to help structurally address situations of energy poverty, through long-lasting reforms and investments. Reforms and investments that aim to tackle energy poverty should provide a higher level of financial support to energy efficiency schemes, including via dedicated financial instruments, clean energy policies and schemes to reduce energy demand for those households and companies including micro-, small and medium enterprises facing severe difficulties due to high energy bills.

(17) Energy-demand reduction measures taken by Member States should incentivise investments in energy savings.

(18) The application of a new regime on REPowerEU chapters should be without prejudice to all other legal requirements under Regulation (EU) 2021/241, unless otherwise provided.

(19) The recovery and resilience plan, including the REPowerEU chapter, should contribute effectively to addressing all or a significant subset of the challenges identified in the relevant country-specific recommendations, including the country-specific recommendations adopted under the 2022 European Semester cycle which refer inter alia to the energy challenges that Member States are facing.

(20) An effective transition to green energy and a reduction in energy dependency involves significant digital investments. In light of Regulation (EU) 2021/241, Member States should provide an explanation of how the measures in the recovery and resilience plan, including those in the REPowerEU chapter, are expected to contribute to the digital transition and to addressing the resulting challenges and whether they account for an amount contributing to the digital target based on the methodology for digital tagging. However, given the unprecedented urgency and importance of energy challenges faced by the Union, reforms and investments in the REPowerEU chapter should not be taken into account when calculating the plan’s total allocation for the purpose of applying the digital target requirement set by Regulation (EU) 2021/241. Nevertheless, Member States should endeavour to include in the REPowerEU chapters, to the maximum extent possible, measures that contribute to the digital target based on the methodology for digital tagging.

(21) Lengthy administrative procedures are some of the main obstacles to the deployment of renewable energy. Those barriers include the complexity of the applicable rules for site selection and administrative authorisations for projects, the complexity and duration of the assessment of the environmental impact of the projects, grid connection issues, and staffing constraints of the permit-granting authorities or grid operators. Further simplification and speeding up of the administrative permit-granting processes for renewables and related power grid infrastructure is necessary to ensure that the Union achieves its energy and climate targets. Recommendations were made to Member States in the context of the 2022 European Semester to accelerate the deployment of renewable energy. As announced in the communication of the Commission of 18 May 2022 entitled 'REPowerEU Plan', the Commission has proposed to amend Directive (EU) 2018/2001 of the European Parliament and of the Council ([9]) on energy from renewable sources, aiming to establish a faster permit-granting process for renewables. In addition, Council Regulation (EU) 2022/2577 ([10]), which lays down a framework to accelerate the deployment of renewable energy, has introduced temporary emergency rules.

(22) Pursuant to Article 18(4), point (q), of Regulation (EU) 2021/241, the Member States should provide a summary of the consultation process, conducted in accordance with national legal frameworks, of local and regional authorities, social partners and other relevant stakeholders concerned with the implementation of their recovery and resilience plans. That consultation should be complemented to address reforms and investments to be included in a potential REPowerEU chapter, in a way that allows stakeholders sufficient time to react while ensuring a speedy finalisation of the REPowerEU chapter by the Member State concerned. The updated summary should set out the stakeholders consulted, explain the outcome of the complementary consultation and outline how the input received from the stakeholders was reflected in the REPowerEU chapters.

(23) The application of the principle of 'do no significant harm' within the meaning of Article 17 of Regulation (EU) 2020/852 of the European Parliament and of the Council ([11]) (the principle of 'do no significant harm') is essential to ensure that the reforms and investments undertaken as part of the recovery from the COVID-19 crisis are implemented in a sustainable manner. It should continue to apply to the reforms and investments supported by the Facility, with one targeted exemption to safeguard the Union's immediate energy security concerns. Considering the objective of diversifying energy supplies away from Russian suppliers, the reforms and investments set out in the REPowerEU chapters which are necessary to improve energy infrastructure and facilities to meet immediate security of supply needs for gas should be eligible for financial support under the Facility even if they do not comply with the principle of 'do no significant harm'. As a rule, oil infrastructure and facilities are excluded from the REPowerEU chapter. By derogation, a Member State that has been subject to the exceptional temporary derogation in Article 3m(4) of Council Regulation (EU) No 833/2014 ([12]) until the entry into force of this amending Regulation, due to its specific dependence on crude oil and geographical situation, should be able to include in the REPowerEU chapter oil infrastructure and facilities necessary to meet immediate security of supply needs.

The Commission should assess whether measures expected to address immediate security of energy supply needs are eligible for the derogation from the principle of 'do no significant harm'. For the purpose of that assessment, the Commission should consider, among other conditions, the risk of lock-in effects and the unavailability of cleaner, technologically and economically feasible alternatives that could be deployed within a comparable timeline. Such assessment should be proportionate, taking into account the urgency of achieving the REPowerEU objectives. In case of doubts, the Commission should be able to request Member States to provide relevant information to support the assessment. The evaluation of cleaner alternatives should be performed within reasonable limits.

([9]) Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources (OJ L 328, 21.12.2018, p. 82).

([10]) Council Regulation (EU) 2022/2577 of 22 December 2022 laying down a framework to accelerate the deployment of renewable energy (OJ L 335, 29.12.2022, p. 36).

([11]) Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088 (OJ L 198, 22.6.2020, p. 13).

([12]) Council Regulation (EU) No 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine (OJ L 229, 31.7.2014, p. 1).

(24) All measures in the recovery and resilience plans should be undertaken in compliance with the applicable Union and national environmental *acquis*, in particular relating to environmental impact assessment and nature protection. For measures benefitting from the derogation from the principle of 'do no significant harm', Member States should undertake satisfactory efforts to limit the potential harm to environmental objectives within the meaning of Article 17 of Regulation (EU) 2020/852, where feasible, and to mitigate the harm through other measures, including measures in the REPowerEU chapters.

(25) The REPowerEU chapters should be consistent with the national energy and climate plans of Member States and with the Union climate targets set out in Regulation (EU) 2021/1119.

(26) Reflecting the European Green Deal as Europe's sustainable growth strategy and the importance of tackling climate change in line with the Union's commitments to implement the Paris Agreement and the United Nations Sustainable Development Goals, the Facility is to contribute to the mainstreaming of climate action and environmental sustainability and to the achievement of an overall target of 30 % of Union budget expenditure supporting climate objectives. To that end, the measures supported by the Facility and included in recovery and resilience plans of Member States should contribute to the green transition, including biodiversity, or to addressing the challenges resulting therefrom, and should account for an amount that represents at least 37 % of the recovery and resilience plan's total allocation and for at least 37 % of the total estimated costs of the measures in the REPowerEU chapter based on the methodology for climate tracking set out in Annex VI to Regulation (EU) 2021/241. That methodology should be used accordingly for measures that cannot be directly assigned to an intervention field listed in that Annex. If the Member State concerned and the Commission agree, it should be possible to increase the coefficients for support for the climate objectives to 40 % or 100 % for individual investments, as explained in the recovery and resilience plan, to take account of accompanying reform measures that credibly increase their impact on the climate objectives. To that end, it should be possible to increase the coefficients for support for the climate objectives up to a total amount of 3 % of the allocation of the recovery and resilience plan for individual investments. The Facility should support activities that fully respect the climate and environmental standards and priorities of the Union and the principle of 'do no significant harm'.

(27) Member States should, where relevant, include in REPowerEU chapters measures having a cross-border or multi-country dimension or effect, as identified in the Commission's most recent needs assessment, contributing, among other things, to generating European added value. It should also be taken into account that measures carried out in one Member State could have spill-over effects in other Member States. The Commission should facilitate co-operation between Member States as early as possible with a view to developing measures having a cross-border or multi-country dimension or effect to be included in the REPowerEU chapters. Member States should strive to ensure those measures account for an amount that represents at least 30 % of the estimated costs of the measures in the REPowerEU chapter. In addition to measures having a cross-border or multi-country dimension or effect, measures at national level that contribute to securing energy supply in the Union as a whole, in line with the REPowerEU objectives, in particular as regards addressing existing bottlenecks in terms of energy transmission, distribution and storage, as identified in the Commission's most recent needs assessment, thereby increasing the potential for cross-border flows between Member States, should be considered as having a cross-border or multi-country dimension or effect. Measures reducing dependency on fossil fuels and reducing energy demand should also be considered as having a positive cross-border effect as they free up further capacity or supply for other Member States.

(28) An appropriate assessment criterion should be added to serve as a basis for the Commission to assess the cross-border or multi-country dimension or effect of the reforms and investments in the REPowerEU chapters.

(29) Further incentives should be provided for Member States to request loan support to ensure the uptake of the available funds by Member States while complying with the principles of equal treatment, solidarity, proportionality and transparency. To that end, Member States should communicate as clearly as possible to the Commission, at the latest 30 days after the entry into force of this Regulation, whether they intend to submit a request for loan support. The Commission should present to the European Parliament and the Council, simultaneously, on equal terms and without undue delay, an overview of the intentions expressed by the Member States and the proposed way forward for the distribution of the available resources. The communication of an intention should not prejudice the ability of Member States to request loan support until 31 August 2023 in accordance with Article 14 of Regulation (EU) 2021/241, including in the case of requests exceeding 6,8 % of their gross national income (GNI) where the relevant conditions apply. It should also not prejudice the entering into of the corresponding loan agreement by the Commission after the adoption of the relevant Council implementing decision.

(30) Member States are encouraged to submit the REPowerEU chapters as soon as possible and preferably by two months of the entry into force of this amending Regulation. In line with Article 19(1) of Regulation (EU) 2021/241, the Commission should assess the modified recovery and resilience plan submitted by the Member State within two months and make a proposal for a Council implementing decision. Given the urgency of the challenges that the Member States are facing, the Commission should strive to conclude the assessment of the modified recovery and resilience plans without undue delay.

(31) In addition, to incentivise a high level of ambition for reforms and investments to be included in the REPowerEU chapter, new dedicated funding sources should be provided.

(32) Council Regulation (EU) 2022/1854 ([13]) introduces a temporary solidarity contribution for Union companies and permanent establishments with activities in the crude petroleum, natural gas, coal and refinery sectors applicable in all Member States. Member States are invited to use a proportion of the proceeds generated by that temporary contribution to foster synergies and complementarities with the reforms and investments in their REPowerEU chapters in a coherent manner, for the funding of measures to be implemented at national level in accordance with the REPowerEU objectives.

(33) The current economic and geopolitical situation requires the Union to mobilise available resources to rapidly diversify the Union's energy supply and reduce dependence on fossil fuels before 2030. In that context, Directive 2003/87/EC should allow for an exceptional monetisation by auctioning of a portion of allowances from the innovation fund and of allowances allocated to Member States, except allowances distributed for the purposes of solidarity, growth and interconnections, and should direct revenues towards reforms and investments contributing to the REPowerEU objectives, in the Facility framework. The auctioning of allowances from the innovation fund and of allowances allocated to Member States should also be frontloaded. A portion of allowances from the market stability reserve that would otherwise be invalidated should be used to replenish the innovation fund.

(34) In the context of the Union emergency intervention to address high energy prices resulting from the impact of Russia's war of aggression against Ukraine, targeted exceptional temporary measures under the 2014-2020 cohesion policy framework set out in Regulation (EU) No 1303/2013 of the European Parliament and of the Council ([14]), through a flexible use of resources from the European Regional Development Fund (ERDF), the European Social Fund (ESF), and the Cohesion Fund, should help small and medium enterprises (SMEs) particularly affected by energy price increases, as well as vulnerable households, cover energy costs incurred and paid as from 1 February 2022. Such support is fully in line with the REPowerEU objectives.

([13]) Council Regulation (EU) 2022/1854 of 6 October 2022 on an emergency intervention to address high energy prices (OJ L 261 I, 7.10.2022, p. 1).

([14]) Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006 (OJ L 347, 20.12.2013, p. 320).

(35) In particular, the ERDF should exceptionally be used to provide working capital support to SMEs particularly affected by energy price increases. Support to SMEs particularly affected by energy price increases should be proportionate and respect applicable State aid rules. Moreover, the ESF should exceptionally be used to provide support to vulnerable households, as defined in national rules, to help them meet their energy consumption costs even in the absence of measures increasing the employability of the people supported, i.e., active measures. Those are exceptional measures strictly necessary to address the energy crisis resulting from the impact of Russia's war of aggression against Ukraine. They ensure that people supported have access to essential services, thereby also contributing to the conditions conducive to good health necessary to participate in the labour market. Support may be provided by the ERDF, the ESF and the Cohesion Fund interchangeably. Furthermore, in addition to the ESF, it should be possible to use the ERDF and the Cohesion Fund to support job retention measures through short-time work and equivalent schemes, including support to the self-employed. Such schemes aim to protect employees and the self-employed against the risk of unemployment. The resources allocated to such schemes are to be used exclusively to support workers and self-employed. Union support to such short-time work and equivalent schemes should be limited in time. It should also be possible to use REACT-EU resources set out in Article 92a of Regulation (EU) No 1303/2013 for those three types of support in order to reinforce the ongoing efforts of Member States towards the resilient recovery of their economies following the COVID-19 crisis.

(36) Specific programming arrangements should allow resources to be exclusively programmed within dedicated priority axes and contribute to specific investment priorities. In order to offer significant support to Member States in their efforts to contain the fall-out of the energy crisis, Member States should exceptionally benefit from a co-financing rate of 100 % to be applied to the dedicated priority axes of operational programmes providing exclusively such support until the end of the 2014-2020 programming period. Those limited and targeted measures should complement the structural interventions in the cohesion policy supporting the production of clean energy and promotion of energy efficiency. In order to take account of Union budgetary constraints, payments by the Commission to such operations under the dedicated priorities should be capped at EUR 5 000 000 000 in 2023.

(37) In order to provide Member States and regions with sufficient flexibility in addressing the newly emerging challenges, Regulation (EU) 2021/1060 of the European Parliament and of the Council ([15]) should provide Member States with the possibility to request up to 7,5 % of resources under the ERDF, the European Social Fund Plus and the Cohesion Fund to contribute to the REPowerEU objectives. It should be possible that those Funds provide support to the REPowerEU objectives where such support falls within the scope of the Fund concerned, contributes to its specific objectives and complies with the rules set out in Regulation (EU) 2021/1060 and the relevant Fund-specific Regulation, including the principle of 'do no significant harm'.

(38) Member States should have the possibility to transfer all or part of their provisional allocation from the resources of the Brexit Adjustment Reserve to the Facility. The COVID-19 crisis, aggravated by the threat to the Union's energy security, has exacerbated the negative repercussions of the withdrawal of the United Kingdom from the Union in Member States, including their regions and local communities, and sectors, in particular in those that are most adversely affected by that withdrawal. The measures to be funded under the Brexit Adjustment Reserve and the reforms and investments to be funded under the Facility can serve similar purposes and have similar content. Both the Brexit Adjustment Reserve and the Facility aim ultimately at mitigating the negative impacts on economic, social and territorial cohesion. In that context, whilst reforms and investments under the Facility primarily aim to address the economic consequences of the pandemic, they can also contribute to countering unforeseen and

([15]) Regulation (EU) 2021/1060 of the European Parliament and of the Council of 24 June 2021 laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime, Fisheries and Aquaculture Fund and financial rules for those and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy (OJ L 231, 30.6.2021, p. 159).

adverse consequences in the Member States and sectors that are worst affected by Brexit. Finally, commitments and payment appropriations under both the Brexit Adjustment Reserve and the Facility are entered over and above the ceilings of the multiannual financial framework. Under that scenario, and bearing in mind the global energy market disruption caused by the more recent geopolitical developments, it is appropriate to provide flexibility to Member States by allowing transfers from the Brexit Adjustment Reserve to the Facility, which will permit catering for the objectives of both, and ultimately to bring about economic, social and territorial cohesion.

(39) Disbursements of additional funding to Member States which include a REPowerEU chapter in their recovery and resilience plan should be made following the rules of the Facility until the end of 2026.

(40) A request, submitted in a recovery and resilience plan, for dedicated funding, including an allocation from the auctioning of allowances of the emissions trading system under Directive 2003/87/EC, transfers of resources from the ERDF, the European Social Fund Plus or the Cohesion Fund governed by Article 26 of Regulation (EU) 2021/1060 and transfers of resources from the Brexit Adjustment Reserve, for measures contained in a REPowerEU chapter should reflect a higher financial need linked to reforms and investments included in that chapter.

(41) To ensure that financial support is frontloaded to better respond to the current energy crisis, it should be possible that, upon request of a Member State to be submitted together with the REPowerEU chapter in a modified recovery and resilience plan, an amount of the additional funding required to finance measures of the REPowerEU chapter be paid in the form of two pre-financing payments.

