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⁽¹⁾ Text with EEA relevance.

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⁽¹⁾ Text with EEA relevance.

II

(Non-legislative acts)

REGULATIONS

COUNCIL IMPLEMENTING REGULATION (EU) 2022/748**of 16 May 2022****implementing Regulation (EU) 2015/735 concerning restrictive measures in respect of the situation in South Sudan**

THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to Council Regulation (EU) 2015/735 of 7 May 2015 concerning restrictive measures in respect of the situation in South Sudan, and repealing Regulation (EU) No 748/2014 ⁽¹⁾, and in particular Article 22(4) thereof,

Having regard to the proposal from the High Representative of the Union for Foreign Affairs and Security Policy,

Whereas:

- (1) On 7 May 2015, the Council adopted Regulation (EU) 2015/735.
- (2) In accordance with Article 22(4) of Regulation (EU) 2015/735, the Council has reviewed the list of persons subject to restrictive measures set out in Annex II to that Regulation.
- (3) The Council has concluded that restrictive measures against one person listed in Annex II to Regulation (EU) 2015/735 should be maintained and that the entry for that person should be updated and renumbered.
- (4) Regulation (EU) 2015/735 should therefore be amended accordingly,

HAS ADOPTED THIS REGULATION:

Article 1

Annex II to Regulation (EU) 2015/735 is amended as set out in the Annex to this Regulation.

*Article 2*This Regulation shall enter into force on the day following that of its publication in the *Official Journal of the European Union*.

⁽¹⁾ OJ L 117, 8.5.2015, p. 13.

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

Done at Brussels, 16 May 2022.

For the Council
The President
J. BORRELL FONTELLES

ANNEX

In Annex II to Regulation (EU) 2015/735, the table is replaced by the following:

	Name	Identifying information	Reasons for listing	Date of listing
'1.	Michael MAKUEI LUETH	DoB: 1947 PoB: Bor, Sudan (now South Sudan) Gender: male	Michael Makuei Lueth has held the position of Minister for Information and Broadcasting since 2013 and continues to hold that position in the Transitional Government of National Unity. He was also the public spokesman for the government delegation to the Intergovernmental Authority on Development peace talks from 2014 to 2015 and from 2016 to 2018. Makuei has obstructed the political process in South Sudan, in particular by obstructing through inflammatory public statements the implementation of the Agreement on the Resolution of the Conflict in South Sudan (ARCSS) of August 2015 (replaced in September 2018 by the "Revitalised ARCSS" (R-ARCSS)), by obstructing the work of the ARCSS Joint Monitoring and Evaluation Commission (JMEC, renamed "Reconstituted JMEC" under R-ARCSS) and by obstructing the establishment of the ARCSS Transitional Justice Institutions, which is also provided for in R-ARCSS. He has also obstructed the operations of the United Nations' Regional Protection Force. Makuei is also responsible for serious violations of human rights, including restrictions on freedom of expression.	3.2.2018'

COMMISSION DELEGATED REGULATION (EU) 2022/749**of 8 February 2022****amending the regulatory technical standards laid down in Delegated Regulation (EU) 2017/2417 as regards the transition to new benchmarks referenced in certain OTC derivative contracts****(Text with EEA relevance)**

THE EUROPEAN COMMISSION,

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

Having regard to Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012 ⁽¹⁾, and in particular Article 32(1) thereof,

Whereas:

- (1) Commission Delegated Regulation (EU) 2017/2417 ⁽²⁾ specifies, among others, the classes of over-the-counter (OTC) derivatives denominated in EURO (EUR), the Pound Sterling (GBP) and US dollar (USD) that are subject to the derivatives trading obligation referred to in Article 28 of Regulation (EU) No 600/2014. The classes denominated in GBP and USD reference the London Inter-Bank Offered Rate (LIBOR) benchmarks.
- (2) ICE Benchmark Administration (IBA), the administrator for LIBOR, announced that GBP and JPY LIBOR settings will cease publication at the end of 2021, whereas the publication of certain settings of USD LIBOR will cease in June 2023. On 5 March 2021, the United Kingdom Financial Conduct Authority confirmed that all LIBOR settings will either cease to be provided by any administrator or no longer be representative. In addition, the Commission, the European Central Bank in its banking supervisory capacity (ECB Banking Supervision), the European Banking Authority (EBA) and the European Securities and Markets Authority (ESMA) issued a joint statement to strongly encourage counterparties to stop using any of the LIBOR settings, including USD LIBOR, as a reference rate in new contracts as soon as practicable and in any event by 31 December 2021.
- (3) After 31 December 2021, counterparties will hence no longer be able to enter into OTC interest rate derivatives contracts referencing GBP LIBOR as that benchmark will have ceased and counterparties are expected to no longer enter into OTC interest rate derivatives contracts referencing USD LIBOR. As a result, the remaining traded volumes in those derivatives are expected to be non-existent to very low, as is their liquidity. The same holds for the volume of trades in those derivatives that will be cleared by central counterparties (CCPs) or traded on trading venues and decreasing volume or liquidity is expected for derivatives referencing USD LIBOR. Those events warrant a change in the scope of the clearing obligation and a subsequent amendment in Commission Delegated Regulation (EU) 2015/2205 ⁽³⁾, whereby derivatives referencing GBP LIBOR and USD LIBOR are to be removed from the scope of the clearing obligation. As a consequence, the classes of derivatives currently in scope of the derivatives trading obligation that reference GBP LIBOR or USD LIBOR will no longer meet the condition laid down in Article 32(1) of Regulation (EU) No 600/2014 for making derivatives subject to the derivatives trading obligation as of 3 January 2022. Those classes of derivatives therefore need to be removed from the scope of the trading obligation.

⁽¹⁾ OJ L 173, 12.6.2014, p. 84.

⁽²⁾ Commission Delegated Regulation (EU) 2017/2417 of 17 November 2017 supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council on markets in financial instruments with regard to regulatory technical standards on the trading obligation for certain derivatives (OJ L 343, 22.12.2017, p. 48.).

⁽³⁾ Commission Delegated Regulation (EU) 2015/2205 of 6 August 2015 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to regulatory technical standards on the clearing obligation (OJ L 314, 1.12.2015, p. 13).

- (4) As the planned cessation of GBP LIBOR is scheduled for the end of 2021, and regulatory expectations expressed by the Commission, ECB Banking Supervision, ESMA and EBA are for counterparties to stop using any of the LIBOR settings as a reference rate in new contracts as soon as practicable and in any event by 31 December 2021, the move away from LIBOR-based interest rate derivatives is expected to take place swiftly. Instead, after 31 December 2021, counterparties are expected to trade or clear other OTC interest rate derivatives, in particular OTC interest rate derivatives, referencing the risk-free rates for GBP or USD. This Regulation should thus enter into force without delay after its publication.
- (5) Delegated Regulation (EU) 2017/2417 should therefore be amended accordingly.
- (6) This Regulation is based on the draft regulatory technical standards submitted to the Commission by the European Securities and Markets Authority (ESMA).
- (7) ESMA has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the advice of the Security and Markets Stakeholder Group established by Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council ⁽⁴⁾,

HAS ADOPTED THIS REGULATION:

Article 1

Amendment to Delegated Regulation (EU) 2017/2417

In the Annex to Delegated Regulation (EU) 2017/2417, Tables 2 and 3 are deleted.

Article 2

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, 8 February 2022.

For the Commission

The President

Ursula VON DER LEYEN

⁽⁴⁾ Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

COMMISSION DELEGATED REGULATION (EU) 2022/750**of 8 February 2022****amending the regulatory technical standards laid down in Delegated Regulation (EU) 2015/2205 as regards the transition to new benchmarks referenced in certain OTC derivative contracts****(Text with EEA relevance)**

THE EUROPEAN COMMISSION,

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

Having regard to Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories ⁽¹⁾, and in particular Article 5(2) thereof,

Whereas:

- (1) Commission Delegated Regulation (EU) 2015/2205 ⁽²⁾ specifies, among others, the classes of over-the-counter (OTC) interest rate derivatives denominated in Euro (EUR), Pound Sterling (GBP), Japanese Yen (JPY) and US Dollar (USD) that are subject to the clearing obligation. Those classes include one class denominated in EUR that references the Euro Overnight Index Average (EONIA) rate as well as several classes denominated in GBP, JPY or USD that reference the London Inter-Bank Offered Rate (LIBOR), whereas EONIA and LIBOR are two benchmarks that are due to cease.
- (2) The European Money Markets Institute, the administrator for EONIA, communicated that the cessation of EONIA will take place at the end of 2021. Similarly, the ICE Benchmark Administrator, the administrator for LIBOR, communicated that the cessation of GBP LIBOR, JPY LIBOR and certain fixings of USD LIBOR will also take place at the end of 2021, whereas the publication of all remaining settings of USD LIBOR will cease in June 2023. On 5 March 2021, the Financial Conduct Authority from the United Kingdom confirmed that all LIBOR settings will indeed either cease to be provided by any administrator or no longer be representative. In addition, the Commission, the European Central Bank in its banking supervisory capacity (ECB Banking Supervision), the European Banking Authority (EBA) and the European Securities and Markets Authority (ESMA) issued a joint statement to strongly encourage counterparties to stop using any of the LIBOR settings, including USD LIBOR, as a reference rate in new contracts as soon as practicable and in any event by 31 December 2021.
- (3) After 31 December 2021, counterparties will hence no longer be able to enter into OTC interest rate derivatives referencing EONIA, GBP LIBOR or JPY LIBOR as those benchmarks will have ceased or are expected to no longer enter into OTC interest rate derivatives referencing USD LIBOR. On that date, there will thus be no volume nor liquidity in derivatives referencing EONIA, GBP LIBOR or JPY LIBOR and that those trades will also not be cleared by central counterparties (CCPs). On that same date, there should also not be any material liquidity in derivatives referencing USD LIBOR. Therefore, the classes of derivatives currently in scope of the clearing obligation and that are referencing EONIA, GBP LIBOR or JPY LIBOR will no longer meet two of the conditions to be subject to the clearing obligation set out in Regulation (EU) No 648/2012, i.e. to have a sufficient level of liquidity and to be cleared by an authorised or recognised CCP, while the classes of derivatives currently in scope of the clearing obligation and that are referencing USD LIBOR will no longer meet one of the conditions to be subject to the clearing obligation set out in Regulation (EU) No 648/2012, i.e. to have a sufficient level of liquidity. It follows that those classes should be removed from the scope of the clearing obligation.
- (4) Regulators and market participants have been working on replacement rates for those currencies, and in particular on the development of new risk-free rates, which are now being used as benchmarks in financial instruments and financial contracts. In particular, the euro short-term rate (€STR), the Secured Overnight Financing Rate (SOFR), the Sterling Over Night Index Average (SONIA) and the Tokyo Overnight Average Rate (TONA) risk-free rates are

⁽¹⁾ OJ L 201, 27.7.2012, p. 1.

⁽²⁾ Commission Delegated Regulation (EU) 2015/2205 of 6 August 2015 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to regulatory technical standards on the clearing obligation (OJ L 314, 1.12.2015, p. 13).

produced for EUR, USD, GBP and JPY respectively. More specifically with respect to the OTC derivative market, it now means that OTC interest rate derivative contracts referencing €STR, SOFR, SONIA and TONA are being traded by counterparties and are being cleared at certain CCPs.

- (5) ESMA has been notified of the classes of OTC interest rate derivatives referencing €STR, SOFR, SONIA or TONA that certain CCPs have been authorised to clear. For each of those classes ESMA has assessed the criteria that are essential for subjecting them to the clearing obligation, including the level of standardisation, the volume and liquidity, and the availability of pricing information. With the overarching objective of reducing systemic risk, ESMA has determined the classes of OTC interest rate derivatives referencing some of those risk-free rates that should be subject to the clearing obligation in accordance with the procedure set out in Regulation (EU) No 648/2012. Those classes should be therefore included in the scope of the clearing obligation.
- (6) In general, different counterparties need different periods of time for putting in place the necessary arrangements to start clearing their OTC interest rate derivatives subject to the clearing obligation. However, in this case, counterparties have had time to prepare for the benchmark transition and for the planned cessation of EONIA, EUR LIBOR, GBP LIBOR or JPY LIBOR taking place at the end of 2021, including with respect to their clearing arrangements. For counterparties already subject to the clearing obligation and clearing OTC interest rate derivatives denominated in EUR or GBP, clearing the classes referencing the new risk-free rates in those currencies does not require significant changes, if any at all, to their clearing contracts or processes. Indeed, when counterparties have clearing arrangements in place to clear OTC interest rate derivatives denominated in EUR or GBP, then clearing OTC interest rate derivatives referencing the risk-free rates in those currencies does not require establishing and implementing brand new clearing arrangements as was the case when they first started clearing OTC interest rate derivatives denominated in those currencies. Because clearing derivatives referencing the new risk-free rates is part of a bigger implementation preparation to transition away from EONIA and LIBOR and on to new benchmarks, there is no need to introduce an additional phase-in in order to ensure an orderly and timely implementation of that obligation. The changes made to introduce the new classes of OTC interest rate derivatives referencing the risk-free rates and denominated in EUR and GBP should start to apply on the date of entry into force of this Regulation.
- (7) Following the joint statement from the Commission, ESMA, ECB Banking Supervision and EBA to strongly encourage counterparties to stop using any of the LIBOR settings as a reference rate in new contracts as soon as practicable and in any event by 31 December 2021, counterparties have had to plan for the end of when they could reference USD LIBOR, including with respect to their clearing arrangements. The same considerations with regards to the ability of counterparties having clearing arrangements in place to clear OTC interest rate derivatives denominated in a certain currency to adapt them rather with a rather short turnaround time in order to clear OTC interest rate derivatives referencing the risk-free rates in that same currency also apply to USD, but some additional elements mean that their preparations are less advanced for USD. In particular, CCPs have not yet communicated when they will convert the currently cleared OTC interest rate derivatives referencing USD LIBOR into OTC interest rate derivatives referencing SOFR and it is not yet clear either how mandatory clearing will be adapted in the domestic market for these derivatives. This additional complexity means that counterparties need more time to prepare for the clearing obligation of OTC interest rate derivatives referencing the USD risk-free rate and thus that there is a need to introduce an additional phase-in in order to ensure an orderly and timely implementation of that obligation. The changes made to introduce the new class of OTC interest rate derivatives referencing the risk-free rate denominated in USD should start to apply three months after the date of entry into force of this Regulation.
- (8) The planned cessation of EONIA, GBP LIBOR and JPY LIBOR is scheduled for the end of 2021 such that it will not be possible to trade or clear OTC interest rate derivatives referencing those benchmarks as of 3 January 2022 onwards. Similarly, following the joint statement from the Commission, ESMA, ECB Banking Supervision and EBA to strongly encourage counterparties to stop using any of the LIBOR settings as a reference rate in new contracts as soon as practicable and in any event by 31 December 2021, counterparties will be expected to not trade or clear OTC interest rate derivatives referencing USD LIBOR as of 3 January 2022 onwards. Instead, from 3 January 2022, counterparties will trade or clear other OTC interest rate derivatives, in particular OTC interest rate derivatives referencing the risk-free rates. This Regulation should thus enter into force without delay after its publication.

- (9) Delegated Regulation (EU) 2015/2205 should therefore be amended accordingly.
- (10) This Regulation is based on the draft regulatory technical standards submitted to the Commission by ESMA.
- (11) ESMA has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits, requested the advice of the Security and Markets Stakeholder Group established by Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council ⁽³⁾, and consulted the European Systemic Risk Board,

HAS ADOPTED THIS REGULATION:

Article 1

Amendment to Delegated Regulation (EU) 2015/2205

Delegated Regulation (EU) 2015/2205 is amended as follows:

(1) Article 3 is amended as follows:

(a) the following paragraphs 1a and 1b are inserted:

‘1a. By way of derogation from paragraph 1, in respect of contracts pertaining to a class of OTC derivatives set out in the Annex in rows D.4.1, D.4.2 of Table 4, the clearing obligation for such contracts shall take effect on 18 May 2022.

1b. By way of derogation from paragraph 1, in respect of contracts pertaining to a class of OTC derivatives set out in the Annex in rows D.4.3 of Table 4, the clearing obligation for such contracts shall take effect on 18 August 2022.’;

(b) in paragraph 2, the first subparagraph is replaced by the following:

‘By way of derogation from paragraphs 1, 1a and 1b, in respect of contracts pertaining to a class of OTC derivatives set out in the Annex and concluded between counterparties which are part of the same group and where one counterparty is established in a third country and the other counterparty is established in the Union, the clearing obligation shall take effect on:

(a) 30 June 2022 in case no equivalence decision has been adopted pursuant to Article 13(2) of Regulation (EU) No 648/2012 for the purposes of Article 4 of that Regulation covering the OTC derivative contracts set out in the Annex to this Regulation in respect of the relevant third country;

(b) the later of the following dates in case an equivalence decision has been adopted pursuant to Article 13(2) of Regulation (EU) No 648/2012 for the purposes of Article 4 of that Regulation covering the OTC derivative contracts referred to in the Annex to this Regulation in respect of the relevant third country:

(i) 60 days after the date of entry into force of the equivalence decision adopted pursuant to Article 13(2) of Regulation (EU) No 648/2012 for the purposes of Article 4 of that Regulation covering the OTC derivative contracts referred to in the Annex to this Regulation in respect of the relevant third country;

(ii) the date when the clearing obligation takes effect pursuant to paragraph 1.’;

⁽³⁾ Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

(c) paragraph 3 is replaced by the following:

‘3. By way of derogation from paragraphs 1, 1a, 1b and 2, in respect of contracts pertaining to a class of OTC derivatives set out in the Annex, the clearing obligation shall take effect from 18 February 2022 where the following conditions are fulfilled:

(a) the clearing obligation has not been triggered by 18 February 2021;

(b) the contracts are novated for the sole purpose of replacing the counterparty established in the United Kingdom with a counterparty established in a Member State.’;

(2) the Annex is replaced by the text in the Annex to this Regulation.

Article 2

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, 8 February 2022.

For the Commission
The President
Ursula VON DER LEYEN

ANNEX

‘ANNEX

Interest rate OTC derivatives classes subject to the clearing obligation

Table 1

Basis swaps classes

id	Type	Reference Index	Settlement Currency	Maturity	Settlement Currency Type	Optionality	Notional Type
A.1.1	Basis	Euribor	EUR	28D-50Y	Single currency	No	Constant or variable

Table 2

Fixed-to-float interest rate swaps classes

id	Type	Reference Index	Settlement Currency	Maturity	Settlement Currency Type	Optionality	Notional Type
A.2.1	Fixed-to-float	Euribor	EUR	28D-50Y	Single currency	No	Constant or variable

Table 3

Forward rate agreement classes

id	Type	Reference Index	Settlement Currency	Maturity	Settlement Currency Type	Optionality	Notional Type
A.3.1	FRA	Euribor	EUR	3D-3Y	Single currency	No	Constant or variable

Table 4

Overnight index swaps classes

id	Type	Reference Index	Settlement Currency	Maturity	Settlement Currency Type	Optionality	Notional Type
A.4.2	OIS	FedFunds	USD	7D-3Y	Single currency	No	Constant or variable
D.4.1	OIS	€STR	EUR	7D-3Y	Single currency	No	Constant or variable
D.4.2	OIS	SONIA	GBP	7D-50Y	Single currency	No	Constant or variable
D.4.3	OIS	SOFR	USD	7D-3Y	Single currency	No	Constant or variable'

COMMISSION IMPLEMENTING REGULATION (EU) 2022/751**of 16 May 2022****concerning the non-approval of the active substance chloropicrin, in accordance with Regulation (EC) No 1107/2009 of the European Parliament and of the Council concerning the placing of plant protection products on the market****(Text with EEA relevance)**

THE EUROPEAN COMMISSION,

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

Having regard to Regulation (EC) No 1107/2009 of the European Parliament and of the Council of 21 October 2009 concerning the placing of plant protection products on the market and repealing Council Directives 79/117/EEC and 91/414/EEC ⁽¹⁾, and in particular Article 13(2) thereof,

Whereas:

- (1) On 21 December 2014, European Chloropicrin Group (ECG) submitted to the United Kingdom (‘the rapporteur Member State’) an application for the approval of the active substance chloropicrin pursuant to Article 7(1) of Regulation (EC) No 1107/2009.
- (2) Pursuant to Article 9(3) of Regulation (EC) No 1107/2009, the rapporteur Member State notified the applicant, the other Member States, the Commission and the European Food Safety Authority (‘the Authority’) of the admissibility of the application on 18 June 2014.
- (3) For that active substance, the effects on human and animal health and the environment have been assessed, pursuant to Article 11(2) and (3) of Regulation (EC) No 1107/2009, for the use proposed by the applicant. The rapporteur Member State submitted a draft assessment report to the Commission and the Authority on 12 December 2017.
- (4) Pursuant to Article 12(1) of that Regulation, the Authority circulated the draft assessment report received from the rapporteur Member State to the applicant and the other Member States and organised a public consultation on it.
- (5) Pursuant to Article 12(3) of Regulation (EC) No 1107/2009, the Authority requested that the applicant supply additional information to the Member States, the Commission and the Authority.
- (6) During the peer review process, following the United Kingdom’s notification of its intention to withdraw from the Union pursuant to Article 50 of the Treaty on European Union, Italy took over the responsibility for this active substance as the rapporteur Member State in June 2019.
- (7) The assessment of the additional information by the rapporteur Member State was submitted to the Authority in the form of an updated draft assessment report.
- (8) The draft assessment report was reviewed by the Member States and the Authority. The Authority presented to the Commission its conclusion ⁽²⁾ on the risk assessment of the active substance chloropicrin on 30 January 2020.
- (9) In its conclusion, the Authority indicated that, based on the available information, it could not finalise the risk assessment for consumers, operators, workers, bystanders and residents and identified potential concerns for groundwater, soil macro-organisms and micro-organisms and soil dwelling non-target arthropods.
- (10) In addition, the assessment of the risks to aquatic organisms, to bees, to foliar-dwelling non-target arthropods, to earthworms and non-target terrestrial plants could not be finalised.

⁽¹⁾ OJ L 309, 24.11.2009, p. 1.

⁽²⁾ EFSA Journal 2020;18(3):6028, Conclusion on the peer review of the pesticide risk assessment of the active substance chloropicrin. doi:10.2903/j.efsa.2020.6028.

- (11) The Commission invited the applicant to submit its comments on the conclusion of the Authority and, in accordance with Article 13(1) of Regulation (EC) No 1107/2009, on the draft review report. The applicant submitted its comments, which have been carefully examined.
- (12) The Commission presented a review report and a draft Regulation regarding the non-approval of the active substance chloropicrin to the Standing Committee on Plants, Animals, Food and Feed on 22 October 2021. The Commission observed that concerns identified by the Authority could not be eliminated and that consequently it could not be concluded that the approval criteria are satisfied.
- (13) By letter of 18 January 2022, the applicant withdrew its application for the approval of chloropicrin. Therefore, chloropicrin should not be approved.
- (14) This Regulation does not prevent the submission of a further application for the approval of chloropicrin pursuant to Article 7 of Regulation (EC) No 1107/2009.
- (15) The measures provided for in this Regulation are in accordance with the opinion of the Standing Committee on Plants, Animals, Food and Feed,

HAS ADOPTED THIS REGULATION:

Article 1

Non-approval of the active substance

The active substance chloropicrin is not approved.

Article 2

Entry into force

This Regulation shall enter into force on the twentieth 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, 16 May 2022.