The Commission should make, to the extent possible, the first pre-financing payment within two months of it entering into the legal commitment for the purposes of Regulation (EU) 2021/241, and the second pre-financing payment within 12 months of the entry into force of the Council implementing decision approving the assessment of the recovery and resilience plan including a REPowerEU chapter. Those payments should be subject to available resources, in particular the availability of funds from the NextGenerationEU account, of funds approved in the Union annual budget and of the revenue obtained from the auctioning of allowances of the emissions trading system under Directive 2003/87/EC, and to the effective prior transfer of resources under shared management programmes, if requested.

(42) In order to comply with the payment ceilings of the multiannual financial framework, a cap should be established for payments corresponding to the pre-financing for amounts transferred under Regulation (EU) 2021/1060.

(43) The Commission should monitor the implementation of the reforms and investments outlined in the REPowerEU chapter and their contribution to the REPowerEU objectives and provide information in relation thereto in particular through exchanges during the recovery and resilience dialogue, through reporting in the recovery and resilience scoreboard, and through a dedicated section in the annual report to be submitted to the European Parliament and to the Council.

(44) Recent geopolitical events have considerably affected prices of energy, food and construction materials and have also caused shortages in the global supply chains, resulted in increased inflation and generated new challenges, including a risk of energy poverty and higher costs of living. A response to those challenges might be required. It could be that those developments have a direct impact on the capacity to implement the measures in recovery and resilience plans. To the extent that Member States can demonstrate that such developments make a specific milestone or target no longer achievable, either totally or partially, such situations could be invoked as objective circumstances under Regulation (EU) 2021/241. Moreover, to the extent that Member States can demonstrate that the achievement of a specific milestone or target conflicts with the achievement of the REPowerEU objectives, such situations could also be invoked as objective circumstances under that Regulation. In addition, no request for amendments should undermine the overall implementation of recovery and resilience plans, including the reform and investment efforts of the Member States.

(45) Regulations (EU) 2021/241, (EU) No 1303/2013, (EU) 2021/1060 and (EU) 2021/1755, and Directive 2003/87/EC should therefore be amended accordingly.

(46) In order to allow for the prompt application of the measures provided for in this Regulation, it should enter into force on the day following that of its publication in the *Official Journal of the European Union*,

HAVE ADOPTED THIS REGULATION:

Article 1

Amendments to Regulation (EU) 2021/241

Regulation (EU) 2021/241 is amended as follows:

(1) in Article 4, paragraph 1 is replaced by the following:

‘1. In line with the six pillars referred in Article 3 of this Regulation, the coherence and synergies they generate, and in the context of the COVID-19 crisis, the general objective of the Facility shall be to promote the Union’s economic, social and territorial cohesion by improving the resilience, crisis preparedness, adjustment capacity and growth potential of the Member States, by mitigating the social and economic impact of that crisis, in particular on women, by contributing to the implementation of the European Pillar of Social Rights, by supporting the green transition, by contributing to the achievement of the Union’s 2030 climate targets set out in point (11) of Article 2 of Regulation (EU) 2018/1999, by complying with the objective of EU climate neutrality by 2050 and of the digital transition, and by increasing the resilience, security and sustainability of the Union’s energy system through the necessary reduction in dependence on fossil fuels and diversification of energy supplies at Union level, including by means of an increase in the uptake of renewables, in energy efficiency and in energy storage capacity, thereby contributing to the upward economic and social convergence, restoring and promoting sustainable growth and the integration of the economies of the Union, fostering high quality employment creation, and contributing to the strategic autonomy of the Union alongside an open economy and generating European added value.’;

(2) in Article 5, paragraph 2 is replaced by the following:

‘2. The Facility shall only support measures respecting the principle of ‘do no significant harm’, which shall also apply to the measures in the REPowerEU chapters, unless otherwise specified in this Regulation.’;

(3) Article 14 is amended as follows:

(a) in paragraph 3, the following point is added:

‘(d) where applicable, the reforms and investments in line with Article 21c.’;

(b) paragraph 4 is replaced by the following:

‘4. The loan support to the recovery and resilience plan of the Member State concerned shall not be higher than the difference between the total costs of the recovery and resilience plan, as revised where relevant, and the maximum financial contribution referred to in Article 11, including, where relevant, the revenue referred to in Article 21a as well as resources transferred from shared management programmes.’;

(c) paragraph 6 is replaced by the following:

‘6. By derogation from paragraph 5, subject to the availability of resources, in exceptional circumstances the amount of the loan support may be increased, considering the needs of the requesting Member State, as well as requests for loan support already submitted or planned to be submitted by other Member States, while applying the principles of equal treatment, solidarity, proportionality and transparency. To facilitate the application of those principles, Member States shall communicate to the Commission by 31 March 2023, whether they intend to request loan support. The Commission shall present to the European Parliament and to the Council, simultaneously, on equal terms and without undue delay, an overview of the intentions expressed by the Member States and the proposed way forward for the distribution of the available resources. That communication of the intention to request loan support shall not prejudice the ability of Member States to request loan support until 31 August 2023, including in the case of requests exceeding 6,8 % GNI, where the relevant conditions apply. It shall also not prejudice the entering into of the corresponding loan agreement after the adoption of the relevant Council implementing decision.’;

(4) in Article 17, paragraph 2 is replaced by the following:

‘2. Measures started from 1 February 2020 onwards shall be eligible provided that they comply with the requirements set out in this Regulation.

However, the new reforms and investments referred to in Article 21c(1) shall only be eligible where they start from 1 February 2022 onwards.’;

(5) Article 18(4) is amended as follows:

(a) the following point is inserted:

‘(ca) an explanation of how the REPowerEU chapter contributes to addressing energy poverty, including, where relevant, giving adequate priority to the needs of those affected by energy poverty, as well as to the reduction of vulnerabilities during the coming winter seasons;’;

(b) point (e) is replaced by the following:

‘(e) a qualitative explanation of how the measures in the recovery and resilience plan are expected to contribute to the green transition, including biodiversity, or to addressing the challenges resulting therefrom, whether they account for an amount that represents at least 37 % of the recovery and resilience plan’s total allocation and whether measures of that type in the REPowerEU chapter account for an amount that represents at least 37 % of the total estimated costs of measures included in that chapter, based on the methodology for climate tracking set out in Annex VI; that methodology shall be used accordingly for measures that cannot be directly assigned to an intervention field listed in Annex VI; the coefficients for support for the climate objectives may be increased up to a total amount of 3 % of the allocation of the recovery and resilience plan for individual investments to take account of accompanying reform measures that credibly increase their impact on the climate objectives as explained in the recovery and resilience plan;’;

(c) point (h) is replaced by the following:

‘(h) an indication of whether the measures included in the recovery and resilience plan comprise cross-border or multi-country projects, an explanation as to how the relevant measures in the REPowerEU chapter, including the measures addressing challenges identified in the Commission’s most recent needs assessment, have a cross-border or multi-country dimension or effect, and an indication of whether the total costs of those measures account for an amount that represents at least 30 % of the estimated costs of the REPowerEU chapter;’;

(d) point (q) is replaced by the following:

‘(q) for the preparation and, where available, for the implementation of the recovery and resilience plan, a summary of the consultation process, conducted in accordance with the national legal framework, of local and regional authorities, social partners, civil society organisations, youth organisations and other relevant stakeholders, and how the input of the stakeholders is reflected in the recovery and resilience plan, with that summary to be complemented, where a REPowerEU chapter has been included, by setting out the stakeholders consulted, by a description of the outcome of the consultation process as regards that chapter, and by an outline as to how the input received was reflected therein;’;

(6) Article 19(3) is amended as follows:

(a) the following points are inserted:

‘(da) whether the REPowerEU chapter contains reforms and investments referred to in Article 21c that contribute effectively to energy security, the diversification of the Union’s energy supply, an increase in the uptake of renewables and energy efficiency, an increase of energy storage capacities or the necessary reduction of dependence on fossil fuels before 2030;

(db) whether the REPowerEU chapter contains reforms and investments referred to in Article 21c which are expected to have a cross-border or multi-country dimension or effect;’;

(b) point (e) is replaced by the following:

‘(e) whether the recovery and resilience plan contains measures that effectively contribute to the green transition, including biodiversity, or to addressing the challenges resulting therefrom, whether they account for an amount which represents at least 37 % of the recovery and resilience plan’s total allocation and whether such measures in the REPowerEU chapter account for an amount which represents at least 37 % of the total estimated costs of the measures included in that chapter, based on the methodology for climate tracking set out in Annex VI; that methodology shall be used accordingly for measures that cannot be directly assigned to an intervention field listed in Annex VI; the coefficients for support for the climate objectives may be increased up to a total amount of 3 % of the allocation of the recovery and resilience plan for individual investments to take account of accompanying reform measures that credibly increase their impact on the climate objectives, subject to the agreement of the Commission;’;

(7) in Article 20(5), the following point is inserted:

‘(ca) a summary of the measures proposed in the REPowerEU chapter which have a cross-border or multi-country dimension or effect, including those measures addressing challenges identified in the Commission’s most recent needs assessment; where the estimated costs of those measures account for an amount that represents less than 30 % of the estimated costs of all measures included in the REPowerEU chapter, an explanation of the reasons therefor, in particular a demonstration that other measures included in the REPowerEU chapter better address the objectives set out in Article 21c(3) or that there are not enough realistic projects available which have cross-border or multi-country dimension or effect, in particular considering the lifetime of the Facility;’;

(8) the following Chapter is inserted after Chapter III:

‘CHAPTER IIIa

REPower EU

Article 21a

Revenue from the emission trading system under Directive 2003/87/EC

1. EUR 20 000 000 000 in current prices, obtained in accordance with Article 10e of Directive 2003/87/EC of the European Parliament and of the Council (*), shall be made available as additional non-repayable financial support under the Facility for implementation under this Regulation to increase the resilience of the Union’s energy system through a decrease of dependence on fossil fuels and diversifying energy supplies at Union level. As provided for in Article 10e of Directive 2003/87/EC, those amounts shall constitute external assigned revenue in accordance with Article 21(5) of the Financial Regulation.

2. The allocation share of the amount referred to in paragraph 1 available for each Member State shall be calculated on the basis of the indicators set out in the methodology in Annex IVa.

3. The amount referred to in paragraph 1 shall be allocated exclusively to measures referred to in Article 21c, with the exception of measures referred to in Article 21c(3), point (a). It may also cover expenses referred to in Article 6(2).

4. Commitment appropriations covering the amount referred to in paragraph 1 shall be made available automatically for that amount as of 1 March 2023.

5. Each Member State may submit to the Commission a request for the allocation of an amount not exceeding its share by including in its plan the reforms and investments referred to in Article 21c and indicating their estimated costs.

6. The Council implementing decision adopted pursuant to Article 20(1) shall lay down the amount of the revenue referred to in paragraph 1 of this Articleallocated to the Member State following the submission of a request pursuant to paragraph 5 of this Article. The corresponding amount shall be paid in instalments, subject to available funding, in accordance with Article 24, once the Member State concerned has satisfactorily fulfilled the milestones and targets identified in relation to the implementation of the measures referred to in Article 21c.

Article 21b

Resources from shared management programmes to support the REPowerEU objectives

1. Within the resources allocated to them, Member States may request under the Common Provisions Regulation for 2021-2027 support for the objectives set out in Article 21c(3) of this Regulation from programmes supported by the European Regional Development Fund, the European Social Fund Plus and the Cohesion Fund, subject to the conditions set out in Article 26a of the Common Provisions Regulation for 2021-2027 and the Fund-specific Regulations. Such support shall be implemented in accordance with the Common Provisions Regulation for 2021-2027 and the Fund-specific Regulations.

2. Resources may be transferred under Article 4a of Regulation (EU) 2021/1755 of the European Parliament and of the Council (**) to support measures referred to in Article 21c of this Regulation.

Article 21c

REPowerEU chapters in recovery and resilience plans

1. Recovery and resilience plans submitted to the Commission after 1 March 2023 that require the use of additional funding under Articles 14, 21a or 21b, shall include a REPowerEU chapter containing measures and their corresponding milestones and targets. The measures in the REPowerEU chapter shall be either new reforms and investments, started from 1 February 2022 onwards, or the scaled-up part of reforms and investments included in the already adopted Council implementing decision for the Member State concerned.

2. By derogation from paragraph 1, Member States that are subject to a decrease in the maximum financial contribution in accordance with Article 11(2) may also include in the REPowerEU chapters measures included in the already adopted Council implementing decisions without having them scaled-up, up to an amount of estimated costs equal to that decrease.

3. Reforms and investments in the REPowerEU chapter shall aim to contribute to at least one of the following objectives:

(a) improving energy infrastructure and facilities to meet immediate security of supply needs for gas, including liquified natural gas, notably to enable diversification of supply in the interest of the Union as a whole; measures concerning the oil infrastructure and facilities necessary to meet immediate security of supply needs may be included in the REPowerEU chapter of a Member State only where that Member State has been subject to the exceptional temporary derogation in Article 3m(4) of Regulation (EU) No 833/2014 by 1 March 2023, due to its specific dependence on crude oil and its geographical situation;

(b) boosting energy efficiency in buildings and critical energy infrastructure, decarbonising industry, increasing the production and uptake of sustainable biomethane and of renewable or fossil-free hydrogen, and increasing the share and accelerating the deployment of renewable energy;

(c) addressing energy poverty;

(d) incentivising reduction of energy demand;

(e) addressing internal and cross-border energy transmission and distribution bottlenecks, supporting electricity storage and accelerating the integration of renewable energy sources, and supporting zero-emission transport and its infrastructure, including railways;

(f) supporting the objectives set out in points (a) to (e) through an accelerated requalification of the workforce towards green and related digital skills, as well as through support of the value chains in critical raw materials and technologies linked to the green transition.

4. The REPowerEU chapter shall also contain an explanation as to how the measures in that chapter are coherent with the efforts of the Member State concerned to achieve the objectives set out in paragraph 3, taking into account the measures included in the already adopted Council implementing decision, as well as an explanation of the overall contribution of those measures and other nationally funded and Union-funded complementary or accompanying measures to those objectives.

5. The estimated costs of the reforms and investments in the REPowerEU chapter shall not be taken into account for the calculation of the recovery and resilience plan's total allocation under Article 18(4), point (f), and Article 19(3), point (f).

6. By derogation from Article 5(2), Article 17(4), Article 18(4), point (d), and Article 19(3), point (d), the principle of "do no significant harm" shall not apply to the reforms and investments under paragraph 3, point (a), of this Article, subject to a positive assessment by the Commission that the following requirements are met:

(a) the measure is necessary and proportionate to meet immediate security of supply needs in accordance with paragraph 3, point (a), of this Article taking into account cleaner feasible alternatives and the risk of lock-in effects;

(b) the Member State concerned has undertaken satisfactory efforts to limit the potential harm to environmental objectives within the meaning of Article 17 of Regulation (EU) 2020/852, where feasible, and to mitigate harm through other measures, including the measures in the REPowerEU chapter;

(c) the measure does not jeopardise the achievement of the Union's 2030 climate targets and the objective of EU climate neutrality by 2050, based on qualitative considerations;

(d) the measure is planned to be in operation by 31 December 2026.

7. When carrying out the assessment referred to in paragraph 6, the Commission shall act in close cooperation with the Member State concerned. The Commission may make observations or request additional information. The Member State concerned shall provide the requested additional information.

8. The revenue made available in accordance with Article 21a shall not contribute to reforms and investments under paragraph 3, point (a), of this Article.

9. The total estimated costs of the measures subject to a positive assessment by the Commission under paragraph 6 shall not exceed 30 % of the total estimated costs of the measures included in the REPowerEU chapter.

Article 21d

REPowerEU pre-financing

1. The recovery and resilience plan containing a REPowerEU chapter may be accompanied by a request for pre-financing. Subject to the adoption by the Council of the implementing decision referred to in Article 20(1) and Article 21(2) by 31 December 2023, the Commission shall make up to two pre-financing payments for a total amount of up to 20 % of the additional funding requested by the Member State concerned to finance its REPowerEU chapter, under Articles 7, 12, 14, 21a and 21b, while complying with the principles of equal treatment among Member States and proportionality.

2. With regard to resources transferred under the conditions set out in Article 26 of Regulation (EU) 2021/1060, each of the two sets of pre-financing payments shall not exceed EUR 1 000 000 000.

3. By derogation from Article 116(1) of the Financial Regulation, the Commission shall make the pre-financing payments, to the extent possible and subject to available resources, as follows:

(a) as regards the first pre-financing payment, within two months of the conclusion, by the Commission and the Member State concerned, of the agreement constituting a legal commitment as referred to in Article 23;

(b) as regards the second pre-financing payment, within 12 months of the entry into force of the Council implementing decision approving the assessment of the recovery and resilience plan including a REPowerEU chapter.