For the Commission
The President
Ursula VON DER LEYEN

DECISIONS

COUNCIL DECISION (EU) 2022/752

of 5 April 2022

amending Decision 1999/70/EC concerning the external auditors of the national central banks, as regards the external auditors of the Bank of Greece

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to Protocol No 4 on the Statute of the European System of Central Banks and of the European Central Bank, annexed to the Treaty on European Union and the Treaty on the Functioning of the European Union, and in particular Article 27(1) thereof,

Having regard to the Recommendation of the European Central Bank of 17 February 2022 to the Council of the European Union on the external auditors of the Bank of Greece (ECB/2022/3) ⁽¹⁾,

Whereas:

- (1) The accounts of the European Central Bank (ECB) and of the national central banks of the Member States whose currency is the euro are to be audited by independent external auditors recommended by the Governing Council of the ECB and approved by the Council of the European Union.
- (2) The mandate of the current external auditors of the Bank of Greece, Deloitte Certified Public Accountants S.A., will end following the audit for the financial year 2021. It is therefore necessary to appoint external auditors from the financial year 2022.
- (3) The Bank of Greece has selected Ernst & Young (Hellas) Certified Auditors Accountants S.A. as its external auditors for the financial years 2022 to 2026, with the option to extend the mandate to the financial years 2027 and 2028.
- (4) The Governing Council of the ECB recommended that Ernst & Young (Hellas) Certified Auditors Accountants S.A. be appointed as the external auditors of the Bank of Greece for the financial years 2022 to 2026, with the option to extend the mandate to the financial years 2027 and 2028.
- (5) Following the recommendation of the Governing Council of the ECB, Council Decision 1999/70/EC ⁽²⁾ should be amended accordingly,

HAS ADOPTED THIS DECISION:

Article 1

In Article 1 of Decision 1999/70/EC, paragraph 12 is replaced by the following:

‘12. Ernst & Young (Hellas) Certified Auditors Accountants S.A. are hereby approved as the external auditors of the Bank of Greece for the financial years 2022 to 2026.’

Article 2

This Decision shall take effect on the date of its notification.

⁽¹⁾ OJ C 102, 2.3.2022, p. 1.

⁽²⁾ Council Decision 1999/70/EC of 25 January 1999 concerning the external auditors of the national central banks (OJ L 22, 29.1.1999, p. 69).

Article 3

This Decision is addressed to the European Central Bank.

Done at Luxembourg, 5 April 2022.

For the Council
The President
B. LE MAIRE

COUNCIL DECISION (CFSP) 2022/753**of 16 May 2022****amending Decision (CFSP) 2019/938 in support of a process of confidence-building leading to the establishment of a zone free of nuclear weapons and all other weapons of mass destruction in the Middle East**

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on European Union, and in particular Articles 28(1) and 31(1) thereof,

Having regard to the proposal from the High Representative of the Union for Foreign Affairs and Security Policy,

Whereas:

- (1) On 6 June 2019, the Council adopted Decision (CFSP) 2019/938 ⁽¹⁾.
- (2) Decision (CFSP) 2019/938 provided for a 36-month implementation period for the activities referred to in Article 1 thereof from the date of the conclusion of the financing agreement referred to in Article 3(3) thereof.
- (3) The implementing Partner, the United Nations Institute for Disarmament Research, requested a 12-month extension of that implementation period until 10 July 2023, considering the delay in the implementation of project activities under Decision (CFSP) 2019/938 due to the impact of the COVID-19 pandemic.
- (4) The continuation of the activities referred to in Article 1 of Decision (CFSP) 2019/938 until 10 July 2023 does not have any implication as regards financial resources until 10 July 2023.
- (5) Decision (CFSP) 2019/938 should be amended accordingly,

HAS ADOPTED THIS DECISION:

Article 1

In Decision (CFSP) 2019/938, Article 5(2) is replaced by the following:

- ‘2. It shall expire on 10 July 2023.’

Article 2

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

Done at Brussels, 16 May 2022.

For the Council

The President

J. BORRELL FONTELLES

⁽¹⁾ Council Decision (CFSP) 2019/938 of 6 June 2019 in support of a process of confidence-building leading to the establishment of a zone free of nuclear weapons and all other weapons of mass destruction in the Middle East (OJ L 149, 7.6.2019, p. 63).

COUNCIL DECISION (CFSP) 2022/754**of 16 May 2022****amending Decision (CFSP) 2019/797 concerning restrictive measures against cyber-attacks threatening the Union or its Member States**

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on European Union, and in particular Article 29 thereof,

Having regard to the proposal from the High Representative of the Union for Foreign Affairs and Security Policy,

Whereas:

- (1) On 17 May 2019, the Council adopted Decision (CFSP) 2019/797 ⁽¹⁾.
- (2) Decision (CFSP) 2019/797 applies until 18 May 2022. On the basis of a review of that Decision, the validity of that Decision should be extended until 18 May 2025 and the restrictive measures set out therein should be extended until 18 May 2023.
- (3) Decision (CFSP) 2019/797 should therefore be amended accordingly,

HAS ADOPTED THIS DECISION:

Article 1

Article 10 of Decision (CFSP) 2019/797 is replaced by the following:

‘Article 10

This Decision shall apply until 18 May 2025 and shall be kept under constant review. The measures set out in Articles 4 and 5 shall apply as regards the natural and legal persons, entities and bodies listed in the Annex until 18 May 2023.’.

Article 2

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

Done at Brussels, 16 May 2022.

For the Council

The President

J. BORRELL FONTELLES

⁽¹⁾ Council Decision (CFSP) 2019/797 of 17 May 2019 concerning restrictive measures against cyber-attacks threatening the Union or its Member States (OJ L 129 I, 17.5.2019, p. 13).

COUNCIL IMPLEMENTING DECISION (CFSP) 2022/755**of 16 May 2022****implementing Decision (CFSP) 2015/740 concerning restrictive measures in view of the situation in South Sudan**

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on European Union, and in particular Article 31(2) thereof,

Having regard to Council Decision (CFSP) 2015/740 of 7 May 2015 concerning restrictive measures in view of the situation in South Sudan and repealing Decision 2014/449/CFSP ⁽¹⁾, and in particular Article 9(2) thereof,

Having regard to the proposal from the High Representative of the Union for Foreign Affairs and Security Policy,

Whereas:

- (1) On 7 May 2015, the Council adopted Decision (CFSP) 2015/740.
- (2) In accordance with Article 12(2) of Decision (CFSP) 2015/740, the Council has reviewed the list of persons subject to restrictive measures set out in Annex II to that Decision.
- (3) The Council has concluded that restrictive measures against one person listed in Annex II to Decision (CFSP) 2015/740 should be maintained and that the entry for that person should be updated and renumbered.
- (4) Decision (CFSP) 2015/740 should therefore be amended accordingly,

HAS ADOPTED THIS DECISION:

Article 1

Annex II to Decision (CFSP) 2015/740 is amended as set out in the Annex to this Decision.

Article 2

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

Done at Brussels, 16 May 2022.

For the Council
The President
J. BORRELL FONTELLES

⁽¹⁾ Council Decision (CFSP) 2015/740 of 7 May 2015 concerning restrictive measures in view of the situation in South Sudan and repealing Decision 2014/449/CFSP (OJ L 117, 8.5.2015, p. 52).

ANNEX

In Annex II to Decision (CFSP) 2015/740, the table is replaced by the following:

	Name	Identifying information	Reasons for listing	Date of listing
'1.	Michael MAKUEI LUETH	DoB: 1947 PoB: Bor, Sudan (now South Sudan) Gender: male	Michael Makuei Lueth has held the position of Minister for Information and Broadcasting since 2013 and continues to hold that position in the Transitional Government of National Unity. He was also the public spokesman for the government delegation to the Intergovernmental Authority on Development peace talks from 2014 to 2015 and from 2016 to 2018. Makuei has obstructed the political process in South Sudan, in particular by obstructing through inflammatory public statements the implementation of the Agreement on the Resolution of the Conflict in South Sudan (ARCSS) of August 2015 (replaced in September 2018 by the "Revitalised ARCSS" (R-ARCSS)), by obstructing the work of the ARCSS Joint Monitoring and Evaluation Commission (JMEC, renamed "Reconstituted JMEC" under R-ARCSS) and by obstructing the establishment of the ARCSS Transitional Justice Institutions, which is also provided for in R-ARCSS. He has also obstructed the operations of the United Nations' Regional Protection Force. Makuei is also responsible for serious violations of human rights, including restrictions on freedom of expression.	3.2.2018'

COMMISSION DECISION (EU) 2022/756**of 30 September 2021****on the measures SA.32014, SA.32015, SA.32016 (2011/C) (ex 2011/NN) implemented by Italy and the Region of Sardinia in favour of Saremar***(notified under document C(2021) 6990)***(Only the Italian text is authentic)****(Text with EEA relevance)**

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 108(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments pursuant to the provision(s) cited above ⁽¹⁾ and having regard to their comments,

Whereas:

1. PROCEDURE

- (1) On 6 August 1999, the Commission decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union ("TFEU") in respect of aid paid on the basis of the initial public service contracts ('the initial Conventions') to the six companies that formed the Tirrenia Group at the time ⁽²⁾.
- (2) During the investigation phase, the Italian authorities requested the Tirrenia Group case to be divided, so that priority could be given to reaching a final decision concerning only Tirrenia di Navigazione ('Tirrenia'). This request was motivated by the Italian authorities' plan to privatise the Group, beginning with Tirrenia, and their intention to speed up the process in relation to that company.
- (3) The Commission acceded to the Italian authorities' request, and by Commission Decision 2001/851/EC ⁽³⁾ it closed the procedure initiated in respect of the aid awarded to Tirrenia. The aid was declared compatible subject to certain commitments by the Italian authorities.
- (4) By Commission Decision 2005/163/EC ⁽⁴⁾ ('the 2004 Decision'), the Commission declared the compensation granted to the Tirrenia Group companies other than Tirrenia ⁽⁵⁾ to be partially compatible with the internal market, partially compatible conditional upon the respect of certain commitments by the Italian authorities, and partially incompatible with the internal market. The 2004 Decision was based on accounting data spanning from 1992 to 2001 and included conditions to ensure the compatibility of the compensation throughout the entire duration of the initial Conventions (i.e., until 2008).
- (5) By Judgment of 4 March 2009 in cases T-265/04, T-292/04 and T-504/04 ⁽⁶⁾ the General Court annulled the 2004 Decision.

⁽¹⁾ OJ C 28, 1.2.2012, p. 18 and OJ C 84, 22.3.2013, p. 58.

⁽²⁾ OJ C 306, 23.10.1999, p. 2. The former Tirrenia Group consisted of the companies Tirrenia di Navigazione S.p.A., Adriatica S.p.A., Caremar – Campania Regionale Marittima S.p.A., Saremar – Sardegna Regionale Marittima S.p.A., Siremar – Sicilia Regionale Marittima S.p.A., and Toremar – Toscana Regionale Marittima S.p.A.

⁽³⁾ Commission Decision 2001/851/EC of 21 June 2001 on the State aid awarded to the Tirrenia di Navigazione shipping company by Italy (OJ L 318, 4.12.2001, p. 9).

⁽⁴⁾ Commission Decision 2005/163/EC of 16 March 2004 on the State aid paid by Italy to the Adriatica, Caremar, Siremar, Saremar and Toremar shipping companies (Tirrenia Group) (OJ L 53, 26.2.2005, p. 29).

⁽⁵⁾ In particular: Adriatica, Caremar, Siremar, Saremar and Toremar.

⁽⁶⁾ Joined Cases T-265/04, T-292/04 and T-504/04 *Tirrenia di Navigazione v Commission*, ECLI:EU:T:2009:48.

- (6) On 5 October 2011, by Commission Decision C(2011)6961 (the '2011 Decision') ⁽⁷⁾, the Commission opened the formal investigation procedure in respect of various measures adopted by Italy in favour of the companies of the former Tirrenia Group. The investigation concerned, inter alia, the compensations granted to Saremar – Sardegna Regionale Marittima ('Saremar') for the operation of a number of maritime routes as of 1 January 2009 and a number of other measures granted to that company.
- (7) The 2011 Decision was published in the *Official Journal of the European Union*. The Commission invited interested parties to submit their comments on the measures under investigation.
- (8) On 7 November 2012, the Commission extended the investigation procedure, inter alia, in respect of certain support measures granted by the Region of Sardinia to Saremar. On 19 December 2012, the Commission adopted an amended version ⁽⁸⁾ of that Decision (Commission Decision C(2012) 9452, 'the 2012 Decision').
- (9) The 2012 Decision was published in the *Official Journal of the European Union* ⁽⁹⁾. The Commission invited interested parties to submit their comments on the measures under investigation.
- (10) By letter of 14 May 2013, the Region of Sardinia asked the Commission to separate the measures concerning Saremar from the formal investigation procedure opened by the 2011 and 2012 Decisions and to give priority to those measures, notably in view of the imminent privatisation of the company.
- (11) The Commission acceded to the Sardinian authorities' request and, by Commission Decision (EU) 2018/261 ⁽¹⁰⁾ ('the 2014 Decision'), it closed the formal investigation procedure in respect of certain measures granted by the Region of Sardinia in favour of Saremar. Of the five measures adopted by the Region of Sardinia in favour of Saremar, four were assessed in the 2014 Decision, with the exception being the 'Bonus Sardo – Vacanza' project (see recital 29 of this Decision).
- (12) Saremar and the Region of Sardinia launched actions for annulment of the 2014 Decision at the General Court. The General Court dismissed these actions by its Judgments of 6 April 2017 in cases T-219/14 ⁽¹¹⁾ and T-220/14 ⁽¹²⁾. Neither Saremar nor the Region of Sardinia lodged any appeals to those judgments, which are now final.
- (13) By Commission Decision (EU) 2020/1411 ⁽¹³⁾, the Commission concluded the investigation on the Tirrenia Group companies other than Tirrenia for the period 1992-2008. The Commission concluded that the aid granted for the provision of maritime cabotage transport services constituted existing aid, while the aid granted for the provision of international maritime transport services was compatible with the 2011 services of general economic interest ('SGEI') Framework (the '2011 SGEI Framework') ⁽¹⁴⁾.
- (14) By Commission Decision (EU) 2020/1412 ⁽¹⁵⁾, the Commission closed the formal investigation procedure as concerns the measures granted to Tirrenia and its acquirer CIN, for the period 2009-2020.

⁽⁷⁾ OJ C 28, 1.2.2012, p. 18.

⁽⁸⁾ All the amendments concerned measures in favour of Saremar.

⁽⁹⁾ OJ C 84, 22.3.2013, p. 58.

⁽¹⁰⁾ Commission Decision (EU) 2018/261 of 22 January 2014 on the measures SA.32014 (2011/C), SA.32015 (2011/C), SA.32016 (2011/C) implemented by the Region of Sardinia in favour of Saremar (notified under document C(2013) 9101) (OJ L 49, 22.2.2018, p. 22).

⁽¹¹⁾ Case T-219/14 *Regione autonoma della Sardegna v. Commission*, ECLI:EU:T:2017:266.

⁽¹²⁾ Case T-220/14 *Saremar v. Commission* ECLI:EU:T:2017:267.

⁽¹³⁾ Commission Decision (EU) 2020/1411 of 2 March 2020 on the State aid No C 64/99 (ex NN 68/99) implemented by Italy for the Adriatica, Caremar, Siremar, Saremar and Toremar shipping companies (Tirrenia Group) (OJ L 332, 12.10.2020, p. 1).

⁽¹⁴⁾ Communication from the Commission: European Framework for State aid in the form of public service compensation (OJ C 8, 11.1.2012, p. 15).

⁽¹⁵⁾ Commission Decision (EU) 2020/1412 of 2 March 2020 on the measures SA.32014, SA.32015, SA.32016 (11/C) (ex 11/NN) implemented by Italy for Tirrenia di Navigazione and its acquirer Compagnia Italiana di Navigazione (OJ L 332, 12.10.2020, p. 45).

- (15) By Commission Decision (EU) 2021/4268 ⁽¹⁶⁾ and Commission Decision (EU) 2021/4271 ⁽¹⁷⁾, the Commission closed the formal investigation procedure as concerns the measures granted to Siremar and Toremar and their acquirers, for the period from 2009 onwards.
- (16) This Decision only concerns measures in favour of Saremar identified in the 2011 Decision and the 2012 Decision that were not covered by the 2014 Decision, as explained in recitals 28 and 29. The Commission will address all the remaining measures subject to the 2011 Decision and the 2012 Decision, under the case numbers SA.32014, SA.32015 and SA.32016, in separate decisions. In particular, those remaining measures all concern other companies of the former Tirrenia Group (i.e. Caremar and Laziomar).

2. BACKGROUND AND DESCRIPTION OF THE MEASURES SUBJECT TO INVESTIGATION

2.1. Background

2.1.1. *The initial Conventions*

- (17) The Tirrenia Group was originally owned by the Italian State through the company Finanziaria per i Settori Industriale e dei Servizi S.p.A ('Fintecna') ⁽¹⁸⁾ and included six companies, namely Tirrenia, Adriatica, Caremar, Saremar, Siremar and Toremar. These companies provided maritime transport services under separate public service contracts concluded in 1991 with the Italian State, in force for 20 years between January 1989 and December 2008. Fintecna held 100 % of Tirrenia's share capital. Tirrenia wholly owned Adriatica, Caremar, Siremar, Saremar and Toremar (together, 'the regional companies'). Adriatica, which used to operate a number of routes between Italy and Albania, Croatia, Greece and Montenegro, merged with Tirrenia in 2004.
- (18) The purpose of the initial Conventions was to guarantee the regularity and reliability of a large number of maritime transport services, chiefly connecting mainland Italy with Sicily, Sardinia and other smaller Italian islands. To that effect, the Italian State granted financial support in the form of subsidies paid directly to each of the companies of the Tirrenia Group.
- (19) Saremar operated certain purely local cabotage connections between Sardinia and the islands to its north-east and south-west, and an international connection with Corsica, under the initial Convention with the State.

2.1.2. *The prolongation of the initial Conventions*

- (20) The initial Conventions, including the one applicable to Saremar, were prolonged three times.
- (21) Firstly, Article 26 of Decree Law No 207 of 30 December 2008, converted into Law No 14 of 27 February 2009, laid down the prolongation of the initial Conventions, which were initially due to expire on 31 December 2008, until 31 December 2009.
- (22) Secondly, Article 19ter of Decree Law No 135 of 25 September 2009 ('Decree Law 135/2009'), converted into Law No 166 of 20 November 2009 ('the 2009 Law'), laid down that, in view of the privatisation of the Tirrenia Group companies, the shareholding of the regional companies, excluding Siremar, would be transferred from the parent company Tirrenia as follows:
- (a) Caremar to the Region of Campania. Subsequently, the Region of Campania transferred the going concern operating the transport connections with the Pontino archipelago to the Region of Lazio (thereby establishing Laziomar) ⁽¹⁹⁾;
 - (b) Saremar to the Region of Sardinia;

⁽¹⁶⁾ Not yet published in the *Official Journal of the European Union*.

⁽¹⁷⁾ Not yet published in the *Official Journal of the European Union*.

⁽¹⁸⁾ Fintecna is wholly owned by the Ministry of Economy and Finance and is specialised in managing shareholding and privatisation processes, as well as dealing with projects to rationalise and restructure companies facing industrial, financial or organisational difficulties.

⁽¹⁹⁾ This transfer was formalised on 1 June 2011.

(c) Toremar to the Region of Tuscany.

- (23) The 2009 Law also specified that new Conventions would be agreed between the Italian State and Tirrenia and Siremar by 31 December 2009. Likewise, the regional services would be enshrined in new Public Service Contracts, to be agreed between Saremar, Toremar, and Caremar and the respective regional authorities by 31 December 2009 (Sardinia and Tuscany) and 28 February 2010 (Campania and Lazio). The new Conventions or Public Service Contracts would be put up for tender jointly with the companies themselves. The new owners of each of these companies would then sign the respective Convention or Public Service Contract ⁽²⁰⁾.
- (24) To that end, the 2009 Law further prolonged the initial Conventions, including the one applicable to Saremar, from 1 January 2010 until 30 September 2010.
- (25) Finally, Law No 163 of 1 October 2010 converting Decree-Law No 125 of 5 August 2010 (the '2010 Law') laid down the further prolongation of the initial Conventions, including the one applicable to Saremar, from 1 October 2010 until the completion of the privatisation processes of Tirrenia and Siremar.

2.1.3. The implementation of the 2014 Decision

- (26) By its 2014 Decision, the Commission declared two aid measures granted to Saremar incompatible with the internal market, while two other measures were found not to constitute State aid within the meaning of Article 107(1) TFEU. In this context, the Commission ordered the recovery of:
- (a) EUR 10 million compensation paid to Saremar for the operation of two additional routes linking Sardinia to the mainland;
- (b) a planned recapitalisation of EUR 6 099 961 (of which EUR 824 309,69 had already been paid to Saremar).
- (27) Italy has implemented the 2014 Decision, even if certain procedures remain pending at the time of adoption of this decision. In particular:
- (a) By letter of 10 April 2015, the Italian authorities reported that on 15 January 2015, the Tribunale di Cagliari had ruled that Saremar would be admitted to the *concordato preventivo* procedure. The procedure was aimed at selling all the assets of Saremar and satisfy the creditors' claims, with no continuation of business activities on the part of Saremar beyond a certain date (initially set for 31 December 2015). The State aid claims had been registered at the appropriate ranking and included recovery interest accrued until 1 July 2014, for EUR 11 131 231,60. The latter is the date when Saremar asked to be admitted to the *concordato preventivo* procedure that, according to Italian law, stops the accrual of interest ⁽²¹⁾;
- (b) By letter of 28 October 2015, the Italian authorities informed the Commission that the sale of Saremar's vessels and the assignment of the public service obligations operated by Saremar were to be tendered separately. They also sent the decree issued by the Tribunale di Cagliari on 22 July 2015 which validated the *concordato preventivo* (so called '*omologazione*') and informed the Commission that eight expressions of interest for Saremar's ships had been received. By letter of 21 January 2016, the Italian authorities confirmed that Saremar would keep operating only until 31 March 2016. They also reported that Saremar's ships had been sold to the company Delcoservizi Srl ('Delcoservizi'), with the actual transfer due by 30 April 2016, and that the procedure for awarding the public service contract was still ongoing, with two expressions of interest received;
- (c) By letter of 19 May 2016, the Italian authorities reported that the public service contract had been awarded to the company Delcomar Srl ('Delcomar'). Accordingly, on 31 March 2016, Saremar stopped operating any maritime transport connections, and as of 1 April 2016, Delcomar has been operating the public service. The Italian authorities also informed the Commission that after the transfer of Saremar's assets, which had also taken place on 31 March 2016, the Regional Council of Sardinia ordered the liquidation of Saremar by its Decision No 24/23 of 22 April 2016. In that decision, the Regional Council noted that as Saremar had ceased all activities on 31 March 2016, the company no longer served any purpose and had to be liquidated, and a new liquidator was appointed by the Region;

⁽²⁰⁾ Article 19-ter, paragraph 10 of Decree Law 135/2009.

⁽²¹⁾ See points 130 and 133 of the Commission Notice on the recovery of unlawful and incompatible State aid, C 247/1, 23 July 2019.

- (d) By letter of 20 July 2016, the Italian authorities informed the Commission that, based on the funds received from the liquidation of Saremar's assets and the schedule of liabilities, only EUR 4 452 226,42 could be assigned to the State aid claims (approximately 40 % of the amounts due). Moreover, they confirmed that Saremar was laying off its entire staff and that it would be erased from the companies register once its liquidation was completed, and that there were no connections of any kind between the seller (Saremar) and the buyer (Delcoservizi) of the assets. Finally, by letter of 17 July 2017, the Italian authorities provided evidence of payment of EUR 4 452 226,42 by the liquidators of Saremar to the Region.