4. A pre-financing payment in respect of resources referred to in paragraph 2 shall be made following the receipt of information from all Member States on whether they intend to request pre-financing of such resources, and, where necessary, on a pro-rata basis to respect the total ceiling of EUR 1 000 000 000.

5. In cases of pre-financing under paragraph 1, the financial contribution referred to in Article 20(5), point (a), and, where applicable, the amount of the loan to be paid as referred to in Article 20(5), point (h), shall be adjusted proportionally.

(*) Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Union and amending Council Directive 96/61/EC (OJ L 275, 25.10.2003, p. 32).
(**) Regulation (EU) 2021/1755 of the European Parliament and of the Council of 6 October 2021 establishing the Brexit Adjustment Reserve (OJ L 357, 8.10.2021, p. 1).';

(9) in Article 23, paragraph 1 is replaced by the following:

'1. Once the Council has adopted an implementing decision as referred to in Article 20(1), the Commission shall conclude an agreement with the Member State concerned constituting an individual legal commitment within the meaning of the Financial Regulation. For each Member State the legal commitment shall not exceed the total of the financial contribution referred to in point (a) of Article 11(1) for 2021 and 2022, the updated financial contribution referred to in Article 11(2) for 2023 and the amount calculated under Article 21a(2).';

(10) the following Article is inserted:

'*Article 25a*

Transparency with regard to final recipients

1. Each Member State shall create an easy-to-use public portal containing data on the 100 final recipients receiving the highest amount of funding for the implementation of measures under the Facility. Member States shall update those data twice a year.

2. For the final recipients referred to in paragraph 1, the following information shall be published:

(a) in the case of a legal person, the recipient's full legal name and VAT identification number or tax identification number, where available, or another unique identifier established at the national level,

(b) in the case of a natural person, the first and last name of the recipient;

(c) the amount received by each recipient, as well as the associated measures for which a Member State has received funding under the Facility.

3. The information referred to in Article 38(3) of the Financial Regulation shall not be published.

4. Where personal data are published, the information referred to in paragraph 2 shall be removed by the Member State concerned two years after the end of the financial year in which the funding has been paid to the final recipient.

5. The Commission shall centralise the Member States' public portals and publish the data referred to in paragraph 1 in the recovery and resilience scoreboard referred to in Article 30.';

(11) in Article 26(1), the following point is added:

'(h) the progress of the implementation of the reforms and investments in the REPowerEU chapters.';

(12) in Article 29, paragraph 1 is replaced by the following:

'1. The Commission shall monitor the implementation of the Facility and measure the achievement of the objectives set out in Article 4, including the implementation of the reforms and investments in the REPowerEU chapters and their contribution to the objectives set out in Article 21c(3). The monitoring of implementation shall be targeted and proportionate to the activities carried out under the Facility.';

(13) in Article 30, paragraph 3 is replaced by the following:

'3. The Scoreboard shall also display the progress of the implementation of the recovery and resilience plans in relation to the common indicators referred to in Article 29(4). It shall also include the progress of the implementation of the measures in the REPowerEU chapters and their contribution to the objectives set out in Article 21c(3), and display information on the reduction of the Union imports of fossil fuels and the diversification of energy supplies.';

(14) Article 31 is amended as follows:

(a) paragraph 3 is amended as follows:

(i) the introductory sentence is replaced by the following:

'3. The annual report shall also include the following information:';

(ii) the following points are added:

'(d) an overview of measures having a cross-border or multi-country dimension or effect included in all REPowerEU chapters, their total estimated costs and an indication of whether the total costs of those measures account for an amount that represents at least 30 % of the total estimated costs of measures included in all REPowerEU chapters;

(e) the number of measures falling under Article 21c(3), point (a), included in all REPowerEU chapters, and their total estimated costs;

(f) the progress of the implementation of the reforms and investments in the REPowerEU chapter, through a dedicated section which includes lessons learned after analysing the data available on final recipients and examples of best practices.';

(b) the following paragraph is inserted:

'3a. The information referred to in points (d) and (e) of paragraph 3 shall only be included in the annual report following the approval of the assessment of all the recovery and resilience plans containing a REPowerEU chapter.';

(15) in Article 32, paragraph 2 is replaced by the following:

'2. The evaluation report shall, in particular, assess to which extent the objectives have been achieved, the efficiency of the use of the resources and the European added value. It shall also consider the continued relevance of all objectives and actions as well as assess the implementation of the REPowerEU chapters and their contributions to the objectives set out in Article 21c(3).';

(16) the text set out in Annex I to this Regulation is inserted as Annex IVa;

(17) Annex V is amended in accordance with Annex II to this Regulation.

Article 2

Amendments to Regulation (EU) No 1303/2013

The following Article is inserted in Regulation (EU) No 1303/2013:

‘*Article 25b*

Exceptional measures for the use of the Funds to support SMEs particularly affected by energy price increases, vulnerable households, and short-time work and equivalent schemes

1. As an exceptional measure strictly necessary to address the energy crisis resulting from the impact of Russia’s war of aggression against Ukraine, the ERDF may support the financing of working capital in the form of grants to SMEs particularly affected by energy price increases, under the investment priority referred to in Article 5(3), point (d), of Regulation (EU) No 1301/2013. SMEs particularly affected by energy price increases are those eligible to receive aid for additional costs due to exceptionally severe increases in natural gas and electricity prices under the temporary crisis framework for State-aid measures.

As a further exceptional measure strictly necessary to address the energy crisis resulting from the impact of Russia’s war of aggression against Ukraine, the ESF may support vulnerable households to help them meet their energy consumption costs, even without any corresponding active measures, under the investment priority referred to in Article 3(1), point (b)(iv), of Regulation (EU) No 1304/2013.

2. Operations providing the support referred to in paragraph 1 may be financed either by the ERDF or the ESF on the basis of the rules applicable to the other Fund. In addition, where such operations contribute to one of the investment priorities referred to in paragraph 1, they may be financed by the Cohesion Fund on the basis of the rules applicable either to the ERDF or the ESF. Furthermore, the ERDF and the Cohesion Fund may also finance access to the labour market by maintaining the jobs of employees and the self-employed through short-time work and equivalent schemes, on the basis of the rules applicable to the ESF under the investment priority referred to in Article 3(1), point (a)(v), of Regulation (EU) No 1304/2013.

3. Operations providing the support referred to in paragraphs 1 and 2 shall be programmed exclusively under a new dedicated priority axis. The dedicated priority axis may comprise funding from the ERDF and the ESF from different categories of regions and from the Cohesion Fund. Support provided by REACT-EU resources, within the meaning of Article 92a, shall be programmed under a separate dedicated priority axis contributing to the investment priority referred to in Article 92b(9), third subparagraph.

The amounts allocated to the dedicated priority axes referred to in the first subparagraph of this paragraph shall not exceed 10 % of the total ERDF, ESF and Cohesion Fund resources, including REACT-EU resources under the Investment for growth and jobs goal, allocated to the Member State concerned for the 2014-2020 programming period, as laid down in the relevant Commission implementing acts. By way of derogation from the first and second subparagraphs of Article 120(3), a co-financing rate of 100 % shall be applied to the dedicated priority axis or axes.

4. Requests for the amendment of an existing operational programme submitted by a Member State aiming at introducing a dedicated priority axis or axes referred to in paragraph 3 shall be duly justified and accompanied by the revised programme. The elements listed in Article 96(2), point (b)(v) and (vii), shall not be required in the description of the priority axis or axes in the revised operational programme.

5. By way of derogation from Article 65(9), expenditure for operations supporting the financing of working capital in the form of grants in SMEs particularly affected by energy price increases, for operations providing support to vulnerable households to help them meet their energy consumption costs, and for short-time work and equivalent schemes shall be eligible from 1 February 2022. Article 65(6) shall not apply in respect of such operations and schemes.

6. By way of derogation from Article 125(3), point (b), operations supporting the financing of working capital in the form of grants to SMEs particularly affected by energy price increases, operations providing support to vulnerable households to help them meet their energy consumption costs, and short-time work and equivalent schemes may be selected for support by the ERDF, the ESF or the Cohesion Fund prior to the approval of the revised programme.

7. For operations supporting the financing of working capital in the form of grants to SMEs particularly affected by energy price increases implemented outside the programme area but within the Member State, only point (d) of Article 70(2), first subparagraph, shall apply. By way of derogation from Article 70(4), to operations supported by the ESF providing support to vulnerable households to help them meet their energy consumption costs and to short-time work and equivalent schemes implemented outside the programme area but within the Member State, Article 70(2), first subparagraph, point (d), shall also apply.

8. The total payments by the Commission to Member States from the ERDF, the ESF, and the Cohesion Fund, excluding REACT-EU resources, for the dedicated priorities referred to in paragraph 3 shall not exceed EUR 5 000 000 000 in 2023. Amounts shall be paid subject to available funding under the ceilings of the multiannual financial framework 2014-2020.

9. This Article shall not apply to programmes under the European territorial cooperation goal.'.

Article 3

Amendments to Regulation (EU) 2021/1060

Regulation (EU) 2021/1060 is amended as follows:

(1) in Article 22(3), point (g), point (i) is replaced by the following:

'(i) a table specifying the total financial allocations for each of the Funds and, where applicable, for each category of region for the whole programming period and by year, including any amounts transferred pursuant to Article 26 or 27, and the Member State's request for supporting measures contributing to the objectives set out in Article 21c(3) of Regulation (EU) 2021/241 of the European Parliament and of the Council (*);

(*) Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility (OJ L 57, 18.2.2021, p. 17).';

(2) in Article 24, the following paragraph is added:

'8. For programmes supported by the ERDF, the ESF+ or the Cohesion Fund the Member State may submit an amendment of a programme, in accordance with this Article, requesting that measures contributing to the objectives set out in Article 21c(3) of Regulation (EU) 2021/241 are included in a programme, where such support contributes to the specific objectives of the Fund concerned as set out in Fund-specific Regulations. The amounts requested for such measures shall be programmed under a specific objective in accordance with the Fund-specific Regulations and included in a priority. Those amounts overall shall not exceed the limit of 7,5 % of the initial national allocation for each Fund.';

(3) the following Article is inserted:

'*Article 26a*

Support for the objectives in Article 21c(3) of Regulation (EU) 2021/241

1. Member States submitting to the Commission, in accordance with Regulation (EU) 2021/241, recovery and resilience plans which contain a REPowerEU chapter may request through an amendment of a programme under Article 24 of this Regulation that up to 7,5 % of their initial national allocation under the ERDF, the ESF+ and the Cohesion Fund be included in priorities contributing to the objectives set out in Article 21c(3) of Regulation (EU) 2021/241, provided that such support contributes to the specific objectives of the Fund concerned as set out in the Fund-specific Regulations. The possibility of such a request shall be without prejudice to the possibility of transfer of resources envisaged under Article 26 of this Regulation.

2. Resources requested by Member States under this Article shall be implemented in accordance with this Regulation and the Fund-specific Regulations.

3. Requests for an amendment of a programme shall set out the total amount of the resources contributing to the objectives set out in Article 21c(3) of Regulation (EU) 2021/241 for each year by Fund and by category of region, where applicable.';

(4) Annex V is amended in accordance with Annex III to this Regulation.

Article 4

Amendments to Regulation (EU) 2021/1755

In Regulation (EU) 2021/1755, the following Article is inserted:

'*Article 4a*

Transfer to the Recovery and Resilience Facility

1. By 1 March 2023, Member States may submit to the Commission a reasoned request to transfer to the Recovery and Resilience Facility established by Regulation (EU) 2021/241 of the European and of the Council (*) all or part of the amounts of their provisional allocation set out in the implementing act of the Commission referred to in Article 4(5). If the transfer request is approved, the Commission shall amend the implementing act in order to reflect the adjusted amounts following the transfer.

2. Where the transfer affects the instalments already paid or to be paid as pre-financing, the Commission shall amend the implementing act referred to in Article 9(1) accordingly for the Member State concerned. Where appropriate, the Commission shall recover, in accordance with the Financial Regulation, all or part of the 2021 and 2022 instalments paid to that Member State as pre-financing. In that case the recovered amounts shall be transferred to the Recovery and Resilience Facility for the exclusive benefit of the Member State concerned.

3. Where a Member State chooses to transfer all or part of its provisional allocation to the Recovery and Resilience Facility in accordance with this Article, the amounts to be spent for the purposes of Article 4(4), first subparagraph, shall be proportionately reduced.

4. Where a Member State chooses to transfer all of its provisional allocation to the Recovery and Resilience Facility, Article 10(1) shall not apply.

5. Article 10(2) shall not apply to the amounts transferred to the Recovery and Resilience Facility.

(*) Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing a Recovery and Resilience Facility (OJ L 57, 18.2.2021, p. 17).'.

Article 5

Amendments to Directive 2003/87/EC

In Directive 2003/87/EC, the following Article is inserted:

'*Article 10e*

Recovery and Resilience Facility

1. As an extraordinary and one-time measure, until 31 August 2026, the allowances auctioned pursuant to paragraphs 2 and 3 of this Article shall be auctioned until the total amount of revenue obtained from such auctioning has reached EUR 20 billion. That revenue shall be made available to the Recovery and Resilience Facility established by Regulation (EU) 2021/241 of the Parliament and of the Council (*) and shall be implemented in accordance with the provisions of that Regulation.

2. By way of derogation from Article 10a(8), until 31 August 2026, a part of the allowances referred to in that paragraph shall be auctioned to support the objectives set out in Article 21c(3), points (b) to (f), of Regulation (EU) 2021/241, until the amount of revenue obtained from such auctioning has reached EUR 12 billion.

3. Until 31 August 2026, a number of allowances from the quantity which would otherwise be auctioned from 1 January 2027 to 31 December 2030 by the Member States under Article 10(2), point (a), shall be auctioned to support the objectives set out in Article 21c(3), points (b) to (f), of Regulation (EU) 2021/241 until the amount of revenue obtained from such auctioning has reached EUR 8 billion. Those allowances shall, in principle, be auctioned in equal annual volumes over the relevant period.

4. By way of derogation from Article 1(5a) of Decision (EU) 2015/1814, until 31 December 2030, 27 million unallocated allowances in the market stability reserve from the total quantity which would otherwise be invalidated over that period shall be used to support innovation, as referred to in Article 10a(8), first subparagraph, of this Directive.

5. The Commission shall ensure that the allowances to be auctioned under paragraphs 2 and 3, including, where appropriate, for pre-financing payments in accordance with Article 21d of Regulation (EU) 2021/241, are auctioned in accordance with the principles and modalities laid down in Article 10(4) of this Directive and in accordance with Article 24 of Commission Regulation (EU) No 1031/2010 (**) to ensure an adequate amount of innovation fund resources in the period from 2023 to 2026. The period for auctioning referred to in this Article shall be reviewed one year after its start in the light of the impact of the auctioning provided for in this Article on the carbon market and price.

6. The EIB shall be the auctioneer for the allowances to be auctioned pursuant to this Article on the auction platform appointed pursuant to Article 26(1) of Regulation (EU) No 1031/2010 and shall provide the revenues generated from the auctioning to the Commission.

7. The revenues generated from the auctioning of allowances shall constitute external assigned revenue in accordance with Article 21(5) of Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council (***).

(*) Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing a Recovery and Resilience Facility (OJ L 57, 18.2.2021, p. 17).

(**) Commission Regulation (EU) No 1031/2010 of 12 November 2010 on the timing, administration and other aspects of auctioning of greenhouse gas emission allowances pursuant to Directive 2003/87/EC of the European Parliament and of the Council establishing a system for greenhouse gas emission allowances trading within the Union (OJ L 302, 18.11.2010, p. 1).

(***) Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012 (OJ L 193, 30.7.2018, p. 1).’.

Article 6

Entry into force

This Regulation shall enter into force on the day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 27 February 2023.

For the European Parliament	*For the Council*
The President	*The President*
R. METSOLA	J. ROSWALL

ANNEX I

In Regulation (EU) 2021/241, the following Annex is inserted:

'ANNEX IVa

This Annex sets out the methodology for calculating the allocation share of the resources in the form of additional non-repayable financial support under the Facility referred to in Article 21a(1) available for each Member State. The method takes into account, with regard to each Member State:

— the population;

— the inverse of the GDP per capita;

— the gross fixed capital formation price deflator;

— the share of fossil fuels in gross inland energy consumption.

To avoid excessive concentration of resources:

— the inverse of the GDP per capita is capped at a maximum of 160 % of the Union weighted average;

— the inverse of the GDP per capita is capped at a maximum of 55 % of the Union weighted average if the GDP per capita of the Member State concerned is above 130 % of EU-27 average;

— a minimum allocation share is set at 0,15 %;

— a maximum allocation share is set at 13,80 %.