2.2. Measures in scope of the 2011 and 2012 Decisions

- (28) The following measures have been subject to assessment in the formal investigation procedure opened by the 2011 and 2012 Decisions:
- (1) Compensation for the provision of SGEI under the prolongation of the initial Conventions (measure 1);
 - (2) Illegal prolongation of rescue aid to Tirrenia and Siremar (measure 2);
 - (3) The privatisation of the companies of the former Tirrenia Group ⁽²²⁾ (measure 3);
 - (4) Compensation paid for the operation of SGEI under the future Conventions/Public Service Contracts (measure 4);
 - (5) The berthing priority (measure 5);
 - (6) The measures laid down by the 2010 Law (measure 6);
 - (7) Five additional measures adopted by the Region of Sardinia in favour of Saremar (measure 7).
- (29) By its 2014 Decision, the Commission closed the formal investigation procedure as concerns four of the five measures adopted by the Region of Sardinia in favour of Saremar, referred to above as measure 7. However, it did not conclude on a fifth measure: the Bonus Sardo – Vacanza project ⁽²³⁾. Therefore, for Saremar, the Commission has not yet taken a position on the compatibility of measures 1, 3, 4, 5, 6 and the Bonus Sardo – Vacanza project with the internal market.

3. LIQUIDATION OF THE BENEFICIARY AND LACK OF ECONOMIC CONTINUITY

- (30) The Commission recalls that the system of *ex ante* scrutiny of new aid measures by the Commission provided in Article 108(3) TFEU is designed to avoid the granting of aid that is incompatible with the internal market ⁽²⁴⁾. As far as recovery of incompatible aid is concerned, the Court has consistently held that the Commission's power to order Member States to recover aid regarded by the Commission as being incompatible with the internal market is aimed at removing the distortion of competition caused by the competitive advantage which the recipient of the aid has enjoyed, thereby re-establishing the situation that existed before that aid was paid ⁽²⁵⁾. If a company cannot repay the aid, then the implementation of recovery requires the Member State concerned to bring about the liquidation of that company ⁽²⁶⁾, i.e. the cessation of its activities and the sale of its assets under market conditions.
- (31) In other words, the main goal of the system of State aid control is to prevent the granting of incompatible State aid. As a consequence, if competition in the internal market is distorted by the disbursement of unlawful and incompatible State aid, it needs to be ensured that the situation prior to that distortion of competition is restored, if necessary, through the liquidation of the beneficiary.

⁽²²⁾ This includes the deferred payment by CIN of part of the purchase price for its acquisition of the Tirrenia business branch and several alleged additional aid measures in the context of the privatisation of the Siremar business branch (e.g. counter-guarantee and capital increase by the State for Cdl).

⁽²³⁾ The 2014 Decision indicated that this project would be assessed in a separate decision.

⁽²⁴⁾ Judgment of the Court of Justice of 3 March 2020, *Vodafone Magyarország*, C-75/18, ECLI:EU:C:2020:139, paragraph 19.

⁽²⁵⁾ Judgment of the Court of Justice of 11 December 2012, *Commission v Spain* ('*Magefesa II*'), C-610/10, ECLI:EU:C:2012:781, paragraph 105.

⁽²⁶⁾ Judgment of the Court of Justice of 17 January 2018, *Commission v Greece* ('*United Textiles*'), C-363/16, ECLI:EU:C:2018:12, paragraph 36.

- (32) Against this background, the Commission notes that the still pending measures identified in recitals 28 and 29 refer to either Saremar, now in liquidation (measures 1 and the Bonus Sardo Vacanza), or to Saremar's successors after its privatisation (measures 3 and 4), or to both (measures 5 and 6). However, the privatisation of Saremar did not take place as it was described and preliminarily assessed in recitals 149 and 150, 238-246 and 305 and 306 of the 2012 Decision. Instead, Saremar was liquidated and its assets and the public service contract were tendered out under separate tenders.
- (33) Under Italian law ⁽²⁷⁾, once a company enters liquidation, its assets are sold and the proceeds from the sale are transferred to its creditors, according to the ranking of their claims in the schedule of liabilities. Against this background, the Commission must first establish whether continuing the investigation with respect to Saremar still serves any purpose. If this is not the case, then it must establish whether there may be economic continuity between Saremar and any other companies, based on the case law by the Court of Justice.
- (34) Regarding Saremar, the Commission first notes that, on 15 January 2015, following the 2014 Decision, Saremar entered into *concordato preventivo* and a liquidator was appointed. Under Italian law, the *concordato preventivo* is a procedure normally aiming at ensuring continuation of business activities. However, the Commission notes that in this case the company was admitted to a *concordato preventivo con cessione dei beni*, i.e. a liquidation procedure, agreed with the creditors, for the sale of the company's assets and the termination of its business, with only temporary continuation of activities. This procedure is supervised by a judge, who has to validate the agreement between the creditors. In this case, the Commission notes that on 22 July 2015, the Tribunale di Cagliari validated the agreement between the creditors of Saremar, with continuation of activities until 31 December 2015 (see recital 27). Therefore, the Commission considers that the chosen procedure already implied that, at the end of it, Saremar would exit the market.
- (35) Indeed, the Commission notes that Saremar ceased all its economic activities on 31 March 2016 (see recital 27), including its ferry services on routes operated on the basis of a public service contract. The public service contract was from then on entrusted to Delcomar. In parallel, its vessels were sold to the company Delcoservizi. After the sale of Saremar's assets, on 22 April 2016, the Regional Council of Sardinia ordered the liquidation of Saremar by its Decision No 24/23.
- (36) Additionally, Italy implemented the 2014 Decision correctly, albeit with a delay. The State aid claim of EUR 10 824 309,69, plus recovery interest, was duly registered in the schedule of liabilities of the company. Out of that amount, only approximately EUR 4,4 million could be paid to Italy after the sale of Saremar's assets. However, as the insolvency proceedings of Saremar lead to its liquidation and the company is no longer operating any activities ⁽²⁸⁾, the Commission provisionally closed the recovery procedure by letter of 13 September 2017, sent to Italy.
- (37) Based on the above, the Commission notes that Saremar has not operated any economic activity for over five years now, its assets have been sold, its staff laid off, and it will be erased from the company register once the liquidation procedure has been finalised. Any possible distortion of competition or effect on trade of the measures referred to in recitals 28 and 29 ended once Saremar ceased its activities. Moreover, already the recovery claim from the 2014 Decision was only partially satisfied (for approximately 40 % of the amount due, see recitals 27 and 36).
- (38) Against this background, the Commission notes that both objectives of State aid control and of recovery referred to above, i.e. to prevent the granting of incompatible State aid and to ensure that the situation prior to the distortion of competition caused by State aid incompatible with the internal market is restored, are already met. Indeed, Saremar is no longer an economic operator active on the market and is already in liquidation, and State aid claims could be satisfied only partially following the sale of Saremar's assets, due to insufficient funds. Therefore, continuing the investigation with respect to Saremar does not serve any purpose.

⁽²⁷⁾ Regio Decreto 16 marzo 1942, n. 267, as amended (so called '*Legge Fallimentare*').

⁽²⁸⁾ See point 129 of the Commission Notice on the recovery of unlawful and incompatible State aid, C 247/1, 23 July 2019.

- (39) Regarding the question of potential economic continuity between Saremar and its successors, according to the case-law, the following factors may be taken into account: the scope of the transfer (assets and liabilities, continuity of the workforce, bundled assets), the transfer price, the identity of the owners of the acquiring undertaking and of the original undertaking, the moment at which the transfer was carried out (after the start of the investigation, the initiation of the procedure or the final decision) and the economic logic of the transaction ⁽²⁹⁾.
- (40) Against this background, the Commission notes that, as part of the recovery procedure for the implementation of the 2014 Decision, it has already assessed whether the obligation to repay the aid granted to Saremar ought to be extended to other undertakings to which the beneficiary's assets or business may have been transferred. Indeed, in that recovery procedure the Commission accepted that the recovery obligation would be targeted at Saremar only, ruling out the existence of economic continuity with Delcomar or Delcoservizi (together, 'the successors'), for the following reasons:
- (a) the operation of ferry services on routes on the basis of a public service contract and the ships were assigned through two separate, transparent, public and non-discriminatory tenders;
 - (b) Saremar's workforce was laid off and only partly re-hired by the successors ⁽³⁰⁾;
 - (c) the successors are private operators, while Saremar is 100 % owned by the Region of Sardinia, hence no relation could be established between the seller and the buyer of the assets;
 - (d) the investment or bidding decisions by the successors are market decisions.
- (41) Since the provisional closure of the recovery case, no information has reached the Commission that could make it change its view on this matter. Therefore, based on the available information, economic continuity between Saremar and either Delcomar or Delcoservizi, or both, can be ruled out. The Commission will still follow up the liquidation of Saremar until its erasure from the trade registry. Only this will allow it to definitively close the recovery procedure for the 2014 Decision ⁽³¹⁾.
- (42) In this context, given the liquidation of Saremar and the absence of economic continuity with its successors, the formal investigation procedure on the still outstanding measures granted in favour of Saremar or its successors, initiated under the first subparagraph of Article 108(2) TFEU, no longer serves any purpose.
- (43) This Decision does not concern or prejudice any other issues covered by the 2011 Decision and the 2012 Decision ⁽³²⁾ or brought to the attention of the Commission by interested parties in the course of the investigation opened under those Decisions,

HAS ADOPTED THIS DECISION:

Article 1

The proceeding initiated under the first subparagraph of Article 108(2) TFEU on 5 October 2011 and extended on 19 December 2012 in respect of Saremar and its successors is hereby terminated.

Article 2

This Decision is addressed to the Italian Republic.

⁽²⁹⁾ Case T-121/15 *Fortischem a.s. v. Commission*, ECLI:EU:T:2019:684, paragraph 208.

⁽³⁰⁾ Based on the information available to the Commission, less than 20 % of Saremar's workforce would have been re-hired by Delcomar.

⁽³¹⁾ See points 136 to 140 of the Commission Notice on the recovery of unlawful and incompatible State aid, C 247/1, 23 July 2019.

⁽³²⁾ See recitals 6 and 8 of this Decision.

Done at Brussels, 30 September 2021.

For the Commission
Margrethe VESTAGER
Member of the Commission

COMMISSION IMPLEMENTING DECISION (EU) 2022/757**of 11 May 2022****amending Implementing Decision (EU) 2021/1182 as regards harmonised standards for quality management systems, sterilisation and application of risk management to medical devices**

THE EUROPEAN COMMISSION,

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

Having regard to Regulation (EU) No 1025/2012 of the European Parliament and of the Council of 25 October 2012 on European standardisation, amending Council Directives 89/686/EEC and 93/15/EEC and Directives 94/9/EC, 94/25/EC, 95/16/EC, 97/23/EC, 98/34/EC, 2004/22/EC, 2007/23/EC, 2009/23/EC and 2009/105/EC of the European Parliament and of the Council and repealing Council Decision 87/95/EEC and Decision No 1673/2006/EC of the European Parliament and of the Council ⁽¹⁾, and in particular Article 10(6) thereof,

Whereas:

- (1) In accordance with Article 8(1) of Regulation (EU) 2017/745 of the European Parliament and of the Council ⁽²⁾, devices that are in conformity with the relevant harmonised standards, or the relevant parts of those standards, the references of which have been published in the *Official Journal of the European Union*, are to be presumed to be in conformity with the requirements of that Regulation covered by those standards or parts thereof.
- (2) Regulation (EU) 2017/745 replaced Council Directives 90/385/EEC ⁽³⁾ and 93/42/EEC ⁽⁴⁾ from 26 May 2021.
- (3) By Implementing Decision C(2021) 2406 ⁽⁵⁾, the Commission made a request to the European Committee for Standardization (CEN) and the European Committee for Electrotechnical Standardization (Cenelec) for the revision of existing harmonised standards on medical devices developed in support of Directives 90/385/EEC and 93/42/EEC and the drafting of new harmonised standards in support of Regulation (EU) 2017/745.
- (4) On the basis of the request set out in Implementing Decision C(2021) 2406, CEN and Cenelec revised harmonised standards EN 285:2015 and EN ISO 14971:2019, the references of which are not published in the *Official Journal of the European Union*, in order to take into account the latest technical and scientific progress and to adapt them to the requirements of Regulation (EU) 2017/745. This resulted in the adoption of the revised harmonised standard EN 285:2015+A1:2021 on sterilisation and of the amendment EN ISO 14971:2019/A11:2021 to harmonised standard EN ISO 14971:2019 on application of risk management to medical devices.
- (5) The Commission together with CEN and Cenelec has assessed whether harmonised standards EN 285:2015+A1:2021 and EN ISO 14971:2019, as amended by EN ISO 14971:2019/A11:2021, comply with the request set out in Implementing Decision C(2021) 2406.
- (6) Harmonised standards EN 285:2015+A1:2021 and EN ISO 14971:2019, as amended by EN ISO 14971:2019/A11:2021, satisfy the requirements which they aim to cover and which are set out in Regulation (EU) 2017/745. It is therefore appropriate to publish the references of harmonised standards EN 285:2015+A1:2021 and EN ISO 14971:2019 and of its amendment in the *Official Journal of the European Union*.

⁽¹⁾ OJ L 316, 14.11.2012, p. 12.

⁽²⁾ Regulation (EU) 2017/745 of the European Parliament and of the Council of 5 April 2017 on medical devices, amending Directive 2001/83/EC, Regulation (EC) No 178/2002 and Regulation (EC) No 1223/2009 and repealing Council Directives 90/385/EEC and 93/42/EEC (OJ L 117, 5.5.2017, p. 1).

⁽³⁾ Council Directive 90/385/EEC of 20 June 1990 on the approximation of the laws of the Member States relating to active implantable medical devices (OJ L 189, 20.7.1990, p. 17).

⁽⁴⁾ Council Directive 93/42/EEC of 14 June 1993 concerning medical devices (OJ L 169, 12.7.1993, p. 1).

⁽⁵⁾ Commission Implementing Decision C(2021) 2406 of 14 April 2021 on a standardisation request to the European Committee for Standardization and the European Committee for Electrotechnical Standardization as regards medical devices in support of Regulation (EU) 2017/745 of the European Parliament and of the Council and *in vitro* diagnostic medical devices in support of Regulation (EU) 2017/746 of the European Parliament and of the Council.

- (7) The Annex to Commission Implementing Decision (EU) 2021/1182 ⁽⁶⁾ lists the references of harmonised standards drafted in support of Regulation (EU) 2017/745.
- (8) In order to ensure that the references of harmonised standards drafted in support of Regulation (EU) 2017/745 are listed in one act, the references of harmonised standards EN 285:2015+A1:2021 and EN ISO 14971:2019 and of its amendment should be included in Implementing Decision (EU) 2021/1182.
- (9) The references of harmonised standard EN ISO 13485:2016 on quality management systems and its amendment EN ISO 13485:2016/A11:2021 are published by Implementing Decision (EU) 2021/1182. However, that publication does not include the reference of the corrigendum to that standard – EN ISO 13485:2016/AC:2018. The corrigendum corrects only formal aspects of the European foreword and of the informative annexes, without affecting the substance of the harmonised standard. Harmonised standard EN ISO 13485:2016 as amended by EN ISO 13485:2016/A11:2021 and corrected by EN ISO 13485:2016/AC:2018 satisfies the requirements which it aims to cover and which are set out in Regulation (EU) 2017/745. In order to ensure that corrections made by EN ISO 13485:2016/AC:2018 apply for the purposes of the presumption of conformity with the relevant requirements of Regulation (EU) 2017/745, it is necessary to include the reference of that corrigendum in Implementing Decision (EU) 2021/1182. For reasons of legal certainty, the reference of corrigendum EN ISO 13485:2016/AC:2018 should be published in the *Official Journal of the European Union* with retroactive effect.
- (10) Implementing Decision (EU) 2021/1182 should therefore be amended accordingly.
- (11) Compliance with a harmonised standard confers a presumption of conformity with the corresponding essential requirements set out in Union harmonisation legislation from the date of publication of the reference of such standard in the *Official Journal of the European Union*. This Decision should therefore enter into force on the day of its publication,

HAS ADOPTED THIS DECISION:

Article 1

The Annex to Implementing Decision (EU) 2021/1182 is amended in accordance with the Annex to this Decision.

Article 2

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

Point 1 of the Annex shall apply from 5 January 2022.

Done at Brussels, 11 May 2022.

For the Commission
The President
Ursula VON DER LEYEN

⁽⁶⁾ Commission Implementing Decision (EU) 2021/1182 of 16 July 2021 on the harmonised standards for medical devices drafted in support of Regulation (EU) 2017/745 of the European Parliament and of the Council (OJ L 256, 19.7.2021, p. 100).

ANNEX

The Annex to Implementing Decision (EU) 2021/1182 is amended as follows:

(1) entry No 10 is replaced by the following:

No	Reference of the standard
'10.	EN ISO 13485:2016 Medical devices – Quality management systems – Requirements for regulatory purposes (ISO 13485:2016) EN ISO 13485:2016/AC:2018 EN ISO 13485:2016/A11:2021';

(2) the following entries are added:

No	Reference of the standard
'15.	EN 285:2015+A1:2021 Sterilization – Steam sterilizers – Large sterilizers
16.	EN ISO 14971:2019 Medical devices – Application of risk management to medical devices (ISO 14971:2019) EN ISO 14971:2019/A11:2021'.

RECOMMENDATIONS

COMMISSION RECOMMENDATION (EU) 2022/758

of 27 April 2022

on protecting journalists and human rights defenders who engage in public participation from manifestly unfounded or abusive court proceedings ('Strategic lawsuits against public participation')

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 292 thereof,

Whereas:

- (1) Article 2 of the Treaty on European Union states that the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.
- (2) Article 10(3) of the Treaty on European Union states that every Union citizen has the right to participate in the democratic life of the Union. The Charter of Fundamental Rights of the European Union (the 'Charter') provides, inter alia, for the rights to respect for private and family life (Article 7), the protection of personal data (Article 8), freedom of expression and information, which includes respect for the freedom and pluralism of the media (Article 11), and to an effective remedy and to a fair trial (Article 47).
- (3) The right to freedom of expression and information as set forth in Article 11 of the Charter includes the right to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. While it is not an absolute right, any limitations thereto must be provided for by law, respect the essence of the right and be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others (Article 52(1) of the Charter).
- (4) In line with Article 52(3) of the Charter and with the Explanations relating to the Charter, Article 11 of the Charter should be given the meaning and scope of Article 10 on freedom of expression and information of the European Convention on Human Rights as interpreted by the European Court of Human Rights. Article 10 of the European Convention on Human Rights protects freedom of expression and information. Within the scope of application of the European Convention on Human Rights, any restriction must be prescribed by law, must be necessary in a democratic society, and be made in pursuit of the legitimate aims set out in Article 10(2) of the European Convention on Human Rights.
- (5) The European Convention on Human Rights also imposes a positive obligation on contracting states to safeguard the freedom and pluralism of the media and to create a favourable environment for participation in the public debate ⁽¹⁾. The case law of the European Court on Human Rights further specifies that the freedom of expression constitutes one of the essential foundations of a democratic society and is applicable not only to information or to ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock

⁽¹⁾ See for instance European Court of Human Rights' judgement of 14 September 2010, *Dink v. Turkey* (applications Nos 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09), paragraph 137. See also on the positive obligations under Article 10 of the European Convention on Human Rights, the Report of the Research Division of the European Court of Human Rights', https://www.echr.coe.int/documents/research_report_article_10_eng.pdf

or disturb the state or any group in the population ⁽²⁾. It has further clarified that ‘in a democratic society even small and informal campaign groups (...) must be able to carry on their activities effectively’ and that ‘there exists a strong public interest in enabling such groups and individuals outside the mainstream to contribute to the public debate by disseminating information and ideas on matters of general public interest’ ⁽³⁾.

- (6) Journalists play an important role in facilitating public debate and in the imparting and the reception of information, opinions and ideas ⁽⁴⁾. It is essential that they are afforded the necessary space to contribute to an open, free and fair debate and to counter disinformation and other manipulative interference, including from actors from third countries. Journalists should be able to conduct their activities effectively to ensure that citizens have access to a plurality of views in European democracies.
- (7) Human rights defenders also play an important role in European democracies, especially in upholding fundamental rights, democratic values, social inclusion, environmental protection and the rule of law. They should be able to participate actively in public life and make their voices heard on policy matters and in decision-making processes without fear of intimidation. Human rights defenders refer to individuals or organisations engaged in defending fundamental rights and a variety of other rights, including environmental and climate rights, women's rights, LGBTIQ rights, the rights of the people with a minority racial or ethnic background, labour rights or religious freedoms.
- (8) A healthy and thriving democracy requires that people are able to participate actively in public debate. In order to secure meaningful participation, people should be able to access reliable information, which enables them to form their own opinions and exercise their own judgement in a public space in which different views can be expressed freely.
- (9) To foster this environment, it is important to protect journalists and human rights defenders from manifestly unfounded and abusive court proceedings against public participation (commonly known as ‘SLAPPs’). These court proceedings are either manifestly unfounded or fully or partially unfounded proceedings which contain elements of abuse justifying the assumption that the main purpose of the court proceedings is to prevent, restrict or penalise public participation. Indications of such abuse are the disproportionate, excessive or unreasonable nature of the claim or part thereof, the existence of multiple claims asserted by the claimant in relation to similar matters, or intimidation, harassment or threats on the part of the claimant or their representatives prior to the initiation of manifestly unfounded or abusive court proceeding. These proceedings constitute an abuse of court proceedings and put unnecessary burdens on courts as their aim is not to access justice but to harass and silence defendants. Long proceedings create burdens on national court systems.
- (10) Manifestly unfounded and abusive court proceedings against public participation can take the form of a wide array of legal abuses, mainly in civil or criminal matters, but also in administrative law matters and may be based on various grounds.

⁽²⁾ See European Court of Human Rights’ judgement of 7 December 1976, *Handyside v. The United Kingdom* (application No 5493/72), paragraph 49.

⁽³⁾ See European Court of Human Rights’ judgement on 15 February 2005, *Steel and Morris v. The United Kingdom* (application No 68416/01), paragraph 89.