The allocation key applied to the amount referred to in Article 21a(1), ρ_i is defined as follows:

$$\rho_i = \begin{cases} 0{,}0015 & \omega_i \leq 0{,}0015 \\ 0{,}138 & \omega_i \geq 0{,}138 \\ \omega_i - \frac{\omega_i}{\sum_i^{27-z-q} \omega_i}\left[\sum_{i=i}^{z}(0{,}0015-\omega_i) - \sum_{i=i}^{q}(\omega_i - 0{,}138)\right] & 0{,}0015 < \omega_i < 0{,}138 \end{cases}$$

where Member States i to z are the Member States benefitting from a minimum allocation share and Member States i to q are the Member States benefitting from a maximum allocation share.

where $\omega_i = \frac{\tau_i + \mu_i + \psi_i}{3}$

where $\tau_i = \frac{\sigma_{i,2021}}{\sum_{i=1}^{27}\sigma_{i,2021}}$ and $\mu_i = \frac{\sigma_{i,2021} \times \frac{FFGIC_{i,2020}}{FFGIC_{EU,2020}}}{\sum_{i=1}^{27}\sigma_{i,2021} \times \frac{FFGIC_{i,2020}}{FFGIC_{EU,2020}}}$ and $\psi_i = \frac{\sigma_{i,2021} \times \frac{GFCF_{i,2022Q2/2021Q2}}{GFCF_{EU,2022Q2/2021Q2}}}{\sum_{i=1}^{27}\sigma_{i,2021} \times \frac{GFCF_{i,2022Q2/2021Q2}}{GFCF_{EU,2022Q2/2021Q2}}}$,

where $\sigma_{i,2021} = \frac{pop_{i,2021}}{pop_{EU,2021}} \times \min\left\{\frac{GDP^{PC}_{EU,2021}}{GDP^{PC}_{i,2021}}; 1,6\right\}$ for Member States i with $\frac{GDP^{PC}_{i,2021}}{GDP^{PC}_{EU,2021}} \leq 1,3$ and

$$\sigma_{i,2021} = \frac{pop_{i,2021}}{pop_{EU,2021}} \times \min\left\{\frac{GDP^{PC}_{EU,2021}}{GDP^{PC}_{i,2021}}; 0,55\right\} \text{ for Member States i with } \frac{GDP^{PC}_{i,2021}}{GDP^{PC}_{EU,2021}} \> 1,3$$

Defining ([1]):

— $pop_{i,2021}$ as the 2021 total population in Member State i;

— $pop_{EU,2021}$ as the 2021 total population in the EU-27 Member States;

$GDP^{PC}_{EU,2021}$ as the 2021 weighted average of the nominal GDP per capita of the EU-27 Member States;

$GDP^{PC}_{i,2021}$ as the 2021 nominal GDP per capita of Member State i;

— $FFGIC_{i,2020}$ as the 2020 share of fossil fuels in gross inland energy consumption of Member State i;

— $FFGIC_{EU,2020}$ as the 2020 weighted average share of fossil fuels in gross inland energy consumption of the EU-27 Member States;

$GFCF_{i,2022Q2/2021Q2}$ as the ratio of 2022 Q2 gross fixed capital formation price index (implicit deflator, 2015=100, national currency, seasonally and calendar adjusted data) of Member State i and 2021 Q2 Gross fixed capital formation price index (implicit deflator, 2015=100, national currency, seasonally and calendar adjusted data) of Member State i;

$GFCF_{EU,2022Q2/2021Q2}$ as the ratio of 2022 Q2 gross fixed capital formation price index (implicit deflator, 2015=100, national currency, seasonally and calendar adjusted data) of the EU-27 aggregate and 2021 Q2 gross fixed capital formation price index (implicit deflator, 2015=100, national currency, seasonally and calendar adjusted data) of the EU-27 aggregate.

The application of the methodology to the amount referred to in Article 21a(1) will result in the following share and amount per Member State:

Member State	Share as % of total	Amount (in EUR 1 000, current prices)
Belgium	1,41 %	282 139
Bulgaria	2,40 %	480 047
Czechia	3,41 %	681 565
Denmark	0,65 %	130 911
Germany	10,45 %	2 089 555
Estonia	0,42 %	83 423
Ireland	0,45 %	89 598
Greece	3,85 %	769 222
Spain	12,93 %	2 586 147
France	11,60 %	2 320 955
Croatia	1,35 %	269 441
Italy	13,80 %	2 760 000
Cyprus	0,26 %	52 487
Latvia	0,62 %	123 983
Lithuania	0,97 %	194 020

([1]) All data in this Regulation is from Eurostat. Cut-off date 20 September 2022 for historical data used for the application of the allocation key in this annex. Fossil fuels include solid fossil fuels, manufactured gases, peat and peat products, oil shale and oil sands, oil and petroleum products (excluding biofuel portion), natural gas and non-renewable waste.

Member State	Share as % of total	Amount (in EUR 1 000, current prices)
Luxembourg	0,15 %	30 000
Hungary	3,51 %	701 565
Malta	0,15 %	30 000
Netherlands	2,28 %	455 042
Austria	1,05 %	210 620
Poland	13,80 %	2 760 000
Portugal	3,52 %	704 420
Romania	7,00 %	1 399 326
Slovenia	0,58 %	116 910
Slovakia	1,83 %	366 959
Finland	0,56 %	112 936
Sweden	0,99 %	198 727
EU27	100,00 %	20 000 000’

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ANNEX II

Annex V of Regulation (EU) 2021/241 is amended as follows:

(1) In section 2, point 2.5, the first subparagraph is replaced by the following:

‘2.5. The recovery and resilience plan contains measures that effectively contribute to the green transition, including biodiversity, or to addressing the challenges resulting therefrom, that account for an amount which represents at least 37 % of the recovery and resilience plan’s total allocation and such measures in the REPowerEU chapter account for an amount which represents at least 37 % of the total estimated costs of the measures in the REPowerEU chapter, based on the methodology for climate tracking set out in Annex VI; that methodology shall be used accordingly for measures that cannot be directly assigned to an intervention field listed in Annex VI; the coefficients for support for the climate objectives may be increased up to a total amount of 3 % of the allocation of the recovery and resilience plan for individual investments to take account of accompanying reform measures that credibly increase their impact on the climate objectives, subject to the agreement of the Commission.’;

(2) in section 2, the following points are added:

‘2.12. The measures referred to in Article 21c are expected to effectively contribute to energy security, the diversification of the Union’s energy supply, an increase in the uptake of renewables and in energy efficiency, an increase of energy storage capacities or the necessary reduction of dependence on fossil fuels before 2030.

When assessing the measures referred to in Article 21c under this criterion, the Commission shall take into account the specific challenges and the additional funding under the Facility available to the Member State concerned. The Commission shall also take into account the following elements:

Scope

— the implementation of the envisaged measures is expected to effectively contribute to the improvement of energy infrastructure and facilities to meet immediate security of supply needs for gas, including liquified natural gas, or oil where the derogation under Article 21c(3), point (a), applies, notably to enable diversification of supply in the interest of the Union as a whole;

or

— the implementation of the envisaged measures is expected to effectively contribute to boosting energy efficiency in buildings and critical energy infrastructure, decarbonising industry, increasing production and uptake of sustainable biomethane and of renewable or fossil-free hydrogen, and increasing the share and accelerating the deployment of renewable energy;

or

— the implementation of the envisaged measures is expected to effectively contribute to addressing energy poverty and, where relevant, give adequate priority to the needs of those affected by energy poverty as well as to the reduction of vulnerabilities during the coming winter seasons;

or

— the implementation of the envisaged measures is expected to effectively contribute to incentivising reduction of energy demand;

or

— the implementation of the envisaged measures is expected to address internal and cross-border energy transmission and distribution bottlenecks, supporting electricity storage and accelerating the integration of renewable energy sources, and supporting zero emission transport and its infrastructure, including railways;

or

— the implementation of the envisaged measures is expected to effectively contribute to supporting the objectives set out in Article 21c(3), points (a) to (e), through an accelerated requalification of the workforce towards green and related digital skills, as well as support of the value chains in critical raw materials and technologies linked to the green transition;

and

— the envisaged measures are coherent with the efforts of the Member State concerned to achieve the objectives set out in Article 21c(3), taking into account the measures included in the already adopted Council implementing decision, as well as other nationally funded and Union-funded complementary or accompanying measures to the objectives set out in Article 21c(3).

Rating

A – to a large extent

B – to a moderate extent

C – to a small extent

2.13. The measures referred to in Article 21c are expected to have a cross-border or multi-country dimension or effect.

The Commission shall take into account the following elements for the assessment under this criterion:

Scope

— the implementation at the national level of the envisaged measures is expected to contribute to securing energy supply in the Union as a whole, including by addressing challenges identified in the Commission's most recent needs assessment, in line with the objectives set out in Article 21c(3), taking into account the financial contribution available to the Member State concerned and its geographical position;

or

— the implementation of the envisaged measures is expected to contribute to reducing dependency on fossil fuels and to reducing energy demand.

Rating

A – to a large extent

B – to a moderate extent

C – to a small extent';

(3) Section 3 is amended as follows:

(a) the indent that reads '— an A for criteria 2.2, 2.3, 2.5 and 2.6' is replaced by '— an A for criteria 2.2, 2.3, 2.5, 2.6 and 2.12';

(b) the indent that reads '— not an A in criteria 2.2, 2.3, 2.5 and 2.6' is replaced by '— not an A in criteria 2.2, 2.3, 2.5, 2.6 and 2.12'.

ANNEX III

Annex V of Regulation (EU) 2021/1060 is amended as follows:

(1) the text under point 3 is replaced by the following:

'Reference: points (g)(i), (ii) and (iii) of Article 22(3), Article 112(1), (2) and (3), and Articles 14, 26 and 26a CPR';

(2) point 3.1 is amended as follows:

(a) The first paragraph and unnumbered table are replaced by the following:

'3.1 Transfers and contributions (*)

Reference: Articles 14, 26, 26a and 27 CPR

Programme amendment related to		
	☐	contribution to InvestEU
	☐	transfer to instruments under direct or indirect management
	☐	transfer between ERDF, ESF+, Cohesion Fund or to another Fund or Funds
	☐	Funds contributing to the objectives set out in Article 21c(3) of Regulation (EU) 2021/241 (**)

(*) Applicable only to programme amendments in accordance with Articles 14, 26 and 26a, except for complementary transfers to the JTF in accordance with Article 27 CPR. Transfers shall not affect the annual breakdown of financial appropriations at the MFF level for a Member State.

(**) Indicate if the programme amendment contributes, in accordance with Article 26a of this Regulation, to the objectives set out in Article 21c(3) of Regulation (EU) 2021/241. If yes, indicate the additional amount by Fund, year and category of region at programme level in Table 21.';

(b) the following table is inserted after table 17B:

'Table 21: Resources contributing to the objectives set out in Article 21c(3) of Regulation (EU) 2021/241

Fund	Category of region	2022	2023	2024	2025	2026	2027	Total
ERDF	More developed							
	Transition							
	Less developed							
Total								
ESF+	More developed							
	Transition							
	Less developed							
Total								
Cohesion Fund	N/A'							
Total								

II

(Non-legislative acts)

INTERNATIONAL AGREEMENTS

Second Additional Protocol to the Convention on Cybercrime on enhanced co-operation and disclosure of electronic evidence

Preamble

THE MEMBER STATES OF THE COUNCIL OF EUROPE AND THE OTHER STATES PARTIES TO THE CONVENTION on Cybercrime (ETS No. 185, hereinafter "the Convention"), opened for signature in Budapest on 23 November 2001, signatories hereto,

BEARING IN MIND the reach and impact of the Convention in all regions of the world;

RECALLING that the Convention is already supplemented by the Additional Protocol concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems (ETS No. 189), opened for signature in Strasbourg on 28 January 2003 (hereinafter "the First Protocol"), as between Parties to that Protocol;

TAKING INTO ACCOUNT existing Council of Europe treaties on co-operation in criminal matters as well as other agreements and arrangements on co-operation in criminal matters between Parties to the Convention;

HAVING REGARD also for the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108) as amended by its amending Protocol (CETS No. 223), opened for signature in Strasbourg on 10 October 2018, and to which any State may be invited to accede;

RECOGNISING the growing use of information and communication technology, including internet services, and increasing cybercrime, which is a threat to democracy and the rule of law and which many States also consider a threat to human rights;

ALSO RECOGNISING the growing number of victims of cybercrime and the importance of obtaining justice for those victims;

RECALLING that governments have the responsibility to protect society and individuals against crime not only offline but also online, including through effective criminal investigations and prosecutions;

AWARE that evidence of any criminal offence is increasingly stored in electronic form on computer systems in foreign, multiple or unknown jurisdictions, and convinced that additional measures are needed to lawfully obtain such evidence in order to enable an effective criminal justice response and to uphold the rule of law;

RECOGNISING the need for increased and more efficient co-operation between States and the private sector, and that in this context greater clarity or legal certainty is needed for service providers and other entities regarding the circumstances in which they may respond to direct requests from criminal justice authorities in other Parties for the disclosure of electronic data;

AIMING, therefore, to further enhance co-operation on cybercrime and the collection of evidence in electronic form of any criminal offence for the purpose of specific criminal investigations or proceedings through additional tools pertaining to more efficient mutual assistance and other forms of co-operation between competent authorities; co-operation in emergencies; and direct co-operation between competent authorities and service providers and other entities in possession or control of pertinent information;

CONVINCED that effective cross-border co-operation for criminal justice purposes, including between public and private sectors, benefits from effective conditions and safeguards for the protection of human rights and fundamental freedoms;

RECOGNISING that the collection of electronic evidence for criminal investigations often concerns personal data, and recognising the requirement in many Parties to protect privacy and personal data in order to meet their constitutional and international obligations; and

MINDFUL of the need to ensure that effective criminal justice measures on cybercrime and the collection of evidence in electronic form are subject to conditions and safeguards, which shall provide for the adequate protection of human rights and fundamental freedoms, including rights arising pursuant to obligations that States have undertaken under applicable international human rights instruments, such as the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5) of the Council of Europe, the 1966 United Nations International Covenant on Civil and Political Rights, the 1981 African Charter on Human and People's Rights, the 1969 American Convention on Human Rights and other international human rights treaties;

HAVE AGREED AS FOLLOWS:

CHAPTER I

Common provisions

Article 1

Purpose

The purpose of this Protocol is to supplement:

a. the Convention as between the Parties to this Protocol; and

b. the First Protocol as between the Parties to this Protocol that are also Parties to the First Protocol.

Article 2

Scope of application

1. Except as otherwise specified herein, the measures described in this Protocol shall be applied:

a. as between Parties to the Convention that are Parties to this Protocol, to specific criminal investigations or proceedings concerning criminal offences related to computer systems and data, and to the collection of evidence in electronic form of a criminal offence; and

b. as between Parties to the First Protocol that are Parties to this Protocol, to specific criminal investigations or proceedings concerning criminal offences established pursuant to the First Protocol.

2. Each Party shall adopt such legislative and other measures as may be necessary to carry out the obligations set forth in this Protocol.

Article 3

Definitions

1. The definitions provided in Articles 1 and 18, paragraph 3, of the Convention apply to this Protocol.

2. For the purposes of this Protocol, the following additional definitions apply:

a. ”central authority” means the authority or authorities designated under a mutual assistance treaty or arrangement on the basis of uniform or reciprocal legislation in force between the Parties concerned, or, in the absence thereof, the authority or authorities designated by a Party under Article 27, paragraph 2.a, of the Convention;

b. ”competent authority” means a judicial, administrative or other law-enforcement authority that is empowered by domestic law to order, authorise or undertake the execution of measures under this Protocol for the purpose of collection or production of evidence with respect to specific criminal investigations or proceedings;

c. an ”emergency” means a situation in which there is a significant and imminent risk to the life or safety of any natural person;

d. ”personal data” means information relating to an identified or identifiable natural person;

e. ”transferring Party” means the Party transmitting the data in response to a request or as part of a joint investigation team or, for the purposes of Chapter II, section 2, a Party in whose territory a transmitting service provider or entity providing domain name registration services is located.

Article 4

Language

1. Requests, orders and accompanying information submitted to a Party shall be in a language acceptable to the requested Party or the Party notified under Article 7, paragraph 5, or be accompanied by a translation into such a language.

2. Orders under Article 7 and requests under Article 6, and any accompanying information shall be:

a. submitted in a language of the other Party in which the service provider or entity accepts comparable domestic process;

b. submitted in another language acceptable to the service provider or entity; or

c. accompanied by a translation into one of the languages under paragraphs 2.a or 2.b.

CHAPTER II

Measures for enhanced co-operation

Section 1

General principles applicable to Chapter II

Article 5

General principles applicable to Chapter II

1. The Parties shall co-operate in accordance with the provisions of this Chapter to the widest extent possible.

2. Section 2 of this chapter consists of Articles 6 and 7. It provides for procedures enhancing direct co-operation with providers and entities in the territory of another Party. Section 2 applies whether or not there is a mutual assistance treaty or arrangement on the basis of uniform or reciprocal legislation in force between the Parties concerned.