⁽⁴⁾ Recommendation CM/Rec(2022)4 of the Committee of Ministers of the Council of Europe on promoting a favourable environment for quality journalism in the digital age provides that ‘...quality journalism, which rests on the standards of professional ethics while taking different forms according to geographical, legal and societal contexts, pursues the dual goal of acting as a public watchdog in democratic societies and contributing to public awareness and enlightenment’, https://search.coe.int/cm/pages/result_details.aspx?objectid=0900001680a5ddd0. Resolution 2213 (2018) on the status of journalists in Europe adopted by the Parliamentary Assembly of the Council of Europe refers as regards professional journalists to ‘a mission to provide the public with information on general or specialist topics of interest as responsibly and as objectively as possible’, https://search.coe.int/cm/pages/result_details.aspx?objectid=0900001680a5ddd0

- (11) Such court proceedings are often initiated by powerful individuals or entities (for example lobby groups, corporations and state organs) in an attempt to silence public debate. They often involve imbalance of power between the parties with the claimant having a more powerful position than the defendant for example financially or politically. Although not being an indispensable component of manifestly unfounded or abusive court proceedings, where present an imbalance of power significantly increases the harmful effects as well as the chilling effects of court proceedings against public participation.
- (12) Manifestly unfounded or abusive court proceedings against public participation may have an adverse impact on the credibility and reputation of journalists and human rights defenders in particular and exhaust their financial and other resources. They may have adverse psychological consequences for their targets and their family members. Manifestly unfounded or abusive court proceedings against public participation endanger journalists and human rights defenders' ability to conduct their activities. As a result of such proceedings, the publication of information on a matter of public interest may be delayed or altogether prevented. The existence of such proceedings may have more broadly a deterrent effect on the work of journalists and human rights defenders in particular, by contributing to self-censorship in anticipation of possible future court proceedings, leading to the impoverishment of the public debate to the detriment of society as a whole. The length of procedures, the financial pressure and the threat of criminal sanctions constitute powerful tools to intimidate and silence critical voices.
- (13) Those targeted by manifestly unfounded or abusive court proceedings against public participation often face multiple court proceedings simultaneously and in several jurisdictions. Court proceedings initiated in the jurisdiction of one Member State against a person resident in another Member State are usually more complex and costly for the defendant. Claimants in manifestly unfounded or abusive court proceedings against public participation may also use procedural tools to drive up the length and cost of the litigation, and bring cases in a jurisdiction they perceive to be favourable for their case, rather than to the court best placed to hear the claim.
- (14) The use of manifestly unfounded or abusive court proceedings against public participation is on the rise in the European Union. According to recent studies ⁽³⁾, such proceedings are increasingly used across Member States.
- (15) The European Parliament, in its Resolution of 25 November 2020 ⁽⁴⁾, condemned the use of SLAPPs to silence or intimidate investigative journalists and media outlets and create a climate of fear around their reporting of certain topics, calling on the Commission to present a proposal to prevent them. In its Resolution ⁽⁵⁾ of 11 November 2021 on Strengthening democracy and media freedom and pluralism in the EU: the undue use of actions under civil and criminal law to silence journalists, Non-Governmental Organisations (NGOs) and civil society, the European Parliament highlighted again the prevalence of the phenomenon and the need for effective safeguards for its victims across the Union.

⁽³⁾ Academic network on European citizenship rights, Ad hoc request – SLAPP in the EU context, 29 May 2020, https://ec.europa.eu/info/sites/default/files/ad-hoc-literature-review-analysis-key-elements-slapp_en.pdf, p. 4 and Academic network on European citizenship rights, Strategic Lawsuits Against Public Participation (SLAPP) in the European Union: A comparative study, 30 June 2021, https://ec.europa.eu/info/files/strategic-lawsuits-against-public-participation-slapp-european-union-comparative-study_en

⁽⁴⁾ P9_TA(2020)0320. In this Resolution, the Parliament also reiterated the terms of its Resolution of 28 March 2019 (P8_TA(2019)0328).

⁽⁵⁾ P9_TA(2021)0451.

- (16) The Council of Europe's Platform to Promote the Protection of Journalism and Safety of Journalists ⁽⁸⁾ also reports an increasing number of alerts of serious threats to the safety of journalists and media freedom in Europe, including multiple cases of judicial intimidation. The 2021 annual Report of the partner associations to the Council of Europe Platform to Promote the Protection of Journalism and Safety of Journalists underlines the notable increase of SLAPP-related alerts reported in 2020 over the previous year, both in numbers of alerts and jurisdictions of Council of Europe Member States concerned ⁽⁹⁾. In its Recommendation on the protection of journalism and safety of journalists and other media actors ⁽¹⁰⁾ of 13 April 2016, the Council of Europe recommended its Member States to take the necessary legislative and/or other measures to prevent the frivolous, vexatious or malicious use of the law and legal process to intimidate and silence journalists and other media actors.
- (17) The Commission's 2020 ⁽¹¹⁾ and 2021 ⁽¹²⁾ Rule of Law Reports underline that in a number of Member States, journalists and others involved in protecting the public interest increasingly face threats and attacks in relation to their publications and their work, in various forms including the deployment of SLAPPs.
- (18) A stark example of the use of court proceedings against public participation in the Union is that of the journalist Daphne Caruana Galizia who, at the time of her assassination, was facing over 40 civil and criminal libel and defamation court proceedings related to her investigative work.
- (19) The European Democracy Action Plan ⁽¹³⁾ presented by the Commission on 3 December 2020 underlines the fundamental role of free and pluralistic media in democracies as well as the importance of civil society. It highlights among others the important role that independent and pluralistic media play in enabling citizens to make informed decisions, as well as in the fight against information manipulation and interference in the information space, including disinformation. In that context, the Commission already adopted Recommendation (EU) 2021/1534 on ensuring the protection, safety and empowerment of journalists and other media professionals in the European Union ⁽¹⁴⁾. That Recommendation aims to ensure safer working conditions for all media professionals, free from fear and intimidation, whether online or offline. In view of the increasing threat posed by manifestly unfounded or abusive court proceedings against public participation to media freedom and public participation, the Union should develop a coherent and effective approach to counter such proceedings. This Recommendation complements Recommendation (EU) 2021/1534 by providing specific recommendations on manifestly unfounded or abusive court proceedings against public participation. It goes beyond the protection of journalists and other media professionals and includes human rights defenders in its scope. This Recommendation should address the specific threat posed by manifestly unfounded or abusive court proceedings against public participation and by doing so, support the proper functioning of the checks and balances in a healthy democracy. It should provide guidance for Member States to take effective, appropriate and proportionate measures to address such proceedings and to ensure in this context in particular the protection of journalists and human rights defenders. The recommended measures should include raising awareness and developing expertise, in particular among legal professionals and the targets of manifestly unfounded or abusive court proceedings against public participation, to ensure that support is available for those targeted by such proceedings and to support enhanced monitoring.

⁽⁸⁾ Since 2015, the Platform of the Council of Europe has facilitated the compilation and dissemination of information on serious concerns about media freedom and safety of journalists in Council of Europe Member States. Contributing Partner organisations – invited international NGOs and associations of journalists – issue alerts on media freedom violations and publish annual reports on the situation of media freedom and safety of journalists in Europe. The Council of Europe Member States are expected to act and address the issues and inform the Platform on the actions taken in response to the alerts. The low response rate of Council of Europe Member States, which are also EU Member States, shows a need for further action. <https://www.coe.int/en/web/media-freedom>

⁽⁹⁾ In 2021, 282 alerts were published on the Platform to promote the protection of journalism and safety of journalists (coe.int), amongst these, several concerned cases of judicial intimidation, i.e. opportunistic, arbitrary or vexatious use of legislation, including defamation, anti-terrorism, national security, hooliganism or anti-extremism laws. The 2021 Annual Report by the partner organisations to the Council of Europe Platform to Promote the Protection of Journalism and Safety of Journalists noted an increase in 2020 over the previous year, both in numbers of alerts and jurisdictions of Council of Europe Member States concerned – 1680a2440e (coe.int).

⁽¹⁰⁾ Recommendation CM/Rec(2016)4 of the Committee of Ministers to member States on the protection of journalism and safety of journalists and other media actors, https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016806415d9#_ftn1

⁽¹¹⁾ COM(2020) 580 final of 30 September 2020.

⁽¹²⁾ COM(2021) 700 final of 20 July 2021.

⁽¹³⁾ COM(2020) 790 final of 3 December 2020.

⁽¹⁴⁾ Commission Recommendation (EU) 2021/1534 of 16 September 2021 on ensuring the protection, safety and empowerment of journalists and other media professionals in the European Union (OJ L 331, 20.9.2021, p. 8).

- (20) In order to provide for efficient protection against manifestly unfounded or abusive court proceedings against public participation and prevent the phenomenon from taking root in the Union, Member States should ensure that their respective legal frameworks governing civil, criminal, commercial and administrative proceedings, provide for the necessary safeguards to address such court proceedings, in full respect of democratic values and fundamental rights, including the right to a fair trial and the right to freedom of expression. To provide consistent and efficient protection against manifestly unfounded court proceedings against public participation, Member States should aim to ensure that an early dismissal is available. They should also aim to provide other remedies against abusive court proceedings, namely the award of costs so that a claimant who has brought abusive court proceedings against public participation can be ordered to bear all the costs of the proceedings, the compensation of damages for any natural or legal person who has suffered harm as a result of abusive court proceedings against public participation, and the possibility to impose effective, proportionate and dissuasive penalties on the party who brought abusive court proceedings against public participation. The main objective of giving courts the possibility to impose penalties is to deter potential claimants from initiating abusive court proceedings against public participation. Such penalties should be proportionate to the elements of abuse identified. When establishing amounts for penalties, courts could take into account the potential for a harmful or chilling effect of the proceedings on public participation, including as related to the nature of the claim, whether the claimant has initiated multiple or concerted proceedings in similar matters and the existence of attempts to intimidate, harass or threaten the defendant.
- (21) Member States should aim to include in their national laws similar safeguards for domestic cases as those included in Union instruments that seek to address manifestly unfounded and abusive court proceedings against public participation for civil matters with cross-border implications. This would provide a consistent and efficient protection against such court proceedings and would contribute to prevent the phenomenon from growing roots in the Union.
- (22) Member States should specifically review their legal frameworks applicable to defamation to ensure that existing concepts and definitions cannot be used by plaintiffs against journalists or human rights defenders in the context of manifestly unfounded or abusive court proceedings against public participation.
- (23) In order to prevent a chilling effect on the public debate, Member States should ensure that penalties against defamation are not excessive and disproportionate. They should pay particular attention to the Council of Europe's guidelines and recommendations ⁽¹⁵⁾ addressing the legal framework for defamation, in particular criminal law. In this context, Member States are encouraged to remove prison sentences for defamation from their legal framework. The Parliamentary Assembly of the Council of Europe in its Resolution 1577 (2007) ⁽¹⁶⁾ has called on its Member States, which still provide for prison sentences for defamation, even if they are not actually imposed, to abolish them without delay. Member States are also encouraged to favour the use of administrative or civil law to deal with defamation cases, provided that such provisions have a less punitive effect than those of criminal law ⁽¹⁷⁾.

⁽¹⁵⁾ See, *inter alia*, PACE's Resolution 1577 Towards decriminalisation of defamation (2007) <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17588&lang=en>, PACE's Recommendation Towards decriminalisation of defamation 1814 (2007) <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17587&lang=en>, the Secretariat-General of the Council of Europe's study on Freedom of expression and defamation. A study of the case-law of the European Court of Human Rights (2012) <https://rm.coe.int/study-on-the-alignment-of-laws-and-practices-concerning-alignment-of-l/16804915c5>, and most recently the Council of Europe's study of the case law of the European Court of Human Rights (2016) <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806ac95b>

⁽¹⁶⁾ Resolution 1577 (2007) of Parliamentary Assembly of the Council of Europe of 4 October 2007 on towards decriminalisation of defamation, <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17588&lang=en>

⁽¹⁷⁾ See also United Nations' Human Rights Committee's General comment No 34 Article 19: Freedoms of opinion and expression of 12 September 2011, <https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf> and the Organization for Security and Cooperation in Europe's Office of the Representative on Freedom of the Media's Special report legal harassment and abuse of the judicial system against the media, 23 November 2021, https://www.osce.org/files/f/505075_0.pdf