3. Section 3 of this chapter consists of Articles 8 and 9. It provides for procedures to enhance international co-operation between authorities for the disclosure of stored computer data. Section 3 applies whether or not there is a mutual assistance treaty or arrangement on the basis of uniform or reciprocal legislation in force between the requesting and requested Parties.

4. Section 4 of this chapter consists of Article 10. It provides for procedures pertaining to emergency mutual assistance. Section 4 applies whether or not there is a mutual assistance treaty or arrangement on the basis of uniform or reciprocal legislation in force between the requesting and requested Parties.

5. Section 5 of this chapter consists of Articles 11 and 12. Section 5 applies where there is no mutual assistance treaty or arrangement on the basis of uniform or reciprocal legislation in force between the requesting and requested Parties. The provisions of section 5 shall not apply where such treaty or arrangement exists, except as provided in Article 12, paragraph 7. However, the Parties concerned may mutually determine to apply the provisions of section 5 in lieu thereof, if the treaty or arrangement does not prohibit it.

6. Where, in accordance with the provisions of this Protocol, the requested Party is permitted to make co-operation conditional upon the existence of dual criminality, that condition shall be deemed fulfilled, irrespective of whether its laws place the offence within the same category of offence or denominate the offence by the same terminology as the requesting Party, if the conduct underlying the offence for which assistance is sought is a criminal offence under its laws.

7. The provisions in this chapter do not restrict co-operation between Parties, or between Parties and service providers or other entities, through other applicable agreements, arrangements, practices, or domestic law.

Section 2

Procedures enhancing direct co-operation with providers and entities in other Parties

Article 6

Request for domain name registration information

1. Each Party shall adopt such legislative and other measures as may be necessary to empower its competent authorities, for the purposes of specific criminal investigations or proceedings, to issue a request to an entity providing domain name registration services in the territory of another Party for information in the entity's possession or control, for identifying or contacting the registrant of a domain name.

2. Each Party shall adopt such legislative and other measures as may be necessary to permit an entity in its territory to disclose such information in response to a request under paragraph 1, subject to reasonable conditions provided by domestic law.

3. The request under paragraph 1 shall include:

a. the date on which the request was issued and the identity and contact details of the competent authority issuing the request;

b. the domain name about which information is sought and a detailed list of the information sought, including the particular data elements;

c. a statement that the request is issued pursuant to this Protocol, that the need for the information arises because of its relevance to a specific criminal investigation or proceeding and that the information will only be used for that specific criminal investigation or proceeding; and

d. the time frame within which and the manner in which to disclose the information and any other special procedural instructions.

4. If acceptable to the entity, a Party may submit a request under paragraph 1 in electronic form. Appropriate levels of security and authentication may be required.

5. In the event of non-co-operation by an entity described in paragraph 1, a requesting Party may request that the entity give a reason why it is not disclosing the information sought. The requesting Party may seek consultation with the Party in which the entity is located, with a view to determining available measures to obtain the information.

6. Each Party shall, at the time of signature of this Protocol or when depositing its instrument of ratification, acceptance or approval, or at any other time, communicate to the Secretary General of the Council of Europe the authority designated for the purpose of consultation under paragraph 5.

7. The Secretary General of the Council of Europe shall set up and keep updated a register of authorities designated by the Parties under paragraph 6. Each Party shall ensure that the details that it has provided for the register are correct at all times.

Article 7

Disclosure of subscriber information

1. Each Party shall adopt such legislative and other measures as may be necessary to empower its competent authorities to issue an order to be submitted directly to a service provider in the territory of another Party, in order to obtain the disclosure of specified, stored subscriber information in that service provider's possession or control, where the subscriber information is needed for the issuing Party's specific criminal investigations or proceedings.

2.

a. Each Party shall adopt such legislative and other measures as may be necessary for a service provider in its territory to disclose subscriber information in response to an order under paragraph 1.

b. At the time of signature of this Protocol or when depositing its instrument of ratification, acceptance or approval, a Party may - with respect to orders issued to service providers in its territory - make the following declaration: "The order under Article 7, paragraph 1, must be issued by, or under the supervision of, a prosecutor or other judicial authority, or otherwise be issued under independent supervision".

3. The order under paragraph 1 shall specify:

a. the issuing authority and date issued;

b. a statement that the order is issued pursuant to this Protocol;

c. the name and address of the service provider(s) to be served;

d. the offence(s) that is/are the subject of the criminal investigation or proceeding;

e. the authority seeking the specific subscriber information, if not the issuing authority; and

f. a detailed description of the specific subscriber information sought.

4. The order under paragraph 1 shall be accompanied by the following supplemental information:

a. the domestic legal grounds that empower the authority to issue the order;

b. a reference to legal provisions and applicable penalties for the offence being investigated or prosecuted;

c. the contact information of the authority to which the service provider shall return the subscriber information, from which it can request further information, or to which it shall otherwise respond;

d. the time frame within which and the manner in which to return the subscriber information;

e. whether preservation of the data has already been sought, including the date of preservation and any applicable reference number;

f. any special procedural instructions;

g. if applicable, a statement that simultaneous notification has been made pursuant to paragraph 5; and

h. any other information that may assist in obtaining disclosure of the subscriber information.

5.

a. A Party may, at the time of signature of this Protocol or when depositing its instrument of ratification, acceptance or approval, and at any other time, notify the Secretary General of the Council of Europe that, when an order is issued under paragraph 1 to a service provider in its territory, the Party requires, in every case or in identified circumstances, simultaneous notification of the order, the supplemental information and a summary of the facts related to the investigation or proceeding.

b. Whether or not a Party requires notification under paragraph 5.a, it may require the service provider to consult the Party's authorities in identified circumstances prior to disclosure.

c. The authorities notified under paragraph 5.a or consulted under paragraph 5.b may, without undue delay, instruct the service provider not to disclose the subscriber information if:

   i. disclosure may prejudice criminal investigations or proceedings in that Party; or

   ii. conditions or grounds for refusal would apply under Article 25, paragraph 4, and Article 27, paragraph 4, of the Convention had the subscriber information been sought through mutual assistance.

d. The authorities notified under paragraph 5.a or consulted under paragraph 5.b:

   i. may request additional information from the authority referred to in paragraph 4.c for the purposes of applying paragraph 5.c and shall not disclose it to the service provider without that authority's consent; and

   ii. shall promptly inform the authority referred to in paragraph 4.c if the service provider has been instructed not to disclose the subscriber information and give the reasons for doing so.

e. A Party shall designate a single authority to receive notification under paragraph 5.a and perform the actions described in paragraphs 5.b, 5.c and 5.d. The Party shall, at the time when notification to the Secretary General of the Council of Europe under paragraph 5.a is first given, communicate to the Secretary General the contact information of that authority.

f. The Secretary General of the Council of Europe shall set up and keep updated a register of the authorities designated by the Parties pursuant to paragraph 5.e and whether and under what circumstances they require notification pursuant to paragraph 5.a. Each Party shall ensure that the details that it provides for the register are correct at all times.

6. If acceptable to the service provider, a Party may submit an order under paragraph 1 and supplemental information under paragraph 4 in electronic form. A Party may provide notification and additional information under paragraph 5 in electronic form. Appropriate levels of security and authentication may be required.

7. If a service provider informs the authority in paragraph 4.c that it will not disclose the subscriber information sought, or if it does not disclose subscriber information in response to the order under paragraph 1 within thirty days of receipt of the order or the timeframe stipulated in paragraph 4.d, whichever time period is longer, the competent authorities of the issuing Party may then seek to enforce the order only via Article 8 or other forms of mutual assistance. Parties may request that a service provider give a reason for refusing to disclose the subscriber information sought by the order.

8. A Party may, at the time of signature of this Protocol or when depositing its instrument of ratification, acceptance or approval, declare that an issuing Party shall seek disclosure of subscriber information from the service provider before seeking it under Article 8, unless the issuing Party provides a reasonable explanation for not having done so.

9. At the time of signature of this Protocol or when depositing its instrument of ratification, acceptance, or approval, a Party may:

a. reserve the right not to apply this article; or

b. if disclosure of certain types of access numbers under this article would be inconsistent with the fundamental principles of its domestic legal system, reserve the right not to apply this article to such numbers.

Section 3

Procedures enhancing international co-operation between authorities for the disclosure of stored computer data

Article 8

Giving effect to orders from another Party for expedited production of subscriber information and traffic data

1. Each Party shall adopt such legislative and other measures as may be necessary to empower its competent authorities to issue an order to be submitted as part of a request to another Party for the purpose of compelling a service provider in the requested Party's territory to produce specified and stored

a. subscriber information, and

b. traffic data

in that service provider's possession or control which is needed for the Party's specific criminal investigations or proceedings.

2. Each Party shall adopt such legislative and other measures as may be necessary to give effect to an order under paragraph 1 submitted by a requesting Party.

3. In its request, the requesting Party shall submit the order under paragraph 1, the supporting information and any special procedural instructions to the requested Party.

a. The order shall specify:

   i. the issuing authority and the date the order was issued;

   ii. a statement that the order is submitted pursuant to this Protocol;

   iii. the name and address of the service provider(s) to be served;

   iv. the offence(s) that is/are the subject of the criminal investigation or proceeding;

   v. the authority seeking the information or data, if not the issuing authority; and

   vi. a detailed description of the specific information or data sought.

b. The supporting information, provided for the purpose of assisting the requested Party to give effect to the order and which shall not be disclosed to the service provider without the consent of the requesting Party, shall specify:

   i. the domestic legal grounds that empower the authority to issue the order;

   ii. the legal provisions and applicable penalties for the offence(s) being investigated or prosecuted;

   iii. the reason why the requesting Party believes that the service provider is in possession or control of the data;

   iv. a summary of the facts related to the investigation or proceeding;

   v. the relevance of the information or data to the investigation or proceeding;

vi. contact information of an authority or authorities that may provide further information;

vii. whether preservation of the information or data has already been sought, including the date of preservation and any applicable reference number; and

viii. whether the information has or data have already been sought by other means, and, if so, in what manner.

c. The requesting Party may request that the requested Party carry out special procedural instructions.

4. A Party may declare at the time of signature of this Protocol or when depositing its instrument of ratification, acceptance or approval, and at any other time, that additional supporting information is required to give effect to orders under paragraph 1.

5. The requested Party shall accept requests in electronic form. It may require appropriate levels of security and authentication before accepting the request.

6.

a. The requested Party, from the date of receipt of all the information specified in paragraphs 3 and 4, shall make reasonable efforts to serve the service provider within forty-five days, if not sooner, and shall order a return of requested information or data no later than:

   i. twenty days for subscriber information; and

   ii. forty-five days for traffic data.

b. The requested Party shall provide for the transmission of the produced information or data to the requesting Party without undue delay.

7. If the requested Party cannot comply with the instructions under paragraph 3.c in the manner requested, it shall promptly inform the requesting Party, and, if applicable, specify any conditions under which it could comply, following which the requesting Party shall determine whether the request should nevertheless be executed.

8. The requested Party may refuse to execute a request on the grounds established in Article 25, paragraph 4, or Article 27, paragraph 4, of the Convention or may impose conditions it considers necessary to permit execution of the request. The requested Party may postpone execution of requests for reasons established under Article 27, paragraph 5, of the Convention. The requested Party shall notify the requesting Party as soon as practicable of the refusal, conditions, or postponement. The requested Party shall also notify the requesting Party of other circumstances that are likely to delay execution of the request significantly. Article 28, paragraph 2.b, of the Convention shall apply to this article.

9.

a. If the requesting Party cannot comply with a condition imposed by the requested Party under paragraph 8, it shall promptly inform the requested Party. The requested Party shall then determine if the information or material should nevertheless be provided.

b. If the requesting Party accepts the condition, it shall be bound by it. The requested Party that supplies information or material subject to such a condition may require the requesting Party to explain in relation to that condition the use made of such information or material.

10. Each Party shall, at the time of signature of this Protocol or when depositing its instrument of ratification, acceptance or approval, communicate to the Secretary General of the Council of Europe and keep up to date the contact information of the authorities designated:

a. to submit an order under this article; and

b. to receive an order under this article.

11. A Party may, at the time of signature of this Protocol or when depositing its instrument of ratification, acceptance or approval, declare that it requires that requests by other Parties under this article be submitted to it by the central authority of the requesting Party, or by such other authority as mutually determined between the Parties concerned.

12. The Secretary General of the Council of Europe shall set up and keep updated a register of authorities designated by the Parties under paragraph 10. Each Party shall ensure that the details that it has provided for the register are correct at all times.

13. At the time of signature of this Protocol or when depositing its instrument of ratification, acceptance, or approval, a Party may reserve the right not to apply this article to traffic data.

Article 9

Expedited disclosure of stored computer data in an emergency

1.

a. Each Party shall adopt such legislative and other measures as may be necessary, in an emergency, for its point of contact for the 24/7 Network referenced in Article 35 of the Convention ("point of contact") to transmit a request to and receive a request from a point of contact in another Party seeking immediate assistance in obtaining from a service provider in the territory of that Party the expedited disclosure of specified, stored computer data in that service provider's possession or control, without a request for mutual assistance.

b. A Party may, at the time of signature of this Protocol or when depositing its instrument of ratification, acceptance or approval, declare that it will not execute requests under paragraph l.a seeking only the disclosure of subscriber information.

2. Each Party shall adopt such legislative and other measures as may be necessary to enable, pursuant to paragraph 1:

a. its authorities to seek data from a service provider in its territory following a request under paragraph 1;

b. a service provider in its territory to disclose the requested data to its authorities in response to a request under paragraph 2.a; and

c. its authorities to provide the requested data to the requesting Party.

3. The request under paragraph 1 shall specify:

a. the competent authority seeking the data and date on which the request was issued;

b. a statement that the request is issued pursuant to this Protocol;

c. the name and address of the service provider(s) in possession or control of the data sought;

d. the offence(s) that is/are the subject of the criminal investigation or proceeding and a reference to its legal provisions and applicable penalties;

e. sufficient facts to demonstrate that there is an emergency and how the data sought relates to it;

f. a detailed description of the data sought;

g. any special procedural instructions; and

h. any other information that may assist in obtaining disclosure of the requested data.

4. The requested Party shall accept a request in electronic form. A Party may also accept a request transmitted orally and may require confirmation in electronic form. It may require appropriate levels of security and authentication before accepting the request.

5. A Party may, at the time of signature of this Protocol or when depositing its instrument of ratification, acceptance or approval, declare that it requires requesting Parties, following the execution of the request, to submit the request and any supplemental information transmitted in support thereof, in a format and through such channel, which may include mutual assistance, as specified by the requested Party.

6. The requested Party shall inform the requesting Party of its determination on the request under paragraph 1 on a rapidly expedited basis and, if applicable, shall specify any conditions under which it would provide the data and any other forms of co-operation that may be available.

7.

a. If a requesting Party cannot comply with a condition imposed by the requested Party under paragraph 6, it shall promptly inform the requested Party. The requested Party shall then determine whether the information or material should nevertheless be provided. If the requesting Party accepts the condition, it shall be bound by it.

b. The requested Party that supplies information or material subject to such a condition may require the requesting Party to explain in relation to that condition the use made of such information or material.

Section 4

Procedures pertaining to emergency mutual assistance

Article 10

Emergency mutual assistance

1. Each Party may seek mutual assistance on a rapidly expedited basis where it is of the view that an emergency exists. A request under this article shall include, in addition to the other contents required, a description of the facts that demonstrate that there is an emergency and how the assistance sought relates to it.

2. A requested Party shall accept such a request in electronic form. It may require appropriate levels of security and authentication before accepting the request.

3. The requested Party may seek, on a rapidly expedited basis, supplemental information in order to evaluate the request. The requesting Party shall provide such supplemental information on a rapidly expedited basis.

4. Once satisfied that an emergency exists and the other requirements for mutual assistance have been satisfied, the requested Party shall respond to the request on a rapidly expedited basis.

5. Each Party shall ensure that a person from its central authority or other authorities responsible for responding to mutual assistance requests is available on a twenty-four hour, seven-day-a-week basis for the purpose of responding to a request under this article.

6. The central authority or other authorities responsible for mutual assistance of the requesting and requested Parties may mutually determine that the results of the execution of a request under this article, or an advance copy thereof, may be provided to the requesting Party through a channel other than that used for the request.

7. Where there is no mutual assistance treaty or arrangement on the basis of uniform or reciprocal legislation in force between the requesting and requested Parties, Article 27, paragraphs 2.b and 3 to 8, and Article 28, paragraphs 2 to 4, of the Convention shall apply to this article.

8. Where such a treaty or arrangement exists, this article shall be supplemented by the provisions of such treaty or arrangement unless the Parties concerned mutually determine to apply any or all of the provisions of the Convention referred to in paragraph 7 of this article, in lieu thereof.

9. Each Party may, at the time of signature of this Protocol or when depositing its instrument of ratification, acceptance or approval, declare that requests may also be sent directly to its judicial authorities, or through the channels of the International Criminal Police Organization (INTERPOL) or to its 24/7 point of contact established under Article 35 of the Convention. In any such cases, a copy shall be sent at the same time to the central authority of the requested Party through the central authority of the requesting Party. Where a request is sent directly to a judicial authority of the requested Party and that authority is not competent to deal with the request, it shall refer the request to the competent national authority and inform the requesting Party directly that it has done so.

Section 5

Procedures pertaining to international co-operation in the absence of applicable international agreements

Article 11

Video conferencing

1. A requesting Party may request, and the requested Party may permit, testimony and statements to be taken from a witness or expert by video conference. The requesting Party and the requested Party shall consult in order to facilitate resolution of any issues that may arise with regard to the execution of the request, including, as applicable: which Party shall preside; the authorities and persons that shall be present; whether one or both Parties shall administer particular oaths, warnings or give instructions to the witness or expert; the manner of questioning the witness or expert; the manner in which the rights of the witness or expert shall be duly ensured; the treatment of claims of privilege or immunity; the treatment of objections to questions or responses; and whether one or both Parties shall provide translation, interpretation and transcription services.

2.

a. The central authorities of the requested and requesting Parties shall communicate directly with each other for the purposes of this article. A requested Party may accept a request in electronic form. It may require appropriate levels of security and authentication before accepting the request.

b. The requested Party shall inform the requesting Party of the reasons for not executing or for delaying the execution of the request. Article 27, paragraph 8, of the Convention applies to this article. Without prejudice to any other condition a requested Party may impose in accordance with this article, Article 28, paragraphs 2 to 4, of the Convention apply to this article.

3. A requested Party providing assistance under this article shall endeavour to obtain the presence of the person whose testimony or statement is sought. Where appropriate the requested Party may, to the extent possible under its law, take the necessary measures to compel a witness or expert to appear in the requested Party at a set time and location.

4. The procedures relating to the conduct of the video conference specified by the requesting Party shall be followed, except where incompatible with the domestic law of the requested Party. In case of incompatibility, or to the extent that the procedure has not been specified by the requesting Party, the requested Party shall apply the procedure under its domestic law unless otherwise mutually determined by the requesting and requested Parties.

5. Without prejudice to any jurisdiction under the domestic law of the requesting Party, where in the course of the video conference, the witness or expert:

a. makes an intentionally false statement when the requested Party has, in accordance with the domestic law of the requested Party, obliged such person to testify truthfully;

b. refuses to testify when the requested Party has, in accordance with the domestic law of the requested Party, obliged such person to testify; or

c. commits other misconduct that is prohibited by the domestic law of the requested Party in the course of such proceedings;

the person shall be sanctionable in the requested Party in the same manner as if such act had been committed in the course of its domestic proceedings.

6.

a. Unless otherwise mutually determined between the requesting Party and the requested Party, the requested Party shall bear all costs related to the execution of a request under this article, except:

   i. the fees of an expert witness;

   ii. the costs of translation, interpretation and transcription; and

   iii. costs of an extraordinary nature.

b. If the execution of a request would impose costs of an extraordinary nature, the requesting Party and the requested Party shall consult each other in order to determine the conditions under which the request may be executed.

7. Where mutually agreed upon by the requesting Party and the requested Party:

a. the provisions of this article may be applied for the purposes of carrying out audio conferences;

b. video conferencing technology may be used for purposes, or for hearings, other than those described in paragraph 1, including for the purposes of identifying persons or objects.

8. Where a requested Party chooses to permit the hearing of a suspect or accused person, it may require particular conditions and safeguards with respect to the taking of testimony or a statement from, or providing notifications or applying procedural measures to, such person.

Article 12

Joint investigation teams and joint investigations

1. By mutual agreement, the competent authorities of two or more Parties may establish and operate a joint investigation team in their territories to facilitate criminal investigations or proceedings, where enhanced coordination is deemed to be of particular utility. The competent authorities shall be determined by the respective Parties concerned.

2. The procedures and conditions governing the operation of joint investigation teams, such as their specific purposes; composition; functions; duration and any extension periods; location; organisation; terms of gathering, transmitting and using information or evidence; terms of confidentiality; and terms for the involvement of the participating authorities of a Party in investigative activities taking place in another Party's territory, shall be as agreed between those competent authorities.

3. A Party may declare at the time of signature of this Protocol or when depositing its instrument of ratification, acceptance, or approval that its central authority must be a signatory to or otherwise concur in the agreement establishing the team.

4. Those competent and participating authorities shall communicate directly, except that Parties may mutually determine other appropriate channels of communication where exceptional circumstances require more central coordination.

5. Where investigative measures need to be taken in the territory of one of the Parties concerned, participating authorities from that Party may request their own authorities to take those measures without the other Parties having to submit a request for mutual assistance. Those measures shall be carried out by that Party's authorities in its territory under the conditions that apply under domestic law in a national investigation.

6. Use of information or evidence provided by the participating authorities of one Party to participating authorities of other Parties concerned may be refused or restricted in the manner set forth in the agreement described in paragraphs 1 and 2. If that agreement does not set forth terms for refusing or restricting use, the Parties may use the information or evidence provided:

a. for the purposes for which the agreement has been entered into;

b. for detecting, investigating and prosecuting criminal offences other than those for which the agreement was entered into, subject to the prior consent of the authorities providing the information or evidence. However, consent shall not be required where fundamental legal principles of the Party using the information or evidence require that it disclose the information or evidence to protect the rights of an accused person in criminal proceedings. In that case, those authorities shall notify the authorities that provided the information or evidence without undue delay; or

c. to prevent an emergency. In that case, the participating authorities that received the information or evidence shall notify without undue delay the participating authorities that provided the information or evidence, unless mutually determined otherwise.

7. In the absence of an agreement described in paragraphs 1 and 2, joint investigations may be undertaken under mutually agreed terms on a case-by-case basis. This paragraph applies whether or not there is a mutual assistance treaty or arrangement on the basis of uniform or reciprocal legislation in force between the Parties concerned.

CHAPTER III

Conditions and safeguards

Article 13

Conditions and safeguards

In accordance with Article 15 of the Convention, each Party shall ensure that the establishment, implementation and application of the powers and procedures provided for in this Protocol are subject to conditions and safeguards provided for under its domestic law, which shall provide for the adequate protection of human rights and liberties.

Article 14

Protection of personal data

1. Scope

a. Except as otherwise provided in paragraphs l.b and c, each Party shall process the personal data that it receives under this Protocol in accordance with paragraphs 2 to 15 of this article.

b. If, at the time of receipt of personal data under this Protocol, both the transferring Party and the receiving Party are mutually bound by an international agreement establishing a comprehensive framework between those Parties for the protection of personal data, which is applicable to the transfer of personal data for the purpose of the prevention, detection, investigation and prosecution of criminal offences, and which provides that the processing of personal data under that agreement complies with the requirements of the data protection legislation of the Parties concerned, the terms of such agreement shall apply, for the measures falling within the scope of such agreement, to personal data received under the Protocol in lieu of paragraphs 2 to 15, unless otherwise agreed between the Parties concerned.

c. If the transferring Party and the receiving Party are not mutually bound under an agreement described in paragraph l.b, they may mutually determine that the transfer of personal data under this Protocol may take place on the basis of other agreements or arrangements between the Parties concerned in lieu of paragraphs 2 to 15.

d. Each Party shall consider that the processing of personal data pursuant to paragraphs l.a and l.b meets the requirements of its personal data protection legal framework for international transfers of personal data, and no further authorisation for transfer shall be required under that legal framework. A Party may only refuse or prevent data transfers to another Party under this Protocol for reasons of data protection under the conditions set out in paragraph 15 when paragraph l.a applies; or under the terms of an agreement or arrangement referred to in paragraphs l.b or c, when one of those paragraphs applies.

e. Nothing in this article shall prevent a Party from applying stronger safeguards to the processing by its own authorities of personal data received under this Protocol.

2. Purpose and use

a. The Party that has received personal data shall process them for the purposes described in Article 2. It shall not further process the personal data for an incompatible purpose, and it shall not further process the data when this is not permitted under its domestic legal framework. This article shall not prejudice the ability of the transferring Party to impose additional conditions pursuant to this Protocol in a specific case, however, such conditions shall not include generic data protection conditions.

b. The receiving Party shall ensure under its domestic legal framework that personal data sought and processed are relevant to and not excessive in relation to the purposes of such processing.

3. Quality and integrity

Each Party shall take reasonable steps to ensure that personal data are maintained with such accuracy and completeness and are as up to date as is necessary and appropriate for the lawful processing of the personal data, having regard to the purposes for which they are processed.

4. Sensitive data

Processing by a Party of personal data revealing racial or ethnic origin, political opinions or religious or other beliefs, or trade union membership; genetic data; biometric data considered sensitive in view of the risks involved; or personal data concerning health or sexual life; shall only take place under appropriate safeguards to guard against the risk of unwarranted prejudicial impact from the use of such data, in particular against unlawful discrimination.

5. Retention periods

Each Party shall retain the personal data only for as long as necessary and appropriate in view of the purposes of processing the data pursuant to paragraph 2. In order to meet this obligation, it shall provide in its domestic legal framework for specific retention periods or periodic review of the need for further retention of the data.

6. Automated decisions

Decisions producing a significant adverse effect concerning the relevant interests of the individual to whom the personal data relates may not be based solely on automated processing of personal data, unless authorised under domestic law and with appropriate safeguards that include the possibility to obtain human intervention.

7. Data security and security incidents

a. Each Party shall ensure that it has in place appropriate technological, physical and organisational measures for the protection of personal data, in particular against loss or accidental or unauthorised access, disclosure, alteration or destruction ("security incident").

b. Upon discovery of a security incident in which there is a significant risk of physical or non-physical harm to individuals or to the other Party, the receiving Party shall promptly assess the likelihood and scale thereof and shall promptly take appropriate action to mitigate such harm. Such action shall include notification to the transferring authority or, for purposes of Chapter II, Section 2, the authority or authorities designated pursuant to paragraph 7.c. However, notification may include appropriate restrictions as to the further transmission of the notification; it may be delayed or

omitted when such notification may endanger national security, or delayed when such notification may endanger measures to protect public safety. Such action shall also include notification to the individual concerned, unless the Party has taken appropriate measures so that there is no longer a significant risk. Notification to the individual may be delayed or omitted under the conditions set out in paragraph 12.a.i. The notified Party may request consultation and additional information concerning the incident and the response thereto.

c. Each Party shall, at the time of signature of this Protocol or when depositing its instrument of ratification, acceptance or approval, communicate to the Secretary General of the Council of Europe the authority or authorities to be notified under paragraph 7.b for the purposes of Chapter II, Section 2: the information provided may subsequently be modified.

8. Maintaining records

Each Party shall maintain records or have other appropriate means to demonstrate how an individual's personal data are accessed, used and disclosed in a specific case.

9. Onward sharing within a Party

a. When an authority of a Party provides personal data received initially under this Protocol to another authority of that Party, that other authority shall process it in accordance with this article, subject to paragraph 9.b.

b. Notwithstanding paragraph 9.a, a Party that has made a reservation under Article 17 may provide personal data it has received to its constituent States or similar territorial entities provided the Party has in place measures in order that the receiving authorities continue to effectively protect the data by providing for a level of protection of the data comparable to that afforded by this article.

c. In case of indications of improper implementation of this paragraph, the transferring Party may request consultation and relevant information about those indications.

10. Onward transfer to another State or international organisation

a. The receiving Party may transfer the personal data to another State or international organisation only with the prior authorisation of the transferring authority or, for purposes of chapter II, section 2, the authority or authorities designated pursuant to paragraph 10.b.

b. Each Party shall, at the time of signature of this Protocol or when depositing its instrument of ratification, acceptance or approval, communicate to the Secretary General of the Council of Europe the authority or authorities to provide authorisation for purposes of chapter II, section 2; the information provided may subsequently be modified.

11. Transparency and notice

a. Each Party shall provide notice through the publication of general notices, or through personal notice to the individual whose personal data has been collected, with regard to:

i. the legal basis for and the purpose(s) of processing;

ii. any retention or review periods pursuant to paragraph 5, as applicable;

iii. recipients or categories of recipients to whom such data are disclosed; and

iv. access, rectification and redress available.

b. A Party may subject any personal notice requirement to reasonable restrictions under its domestic legal framework pursuant to the conditions set forth in paragraph 12.a.i.

c. Where the transferring Party's domestic legal framework requires giving personal notice to the individual whose data have been provided to another Party, the transferring Party shall take measures so that the other Party is informed at the time of transfer regarding this requirement and appropriate contact information. The personal notice shall not be

given if the other Party has requested that the provision of the data be kept confidential, where the conditions for restrictions as set out in paragraph 12.a.i apply. Once these restrictions no longer apply and the personal notice can be provided, the other Party shall take measures so that the transferring Party is informed. If it has not yet been informed, the transferring Party is entitled to make requests to the receiving Party which will inform the transferring Party whether to maintain the restriction.

12. Access and rectification

a. Each Party shall ensure that any individual, whose personal data have been received under this Protocol is entitled to seek and obtain, in accordance with processes established in its domestic legal framework and without undue delay:

   i. a written or electronic copy of the documentation kept on that individual containing the individual's personal data and available information indicating the legal basis for and purposes of the processing, retention periods and recipients or categories of recipients of the data ("access"), as well as information regarding available options for redress; provided that access in a particular case may be subject to the application of proportionate restrictions permitted under its domestic legal framework, needed, at the time of adjudication, to protect the rights and freedoms of others or important objectives of general public interest and that give due regard to the legitimate interests of the individual concerned;

   ii. rectification when the individual's personal data are inaccurate or have been improperly processed; rectification shall include - as appropriate and reasonable considering the grounds for rectification and the particular context of processing - correction, supplementation, erasure or anonymisation, restriction of processing, or blocking.

b. If access or rectification is denied or restricted, the Party shall provide to the individual, in written form which may be provided electronically, without undue delay, a response informing that individual of the denial or restriction. It shall provide the grounds for such denial or restriction and provide information about available options for redress. Any expense incurred in obtaining access should be limited to what is reasonable and not excessive.

13. Judicial and non-judicial remedies

Each Party shall have in place effective judicial and non-judicial remedies to provide redress for violations of this article.

14. Oversight

Each Party shall have in place one or more public authorities that exercise, alone or cumulatively, independent and effective oversight functions and powers with respect to the measures set forth in this article. The functions and powers of these authorities acting alone or cumulatively shall include investigation powers, the power to act upon complaints and the ability to take corrective action.

15. Consultation and suspension

A Party may suspend the transfer of personal data to another Party if it has substantial evidence that the other Party is in systematic or material breach of the terms of this article or that a material breach is imminent. It shall not suspend transfers without reasonable notice, and not until after the Parties concerned have engaged in a reasonable period of consultation without reaching a resolution. However, a Party may provisionally suspend transfers in the event of a systematic or material breach that poses a significant and imminent risk to the life or safety of, or substantial reputational or monetary harm to, a natural person, in which case it shall notify and commence consultations with the other Party immediately thereafter. If the consultation has not led to a resolution, the other Party may reciprocally suspend transfers if it has substantial evidence that suspension by the suspending Party was contrary to the terms of this paragraph. The suspending Party shall lift the suspension as soon as the breach justifying the suspension has been remedied; any reciprocal suspension shall be lifted at that time. Any personal data transferred prior to suspension shall continue to be treated in accordance with this Protocol.

CHAPTER IV

Final provisions

Article 15

Effects of this Protocol

1.

a. Article 39, paragraph 2, of the Convention shall apply to this Protocol.

b. With respect to Parties that are members of the European Union, those Parties may, in their mutual relations, apply European Union law governing the matters dealt with in this Protocol.

c. Paragraph l.b does not affect the full application of this Protocol between Parties that are members of the European Union and other Parties.

2. Article 39, paragraph 3, of the Convention shall apply to this Protocol.

Article 16

Signature and entry into force

1. This Protocol shall be open for signature by Parties to the Convention, which may express their consent to be bound by either:

a. signature without reservation as to ratification, acceptance or approval; or

b. signature subject to ratification, acceptance or approval, followed by ratification, acceptance or approval.

2. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

3. This Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date on which five Parties to the Convention have expressed their consent to be bound by this Protocol, in accordance with the provisions of paragraphs 1 and 2 of this article.

4. In respect of any Party to the Convention which subsequently expresses its consent to be bound by this Protocol, the Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date on which the Party has expressed its consent to be bound by this Protocol, in accordance with the provisions of paragraphs 1 and 2 of this article.

Article 17

Federal clause

1. A federal State may reserve the right to assume obligations under this Protocol consistent with its fundamental principles governing the relationship between its central government and constituent States or other similar territorial entities, provided that:

a. the Protocol shall apply to the central government of the federal State;

b. such a reservation shall not affect obligations to provide for the co-operation sought by other Parties in accordance with the provisions of Chapter II; and

c. the provisions of Article 13 shall apply to the federal State’s constituent States or other similar territorial entities.

2. Another Party may prevent authorities, providers or entities in its territory from co-operating in response to a request or order submitted directly by the constituent State or other similar territorial entity of a federal State that has made a reservation under paragraph 1, unless that federal State notifies the Secretary General of the Council of Europe that a constituent State or other similar territorial entity applies the obligations of this Protocol applicable to that federal State. The Secretary General of the Council of Europe shall set up and keep updated a register of such notifications.

3. Another Party shall not prevent authorities, providers, or entities in its territory from co-operating with a constituent State or other similar territorial entity on the grounds of a reservation under paragraph 1, if an order or request has been submitted via the central government or a joint investigation team agreement under Article 12 is entered into with the participation of the central government. In such situations, the central government shall provide for the fulfilment of the applicable obligations of the Protocol, provided that, with respect to the protection of personal data provided to constituent States or similar territorial entities, only the terms of Article 14, paragraph 9, or, where applicable, the terms of an agreement or arrangement described in Article 14, paragraph l.b or l.c, shall apply.

4. With regard to the provisions of this Protocol, the application of which comes under the jurisdiction of constituent States or other similar territorial entities that are not obliged by the constitutional system of the federation to take legislative measures, the central government shall inform the competent authorities of such States of the said provisions with its favourable opinion, encouraging them to take appropriate action to give them effect.

Article 18

Territorial application

1. This Protocol shall apply to the territory or territories specified in a declaration made by a Party under Article 38, paragraphs 1 or 2, of the Convention to the extent that such declaration has not been withdrawn under Article 38, paragraph 3.

2. A Party may, at the time of signature of this Protocol or when depositing its instrument of ratification, acceptance or approval, declare that this Protocol shall not apply to one or more territories specified in the Party's declaration under Article 38, paragraphs 1 and/or 2 of the Convention.

3. A declaration under paragraph 2 of this article may, in respect of any territory specified in such declaration, be withdrawn by a notification addressed to the Secretary General of the Council of Europe. The withdrawal shall become effective on the first day of the month following the expiration of a period of three months after the date of receipt of such notification by the Secretary General.

Article 19

Reservations and declarations

1. By a written notification addressed to the Secretary General of the Council of Europe, any Party to the Convention may, at the time of signature of this Protocol or when depositing its instrument of ratification, acceptance or approval, declare that it avails itself of the reservation(s) provided for in Articles 7, paragraphs 9.a and 9.b, Article 8, paragraph 13, and Article 17 of this Protocol. No other reservations may be made.

2. By a written notification addressed to the Secretary General of the Council of Europe, any Party to the Convention may, at the time of signature of this Protocol or when depositing its instrument of ratification, acceptance or approval, make the declaration(s) identified in Articles 7, paragraphs 2.b and 8; Article 8, paragraph 11; Article 9, paragraphs l.b and 5; Article 10, paragraph 9; Article 12, paragraph 3; and Article 18, paragraph 2, of this Protocol.

3. By a written notification addressed to the Secretary General of the Council of Europe, any Party to the Convention shall make any declaration(s), notifications or communications identified in Article 7, paragraphs 5.a and e; Article 8, paragraphs 4, and 10.a and b; Article 14, paragraphs 7.c and 10.b; and Article 17, paragraph 2, of this Protocol according to the terms specified therein.

Article 20

Status and withdrawal of reservations

1. A Party that has made a reservation in accordance with Article 19, paragraph 1, shall withdraw such reservation, in whole or in part, as soon as circumstances so permit. Such withdrawal shall take effect on the date of receipt of a notification addressed to the Secretary General of the Council of Europe. If the notification states that the withdrawal of a reservation is to take effect on a date specified therein, and such date is later than the date on which the notification is received by the Secretary General, the withdrawal shall take effect on this later date.

2. The Secretary General of the Council of Europe may periodically enquire of Parties that have made one or more reservations in accordance with Article 19, paragraph 1, as to the prospects for withdrawing such reservation(s).

Article 21

Amendments

1. Amendments to this Protocol may be proposed by any Party to this Protocol and shall be communicated by the Secretary General of the Council of Europe, to the member States of the Council of Europe and to the Parties and signatories to the Convention as well as to any State which has been invited to accede to the Convention.

2. Any amendment proposed by a Party shall be communicated to the European Committee on Crime Problems (CDPC), which shall submit to the Committee of Ministers its opinion on that proposed amendment.

3. The Committee of Ministers shall consider the proposed amendment and the opinion submitted by the CDPC and, following consultation with the Parties to the Convention, may adopt the amendment.

4. The text of any amendment adopted by the Committee of Ministers in accordance with paragraph 3 shall be forwarded to the Parties to this Protocol for acceptance.

5. Any amendment adopted in accordance with paragraph 3 shall come into force on the thirtieth day after all Parties to this Protocol have informed the Secretary General of their acceptance thereof.

Article 22

Settlement of disputes

Article 45 of the Convention shall apply to this Protocol.

Article 23

Consultations of the Parties and assessment of implementation

1. Article 46 of the Convention shall apply to this Protocol.

2. Parties shall periodically assess the effective use and implementation of the provisions of this Protocol. Article 2 of the Cybercrime Convention Committee Rules of Procedure as revised on 16 October 2020 shall apply mutatis mutandis. The Parties shall initially review and may modify by consensus the procedures of that article as they apply to this Protocol five years after the entry into force of this Protocol.

3. The review of Article 14 shall commence once ten Parties to the Convention have expressed their consent to be bound by this Protocol.

Article 24

Denunciation

1. Any Party may, at any time, denounce this Protocol by means of a notification addressed to the Secretary General of the Council of Europe.

2. Such denunciation shall become effective on the first day of the month following the expiration of a period of three months after the date of receipt of the notification by the Secretary General.

3. Denunciation of the Convention by a Party to this Protocol constitutes denunciation of this Protocol.

4. Information or evidence transferred prior to the effective date of denunciation shall continue to be treated in accordance with this Protocol.

Article 25

Notification

The Secretary General of the Council of Europe shall notify the member States of the Council of Europe, the Parties and signatories to the Convention, and any State which has been invited to accede to the Convention of:

a. any signature;

b. the deposit of any instrument of ratification, acceptance or approval;

c. any date of entry into force of this Protocol in accordance with Article 16, paragraphs 3 and 4;

d. any declarations or reservations made in accordance with Article 19 or withdrawal of reservations made in accordance with Article 20;

e. any other act, notification or communication relating to this Protocol.

In witness whereof the undersigned, being duly authorised thereto, have signed this Protocol.

Done at Strasbourg on 12 May 2022, in English and in French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe, to the Parties and Signatories to the Convention, and to any State which has been invited to accede to the Convention.

DECISIONS

COUNCIL DECISION (EU) 2023/436

of 14 February 2023

authorising Member States to ratify, in the interest of the European Union, the Second Additional Protocol to the Convention on Cybercrime on enhanced cooperation and disclosure of electronic evidence

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 16 and Article 82(1), in conjunction with 218(6) thereof,

Having regard to the proposal from the European Commission,

Having regard to the consent of the European Parliament ([1]),

Whereas:

(1) On 6 June 2019, the Council authorised the Commission to participate, on behalf of the Union, in the negotiations on a Second Additional Protocol to the Council of Europe Convention on Cybercrime (CETS No 185) ('the Convention on Cybercrime').

(2) The Second Additional Protocol to the Convention on Cybercrime on enhanced cooperation and disclosure of electronic evidence ('the Protocol') was adopted by the Committee of Ministers of the Council of Europe on 17 November 2021 and is envisaged to be opened for signature on 12 May 2022.

(3) The provisions of the Protocol fall within an area covered to a large extent by common rules within the meaning of Article 3(2) of the Treaty on the Functioning of the European Union (TFEU), including instruments facilitating judicial cooperation in criminal matters, ensuring minimum standards of procedural rights as well as data protection and privacy safeguards.

(4) The Commission also submitted legislative proposals for a Regulation on European Production and Preservation Orders for electronic evidence in criminal matters and for a Directive laying down harmonised rules on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings, introducing binding cross-border European Production and Preservation Orders to be addressed directly to a representative of a service provider in another Member State.

(5) With its participation in the negotiations on the Protocol, the Commission ensured its compatibility with relevant common Union rules.

(6) A number of reservations, declarations, notifications and communications in relation to the Protocol are necessary to ensure compatibility of the Protocol with Union law and policies. Others are relevant to ensure the uniform application of the Protocol by Union Member States that are Parties to the Protocol ('Member State Parties') in their relation with third countries that are Parties to the Protocol ('third-country Parties'), as well as the effective application of the Protocol.

(7) The reservations, declarations, notifications and communications on which guidance is given to the Member States in the Annex to this Decision, are without prejudice to any other reservations or declarations that they might wish to make individually where the Protocol so permits.

(8) Member States which did not make reservations, declarations, notifications and communications in accordance with the Annex to this Decision at the time of signature should do so when they deposit their instrument of ratification, acceptance or approval of the Protocol.

([1]) Consent of 17 January 2023 (not yet published in the Official Journal).

(9) Following the ratification, acceptance or approval of the Protocol, Member States should, in addition, observe the indications set out in the Annex to this Decision.

(10) The Protocol provides for swift procedures that improve cross-border access to electronic evidence and a high level of safeguards. Therefore, its entry into force will contribute to the fight against cybercrime and other forms of crime at global level by facilitating cooperation between Member State Parties and third-country Parties, ensure a high level of protection of individuals, and address conflicts of law.

(11) The Protocol provides for appropriate safeguards in line with the requirements for international transfers of personal data under Regulation (EU) 2016/679 of the European Parliament and of the Council ([2]) and Directive (EU) 2016/680 of the European Parliament and of the Council ([3]). Therefore, its entry into force will contribute to the promotion of Union data protection standards at global level, facilitate data flows between Member State Parties and third-country Parties, and ensure compliance of Member State Parties with their obligations under Union data protection rules.

(12) The swift entry into force of the Protocol will furthermore confirm the position of the Convention on Cybercrime as the main multilateral framework for the fight against cybercrime.

(13) The Union cannot ratify the Protocol, as only states can be parties thereto.

(14) Member States should therefore be authorised to ratify the Protocol, acting jointly in the interests of the Union.

(15) The European Data Protection Supervisor was consulted in accordance with Regulation (EU) 2018/1725 of the European Parliament and of the Council ([4]) and delivered an opinion on 21 January 2022.

(16) In accordance with Articles 1 and 2 of Protocol No 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the Treaty on European Union (TEU) and to the TFEU, and without prejudice to Article 4 of that Protocol, Ireland is not taking part in the adoption of this Decision and is not bound by it or subject to its application.

(17) In accordance with Articles 1 and 2 of Protocol No 22 on the position of Denmark, annexed to the TEU and to the TFEU, Denmark is not taking part in the adoption of this Decision and is not bound by it or subject to its application,

(18) The authentic versions of the Protocol are the English and French versions of the text, adopted by the Committee of Ministers of the Council of Europe on 17 November 2021,

HAS ADOPTED THIS DECISION:

Article 1

The Member States are hereby authorised to ratify, in the interest of the Union, the Second Additional Protocol to the Convention on Cybercrime on enhanced cooperation and disclosure of electronic evidence ('the Protocol') ([5]).

([2]) Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ L 119, 4.5.2016, p. 1).

([3]) Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA (OJ L 119, 4.5.2016, p. 89).

([4]) Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC (OJ L 295, 21.11.2018, p. 39).

([5]) See page 28 of this Official Journal.

Article 2

1. When ratifying the Protocol, Member States which did not, at the time of signature of the Protocol, make reservations, declarations, notifications or communications in accordance with Sections 1 to 3 of the Annex to this Decision shall do so when they deposit their instrument of ratification, acceptance or approval of the Protocol.

2. Following the ratification, acceptance or approval of the Protocol, the Member States shall, in addition, observe the indications set out in Section 4 of the Annex to this Decision.

Article 3

This Decision shall enter into force on the date of its adoption.

Article 4

This Decision shall be published in the *Official Journal of the European Union*.

Article 5

This Decision is addressed to the Member States.

Done at Brussels, 14 February 2023.

For the Council
The President
E. SVANTESSON

ANNEX

This Annex sets out the reservations, declarations, notifications, communications and indications referred to in Article 2.

1. Reservations

Pursuant to Article 19, paragraph 1, of the Protocol, a Party may declare that it avails itself of one or more of the reservations provided for in certain articles of the Protocol.

Pursuant to Article 7, paragraph 9.a, of the Protocol, a Party may reserve the right not to apply Article 7 (Disclosure of subscriber information). Member States shall refrain from making such a reservation.

Pursuant to Article 7, paragraph 9.b, of the Protocol, a Party may, subject to the conditions therein, reserve the right not to apply Article 7 to certain types of access numbers. Member States may make such a reservation, but only in relation to access numbers other than those necessary for the sole purpose of identifying the user.

Pursuant to Article 8, paragraph 13, of the Protocol, a Party may reserve the right not to apply Article 8 (Giving effect to orders from another Party for expedited production of subscriber information and traffic data) to traffic data. Member States are encouraged to refrain from making such a reservation.

Where Article 19, paragraph 1, provides a basis for other reservations, Member States are authorised to consider and make such reservations.

2. Declarations

Pursuant to Article 19, paragraph 2, of the Protocol, a Party may make the declarations identified in certain articles of the Protocol.

Pursuant to Article 7, paragraph 2.b, of the Protocol, a Party may, with respect to orders issued to service providers in its territory, make the following declaration:

'The order under Article 7, paragraph 1, must be issued by, or under the supervision of, a prosecutor or other judicial authority, or otherwise be issued under independent supervision.'.

Member States shall, with respect to orders issued to service providers in its territory, make the declaration set out in the second paragraph of this point.

Pursuant to Article 9 (Expedited disclosure of stored computer data in an emergency), paragraph 1.b, of the Protocol, a Party may declare that it will not execute requests under paragraph l.a of that Article, seeking only the disclosure of subscriber information. Member States are encouraged to refrain from making such a declaration.

Where Article 19, paragraph 2, provides a basis for other declarations, Member States are authorised to consider and make such declarations.

3. Declarations, notifications or communications

Pursuant to Article 19, paragraph 3, of the Protocol, a Party is to make any declarations, notifications or communications identified in certain articles of the Protocol according to the terms specified therein.

Pursuant to Article 7, paragraph 5.a, of the Protocol, a Party may notify the Secretary General of the Council of Europe that when an order is issued under paragraph 1 of that Article to a service provider in its territory, that Party requires, in every case or in identified circumstances, simultaneous notification of the order, the supplemental information and a summary of the facts related to the investigation or proceeding. Accordingly, Member States shall make the following notification to the Secretary General of the Council of Europe:

'When an order is issued under Article 7, paragraph 1, to a service provider in the territory of [Member State], [Member State] requires in every case simultaneous notification of the order, the supplemental information and a summary of the facts related to the investigation or proceeding.'.

In accordance with Article 7, paragraph 5.e, of the Protocol, Member States shall designate a single competent authority to receive the notification under Article 7, paragraph 5.a, of the Protocol, and perform the actions described in Article 7, paragraphs 5.b, 5.c and 5.d, of the Protocol, and shall, when the notification to the Secretary General of the Council of Europe under Article 7, paragraph 5.a, of the Protocol is first given, communicate to the Secretary General of the Council of Europe the contact information of that authority.

Pursuant to Article 8, paragraph 4, of the Protocol, a Party may declare that additional supporting information is required to give effect to orders under paragraph 1 of that Article. Accordingly, Member States shall make the following declaration:

'Additional supporting information is required to give effect to orders under Article 8, paragraph 1. The additional supporting information required will depend on the circumstances of the order and the related investigation or proceeding.'.

In accordance with Article 8, paragraphs 10.a and 10.b, of the Protocol, Member States shall communicate and keep up to date the contact information of the authorities designated to submit an order under Article 8, and of the authorities designated to receive an order under Article 8, respectively. The Member States that participate in the enhanced cooperation established by Council Regulation (EU) 2017/1939 ([1]), implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'), shall include the EPPO, within the limits of the exercise of its competences as provided for in Articles 22, 23 and 25 of that Regulation, among the authorities communicated under Article 8, paragraphs 10.a and 10.b, of the Protocol, and do so in a coordinated manner.

Accordingly, Member States shall make the following declaration:

'In accordance with Article 8, paragraph 10, [Member State], as a Member State of the European Union participating in the enhanced cooperation on the establishment of the European Public Prosecutor's Office ("the EPPO"), designates the EPPO, in the exercise of its competences, as provided for in Articles 22, 23 and 25 of Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ("the EPPO"), as a competent authority.'.

In accordance with Article 14, paragraph 7.c, of the Protocol, Member States shall communicate to the Secretary General of the Council of Europe the authority or authorities to be notified under Article 14, paragraph 7.b, of the Protocol, for the purposes of Chapter II, Section 2, of the Protocol, in relation to a security incident.

In accordance with Article 14, paragraph 10.b, of the Protocol, Member States shall communicate to the Secretary General of the Council of Europe the authority or authorities to provide authorisation for the purposes of Chapter II, Section 2, of the Protocol, in relation to the onward transfer to another State or international organisation of data received under the Protocol.

Where Article 19, paragraph 3, of the Protocol provides a basis for other declarations, notifications or communications, Member States are authorised to consider and make such declarations, notifications or communications.

4. Other indications

Member States that participate in the enhanced cooperation established by Regulation (EU) 2017/1939 shall ensure that the EPPO can, in the exercise of its competences as provided for in Articles 22, 23 and 25 of that Regulation, seek cooperation under the Protocol in the same way as national prosecutors of those Member States.

With regard to the application of Article 7, in particular in relation to certain types of access numbers, Member States may subject an order under that Article to the scrutiny of a prosecutor or other judicial authority when their competent authority receives a simultaneous notification of the order prior to the disclosure of the requested information by the provider.

In accordance with Article 14, paragraph 11.c, of the Protocol, Member States shall ensure that, when they transfer data for the purposes of the Protocol, the receiving Party is informed that their domestic legal framework requires giving personal notice to the individual whose data is provided.

([1]) Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO') (OJ L 283, 31.10.2017, p. 1).

With regard to international transfers on the basis of the Agreement between the United States of America and the European Union on the protection of personal information relating to the prevention, investigation, detection, and prosecution of criminal offences ([2]) ('the Umbrella Agreement'), Member States shall, for the purposes of Article 14, paragraph 1.b, of the Protocol, communicate to the competent authorities of the United States that the Umbrella Agreement applies to the reciprocal transfers of personal data under the Protocol between competent authorities. However, Member States shall take into account that the Umbrella Agreement should be complemented with additional safeguards that take into account the unique requirements of the transfer of electronic evidence directly by service providers rather than between authorities as provided for under the Protocol. Accordingly, Member States shall make the following communication to the competent authorities of the United States:

'For the purposes of Article 14, paragraph 1.b, of the Second Additional Protocol to the Council of Europe Convention on Cybercrime ("the Protocol"), [Member State] considers that the Agreement between the United States of America and the European Union on the protection of personal information relating to the prevention, investigation, detection, and prosecution of criminal offences ("the Umbrella Agreement") applies to the reciprocal transfers of personal data under the Protocol between competent authorities. For transfers between service providers and authorities under the Protocol, the Umbrella Agreement applies only in combination with a further, specific agreement within the meaning of Article 3, paragraph 1, of the Umbrella Agreement that addresses the unique requirements of the transfer of electronic evidence directly by service providers rather than between authorities. In the absence of such a specific transfer agreement, such transfers may take place under the Protocol, in which case, Article 14, paragraph 1.a, in conjunction with Article 14, paragraphs 2 to 15, of the Protocol apply.'.

Member States shall ensure that they apply Article 14, paragraph 1.c, of the Protocol, only if the European Commission has adopted an adequacy decision pursuant to Article 45 of Regulation (EU) 2016/679 of the European Parliament and of the Council ([3]) or Article 36 of Directive (EU) 2016/680 of the European Parliament and of the Council ([4]) for the third country concerned that covers the respective data transfers, or on the basis of another agreement that ensures appropriate data protection safeguards pursuant to Article 46(2), point a, of Regulation (EU) 2016/679 or Article 37(1), point a, of Directive (EU) 2016/680.

([2]) OJ L 336, 10.12.2016, p. 3.

([3]) Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ L 119, 4.5.2016, p. 1).

([4]) Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA (OJ L 119, 4.5.2016, p. 89).

COMMISSION IMPLEMENTING DECISION (EU) 2023/437

of 22 February 2023

on the request for registration of the European citizens' initiative entitled 'Ensuring a dignified reception of migrants in Europe', pursuant to Regulation (EU) 2019/788 of the European Parliament and of the Council

(notified under document C(2023) 1121)

(Only the English text is authentic)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) 2019/788 of the European Parliament and of the Council of 17 April 2019 on the European citizens' initiative ([1]), and in particular Article 6(2) and (3) thereof,

Whereas:

(1) A request for registration of a European citizens' initiative entitled 'Ensuring a dignified reception of migrants in Europe' was submitted to the Commission on 30 December 2022.

(2) The objectives of the initiative as expressed by the organisers are: 'The treatment of migrants in the European Union (EU) too often fails to respect the principles of human dignity, a fundamental value of the Union. The main reason, in our view, is the persistent inadequacy of European rules and the lack of solidarity between Member States. As the Union is "an area of freedom, security and justice with respect for fundamental rights", we, European citizens, ask the EU to ensure a dignified reception of migrants, as soon as they enter the territory, compatible with the fundamental rights recognized to every human being by the EU Charter of Fundamental Rights and international law. In order to contribute to this, we call, in the framework of the development of a common asylum policy, for the adoption of regulations to: 1) introduce a new mechanism for the distribution of asylum seekers in the EU, based on their free will and on effective solidarity between Member States (revise the Dublin Regulation); 2) make binding in the Member States reception standards in terms of food, health; housing, education and work, which guarantee asylum seekers dignified living conditions, comparable throughout the Union.'

(3) An annex to the initiative provides further details on the subject matter, objectives and background. The organisers claim that despite the Commission's constant desire to improve a dysfunctional asylum and migration regime, many legislative and policy changes remain to be adopted at both Union and national levels to ensure dignified treatment of all migrants. First, they ask the Commission to establish a new mechanism for the distribution of asylum seekers in the Union by revising Regulation (EU) 604/2013 of the European Parliament and of the Council ([2]) in view of balancing the sharing of reception of asylum seekers in the EU taking into account the aspirations of asylum seekers as a new criterion and providing for a binding solidarity relocation mechanism between Member States to correct disproportionate allocations. Second, they call for the adoption of a regulation on reception conditions for asylum seekers in the EU in order to guarantee them a dignified standard of living and comparable living conditions throughout the Union, requiring Member States to fully respect fundamental rights, ensuring that material reception conditions for asylum seekers comply with the operational standards and indicators developed by the European Asylum and Migration Office (EASO), guaranteeing the rights of the child, facilitating access to employment and providing for emergency reception plans.

(4) An additional document providing information on the background for the proposed citizens' initiative has also been submitted.

([1]) OJ L 130, 17.5.2019, p. 55.

([2]) Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (OJ L 180, 29.6.2013, p. 31).

(5) As regards the objectives of the initiative, the Commission has the power to present a proposal for a legal act that introduces a new mechanism for the distribution of asylum seekers and makes binding in the Member States certain reception standards on the basis of Article 78(2) of the Treaty.

(6) For those reasons, none of the parts of the initiative manifestly fall outside the framework of the Commission's powers to submit a proposal for a legal act of the Union for the purpose of implementing the Treaties.

(7) That conclusion is without prejudice to the assessment of whether the concrete substantive conditions required for the Commission to act, including compliance with the principles of proportionality and subsidiarity and compatibility with fundamental rights, would be met in this case.

(8) The group of organisers has provided appropriate evidence that it fulfils the requirements laid down in Article 5(1) and (2) of Regulation (EU) 2019/788 and has designated the contact persons in accordance with Article 5(3), first subparagraph, of that Regulation.

(9) The initiative is not manifestly abusive, frivolous or vexatious, nor is it manifestly contrary to the values of the Union as set out in Article 2 of the Treaty on European Union or to the rights enshrined in the Charter of Fundamental Rights of the European Union.

(10) The initiative entitled 'Ensuring a dignified reception of migrants in Europe' should therefore be registered.

(11) The conclusion that the conditions for registration under Article 6(3) of Regulation (EU) 2019/788 are fulfilled does not imply that the Commission in any way confirms the factual correctness of the content of the initiative, which is the sole responsibility of the group of organisers of the initiative. The content of the initiative only expresses the views of the group of organisers, and can in no way be taken to reflect the views of the Commission,

HAS ADOPTED THIS DECISION:

Article 1

The European citizens' initiative entitled 'Ensuring a dignified reception of migrants in Europe' shall be registered.

Article 2

This Decision is addressed to the group of organisers of the citizens' initiative entitled 'Ensuring a dignified reception of migrants in Europe', represented by Ms Stéphanie POPPE and Ms Pascale HÖGER acting as contact persons.

Done at Brussels, 22 February 2023.

For the Commission
Věra JOUROVÁ
Vice-President

COMMISSION IMPLEMENTING DECISION (EU) 2023/438

of 24 February 2023

granting a derogation requested by certain Member States pursuant to Regulation (EU) No 952/2013 of the European Parliament and of the Council to use means other than electronic data-processing techniques for the exchange and storage of information for Release 2 of the Import Control System 2

(notified under document C(2023) 1174)

(Only the Croatian, Danish, Dutch, Estonian, French, German, Greek, Polish, Romanian and Swedish texts are authentic)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code ([1]), and in particular Article 6(4) in conjunction with Article 8(2) thereof,

After consulting the Customs Code Committee,

Whereas:

(1) Article 6(1) of Regulation (EU) No 952/2013 requires that all exchanges of information between customs authorities and between economic operators and customs authorities, and the storage of such information, as required under the customs legislation, be made using electronic data-processing techniques. For this purpose and in accordance with Article 6(2) of Regulation (EU) No 952/2013, the Commission draws up common data requirements.

(2) Article 6(4) of Regulation (EU) No 952/2013 provides for the possibility for the Commission to adopt decisions in exceptional cases to allow one or several Member States to derogate from using electronic data processing techniques for the exchange and storage of information, if such derogation is justified by the specific situation of the requesting Member State and is granted for a specific period of time.

(3) Commission Implementing Decision (EU) 2019/2151 ([2]) establishes the work programme relating to the development and deployment of the electronic systems provided for in the Union Customs Code (‘the work programme’). The work programme lists the electronic systems to be developed and the dates on which those systems are expected to become operational. Amongst others, that programme specifies the implementation and deployment window for the Import Control System 2 (‘ICS2’) in accordance with Articles 6(1), Articles 16, 46, 47 and 127 to 132 of Regulation (EU) No 952/2013.

(4) Furthermore, Article 278(3)(b) of Regulation (EU) No 952/2013 specifies the deadline until which means other than electronic data-processing techniques may be used on a transitional basis to implement the provisions concerning entry summary declarations and risk analysis in relation to the entry of goods into the customs territory of the Union.

(5) In accordance with the work programme, Member States are to be ready from 1 March 2023 to deploy the national entry system as a national component of the ICS2 Release 2 in order to exchange and store entry summary declarations collected from economic operators for goods transported by air and they are to grant economic operators the possibility to connect to the system within the deployment window lasting until 2 October 2023 and, as of the date of their connection, to lodge entry summary declarations by using that system.

([1]) OJ L 269, 10.10.2013, p. 1.
([2]) Commission Implementing Decision (EU) 2019/2151 of 13 December 2019 establishing the work programme relating to the development and deployment of the electronic systems provided for in the Union Customs Code (OJ L 325, 16.12.2019, p. 168).

(6) However, three major and partially unforeseen developments have arisen, all having a significant impact on, and posing complementary challenges to, the resources of Member States: the COVID-19 pandemic caused substantial delays in IT developments in Austria, France, Greece and the Netherlands. The withdrawal of the United Kingdom from the European Union and the resulting surge in the number of customs declarations required France and the Netherlands to reshuffle resources and priorities. The financial consequences of the Russian invasion of Ukraine on the customs activities of the neighbouring or geographically close countries, further aggravated the situation and demanded additional resources in Austria. In particular, procurement and tendering difficulties, as well as budgetary and staffing issues, stemming from the aforementioned circumstances had a significant impact on Member States' abilities to meet the deadlines, as cited by Austria, Belgium, Croatia, Denmark, Estonia, France, Greece, Luxembourg, Poland, Romania and Sweden.

(7) These specific circumstances have caused significant delays in the ongoing IT developments and prevented certain Member States from completing the deployment of IT means for the national entry system component of the ICS2 Release 2 system by 1 March 2023. Therefore, on 16 May 2022 Estonia, on 19 May 2022 the Netherlands, on 25 May 2022 Romania, on 3 June 2022 Greece, on 7 June 2022 France, on 23 September 2022 Denmark, on 28 October 2022 Austria, on 15 December 2022 Sweden, on 19 December 2022 Belgium, on 22 December 2022 Luxembourg, on 23 December 2022 Croatia and on 23 January 2023 Poland requested to use means for the exchange and storage of information other than electronic data-processing techniques in accordance with Article 6(4), second subparagraph, of Regulation (EU) No 952/2013.

(8) In compliance with Article 6(4), third subparagraph, of the above regulation, such derogations should not affect the exchange of information between the Member State to which it is addressed and other Member States nor the exchange and storage of information in other Member States for the purposes of the application of the customs legislation. Austria, Belgium, Croatia, Denmark, Estonia, France, Greece, Luxembourg, the Netherlands, Poland, Romania and Sweden are to notify the Commission about the progress made in the deployment of the national entry system of ICS2 Release 2 in relation to goods transported by air as part of the progress reporting process laid down in Article 278a of Regulation (EU) No 952/2013. The communication and sharing of national planning information as outlined in Article 4 of Implementing Decision (EU) 2019/2151 is to be ensured.

(9) Due to the significance of the ICS2 system in establishing an integrated EU approach to reinforce customs risk management and in ensuring pre-arrival security and safety, whilst facilitating the free flow of legitimate trade, and due to the nature and complexity of the ICS2 system, the changes necessary for the alignment to the Union Customs Code requirements have repercussions also on other related or dependant IT systems. The duration of the derogation should thus be kept to a strict minimum. In that light and having regard to the impacts of the exceptional circumstances that have caused delays in the ongoing IT developments of ICS 2 Release 2 in Member States and the current state of those developments, the derogation should last until no later than 30 June 2023,

HAS ADOPTED THIS DECISION:

Article 1

1. Member States may use means for the exchange and storage of information other than electronic data-processing techniques under the common component of release 2 of the electronic system provided for in Article 182 of Regulation (EU) 2015/2447 [3] ('ICS2') until 30 June 2023, provided that the use of means other than electronic data-processing techniques does not affect the exchange of information between the Member State and other Member States or the exchange and storage of information in other Member States for the purpose of the application of the customs legislation.

[3] Commission Implementing Regulation (EU) 2015/2447 of 24 November 2015 laying down detailed rules for implementing certain provisions of Regulation (EU) No 952/2013 of the European Parliament and of the Council laying down the Union Customs Code (OJ L 343, 29.12.2015, p. 558).

2. For the purpose of complying with the condition provided for in paragraph 1 Member States shall use the electronic system referred to in Article 36(1) and (2) of Regulation (EU) 2015/2447 ('CRMS') in order to exchange information as follows:

(a) the customs authorities of the Member States to which the particulars of the entry summary declaration were communicated through ICS2, as referred to in Article 186(2) point (a) of Regulation (EU) 2015/2447 shall communicate the results of their risk analysis to the customs office of first entry in the Member State to whom a derogation laid down in paragraph 1 is granted;

(b) the customs office of first entry, referred to in Article 186(7) first subparagraph of Regulation (EU) 2015/2447, shall communicate the recommendation to control the goods to a customs office, referred to in Article 186(7) second subparagraph of Regulation (EU) 2015/2447, of a Member State to whom the derogation laid down in paragraph 1 is granted;

(c) the customs office, referred to in Article 186(7) second subparagraph of Regulation (EU) 2015/2447, of a Member State to whom a derogation laid down in paragraph 1 is granted, shall communicate the decision on the control of the goods referred to in point (b) to all the customs offices potentially concerned by the movement of goods;

(d) the customs office of a Member State to whom a derogation laid down in paragraph 1 is granted shall communicate the results of the control carried out by it to other customs authorities of the Member States, in accordance with Article 186(7a) of Regulation (EU) 2015/2447.

Article 2

This decision shall apply from 1 March 2023 until 30 June 2023.

Article 3

This Decision is addressed to the Kingdom of Belgium, the Kingdom of Denmark, the Republic of Estonia, the Hellenic Republic, the French Republic, the Republic of Croatia, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, Romania and the Kingdom of Sweden.

Done at Brussels, 24 February 2023.

For the Commission
Paolo GENTILONI
Member of the Commission

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