- (24) Dealing with defamation cases from a criminal law angle should only be used as a last resort and responses through administrative or civil law should be favoured instead, in line with guidance from international organisations. The United Nations' Human Rights Committee ⁽¹⁸⁾ and the Organization for Security and Cooperation in Europe ⁽¹⁹⁾ have recommended the removal of defamation from criminal law statutes. Similarly, the Council of Europe has expressed reservations in this context ⁽²⁰⁾.
- (25) The right to the protection of personal data is further concretised in Regulation (EU) 2016/679 of the European Parliament and of the Council ⁽²¹⁾. The right to the protection of personal data is not an absolute right. Article 85 of the GDPR provides that Member States shall by law reconcile the right to the protection of personal data with the right to freedom of expression and information, including processing for journalistic purposes and the purposes of academic, artistic or literary expression.
- (26) Member States should encourage self-regulatory bodies and associations of legal professionals to align, where necessary, their deontological standards, including codes of conduct, with this Recommendation. Member States should also ensure, as relevant, that the deontological standards which seek to discourage or prohibit legal professionals from engaging in conduct which might constitute an abuse of process or an abuse of their other professional responsibilities towards the integrity of the legal process, and their corresponding disciplinary sanctions, cover manifestly unfounded or abusive court proceedings against public participation. This should be accompanied by appropriate awareness raising and training activities in order to increase knowledge and efficacy of existing deontological standards that are relevant to manifestly unfounded or abusive court proceedings against public participation.
- (27) Legal professionals are key actors in manifestly unfounded or abusive court proceedings against public participation, either by representing litigants, prosecuting individuals or adjudicating disputes. Therefore, it is crucial that they have the necessary knowledge and skills to do so. Member States should support and offer training opportunities to these legal professionals. Training could substantively contribute to building their knowledge and capacity in how to detect manifestly unfounded or abusive court proceedings against public participation, including those with a third-country element, and react appropriately. Such training should address the judiciary and the judicial staff at all court levels including judges, prosecutors, court and prosecutors' office staff, as well as any other justice professionals associated with the judiciary or otherwise participating in the administration of justice, irrespective of the definition in national law, legal status or internal organisation, at the regional and local levels, where manifestly unfounded or abusive court proceedings against public participation may appear in the first instance. Such training should also address other legal professionals such as qualified lawyers. Developing local training capacity can contribute to the long-term sustainability of the training.
- (28) Extending such training to journalists, press council members, media professionals and human rights defenders would help them to recognise when they are confronted with such court proceedings and provide them with critical legal skills to reduce their risks of being exposed to manifestly unfounded or abusive court proceedings against public participation or equip them with better knowledge to better address it. It could also enable them to engage in robust reporting on SLAPPs. Training for journalists should also refer to the ethical standards and guidelines set out by national press or media councils. To contribute to overall capacity building and strengthen the institutional response to manifestly unfounded or abusive court proceedings against public participation, such training could also involve data protection authorities, National Human Rights Institutions, ombudsman institutions and media state regulatory bodies.

⁽¹⁸⁾ United Nations' Human Rights Committee, General comment No 34 Article 19: Freedoms of opinion and expression of 12 September 2011, <https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>

⁽¹⁹⁾ Organization for Security and Cooperation in Europe's Office of the Representative on Freedom of the Media, Special report legal harassment and abuse of the judicial system against the media, 23 November 2021, https://www.osce.org/files/f/documents/c/f/505075_0.pdf

⁽²⁰⁾ Recommendation CM/Rec(2016)4 of the Committee of Ministers to member States on the protection of journalism and safety of journalists and other media actors, see paragraph 6.

⁽²¹⁾ 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).

- (29) Providers of legal training and associations of legal professionals are very well positioned to impart training on manifestly unfounded or abusive court proceedings against public participation, as well as to determine the objectives of such training and to assess the most suitable training methodology. Training delivered by legal professionals to other legal professionals allows all to learn as a group, to better share experiences and to foster mutual trust. Exchanges of relevant practices at the European level should be encouraged, including with the support of the Commission, with the involvement of the European Judicial Training Network (EJTN). Involvement of legal practitioner's and their professional associations, from preparing needs analyses to the evaluation of results, is of paramount importance to ensuring the effectiveness and sustainability of training activities.
- (30) Training should address freedom of expression and information and other fundamental rights, under the EU Charter of Fundamental rights of the European Union and the European Convention on Human rights and national law and include practical guidance on how to apply relevant case-law, restrictions to and articulation between fundamental rights, including freedom of expression, procedural safeguards as well as other relevant provisions under national law. Due account should be taken of Council of Europe's handbook for legal practitioners on protecting the right to freedom of expression under the ECHR ⁽²²⁾.
- (31) Training should, among other things, address the protection of personal data which may be used to initiate manifestly unfounded or abusive court proceedings against public participation. It should also address information manipulation and interference, including disinformation.
- (32) Training should consider the national legal framework and context. Combining these with the guidance developed by the Council of Europe, testimonials from targets of manifestly unfounded or abusive court proceedings against public participation and best practices from other Member States in a structured and coherent manner could contribute to the successful learning objectives associated with training on manifestly unfounded or abusive court proceedings. Training may also be used to foster exchange of best practices between Member States.
- (33) To reach a wider audience and to foster support, training on manifestly unfounded or abusive court proceedings against public participation should also make best use of new technologies, including online training. Access to e-resources, up-to-date material, and stand-alone learning tools on relevant legislation and guidance would complement the benefits of such training activities.
- (34) In order to foster synergies with similar initiatives on the training of legal professionals, training modules on manifestly unfounded or abusive court proceedings on public participation could be included in training on related topics, such as freedom of expression and legal ethics. The use of existing materials and training practices such as those promoted on the European e-Justice Portal, the Unesco Global Toolkit for Judicial Actors ⁽²³⁾ and the Council of Europe's HELP (Human Rights Education for Legal Professionals) ⁽²⁴⁾ online courses should be encouraged.
- (35) Including manifestly unfounded or abusive court proceedings against public participation in the law and journalism curricula would help equip legal professionals and journalists with better knowledge to recognise such proceedings and equip them with specific knowledge to respond accordingly, and support the development of expertise and professional competencies among lecturers. Such knowledge could be provided by higher education institutions in complementary courses or seminars during the final years of a degree programme, for instance to law students of law and journalism.
- (36) Member States should support awareness raising campaigns on manifestly unfounded or abusive court proceedings against public participation organised among others by national entities, including National Human Rights Institutions and civil society organisations.

⁽²²⁾ Council of Europe's handbook for legal practitioners on protecting the right to freedom of expression under the ECHR (2017), <https://rm.coe.int/handbook-freedom-of-expression-eng/1680732814>

⁽²³⁾ Global toolkit for judicial actors: international legal standards on freedom of expression, access to information and safety of journalists (2021) <https://unesdoc.unesco.org/ark:/48223/pf0000378755>

⁽²⁴⁾ <https://www.coe.int/en/web/help/home>

- (37) Communication activities on manifestly unfounded or abusive court proceedings against public participation could take the form of publications, messages, public meetings, conferences, workshops and webinars.
- (38) The targets of manifestly unfounded or abusive court proceedings against public participation often have difficulties finding information on available support resources. To facilitate the identification of entities or bodies able to provide assistance on manifestly unfounded or abusive court proceedings and to ensure the effectiveness of support against such proceedings, information should be collected and made available at a single point, be free of charge and easily accessible. To that end, each Member State should establish one national focal point that gathers and shares information on available resources.
- (39) An underlying goal of awareness raising activities on manifestly unfounded or abusive court proceedings against public participation should be to promote awareness of the importance of a public space that enables democratic participation and allows citizens to have access to a plurality of views and reliable information, free from bias.
- (40) Awareness raising campaigns should be coordinated with national focal points and other competent authorities to ensure their effectiveness. They should also seek synergies with awareness raising campaigns on compatible topics such as those focusing on fostering of open, free and fair debate and the protection of the right to freedom of expression and should be integrated with awareness raising activities that promote active civic participation, pluralism of views and access to reliable information. They should also seek synergies, as relevant, with resilience building on media, information literacy, journalistic standards and fact-checking in the context of measures addressing disinformation, information manipulation, and interference including from abroad. The target audience could include, inter alia, specific groups, such as media professionals, legal professionals and members of civil society organisations, communication professionals, academics, think tanks, politicians, civil servants, public authorities and private corporations.
- (41) Member States should aim to ensure, by any means they consider appropriate, the availability of information on the procedural safeguards and other safeguards under their national legal frameworks, including information on the entities or bodies which can be contacted to provide assistance against manifestly unfounded or abusive court proceedings against public participation.
- (42) Such support resources may include law firms that defend *pro bono* the targets of manifestly unfounded or abusive court proceedings against public participation, the legal clinics of universities which provide such support, organisations that register and report on SLAPPs, and organisations that provide financial and other assistance to the targets of manifestly unfounded or abusive court proceedings.
- (43) The targets of manifestly unfounded or abusive court proceedings against public participation need to be adequately equipped to face such proceedings. It is therefore necessary to develop capacities in Member States in order to provide support to those targeted by such proceedings. Member States should offer funding and promote funding available at Union level to organisations that provide guidance and support for targets of manifestly unfounded or abusive court proceedings.
- (44) A more systematic monitoring of manifestly unfounded or abusive court proceedings against public participation is necessary to better tackle the phenomenon. Data collected should include sufficient information for authorities and other relevant stakeholders to quantify and better understand it including in view of providing the necessary support to targets. Member States should entrust, taking into account their institutional arrangements on judicial statistics ⁽²⁵⁾, one or more authorities with collecting and aggregating data on manifestly unfounded or abusive court proceedings against public participation initiated in national courts. These authorities may collect the data from several stakeholders. To ease the collection of data, the authorities entrusted to collect data may establish contact points so that judicial authorities, professional organisations, non-governmental organisations, human

⁽²⁵⁾ See the Guidelines on judicial statistics of the European Commission for the efficiency of justice (CEPEJ) at its 12th plenary meeting (Strasbourg, 10-11 December 2008) – CEPEJ-GT-EVAL (coe.int).

rights defenders, journalists and other stakeholders can share data on manifestly unfounded or abusive court proceedings. Member States should entrust one of these authorities with coordinating the information and reporting the aggregated data collected at national level to the Commission on a yearly basis starting by the end of 2023. Member States should ensure the accountability of the data collected. For this purpose, they should ensure that the data collection process follows professional standards and that the authorities entrusted with data collection and statistics enjoy sufficient autonomy. Data protection requirements should be complied with.

- (45) When entrusting authorities with data collection and reporting, Member States could consider establishing synergies with relevant instruments in the area of the rule of law and the protection of fundamental rights. National Human Rights Institutions, where established, may play an important role as well as other entities such as ombudspersons' offices, equality bodies, or competent authorities such as those designated under the Directive (EU) 2019/1937 of the European Parliament and of the Council ⁽²⁶⁾ may also be relevant. National focal points providing an overview of support resources and the entities or authorities entrusted to collect and report data could be situated in the same organisation, taking into account the requirements and criteria described in this Recommendation.
- (46) The authorities entrusted to collect data should publish information on manifestly unfounded or abusive court proceedings against public participation, in accessible formats on their websites, and, as relevant via other appropriate tools. When doing so, they should ensure that fundamental rights including the right to privacy and to the protection of personal data of those individuals involved in manifestly unfounded or abusive court proceedings against public participation are fully respected.
- (47) To delineate the duration of proceedings concerning manifestly unfounded or abusive court proceedings, precise information on the events, acts or actions that started and closed such proceedings and the dates on which they occurred should be collected whenever possible. The collected data should also include, as relevant, information about the background of a case, for example, where there have been repetitive preceding court proceedings against the same defendant or by the same plaintiff.
- (48) As necessary, the EU expert group against SLAPP established by the Commission ⁽²⁷⁾ could support the development across Member States of comparable criteria that can be easily applied by the authorities entrusted to collect and report data on manifestly unfounded or abusive court proceedings against public participation.
- (49) The EU expert group against SLAPP supports the exchange and dissemination of practice and knowledge among practitioners on SLAPP related issues. It could provide among others technical assistance to authorities in setting up focal points, developing training material and organising legal assistance.
- (50) The Citizens, Equality, Rights and Values (CERV) Programme, established by Regulation (EU) 2021/692 of the European Parliament and of the Council ⁽²⁸⁾, aims to protect and promote the rights and values enshrined in the Treaties and the Charter. In order to sustain and further develop democratic societies based on the rule of law, the CERV programme provides, inter alia, for the possibility to fund activities linked to capacity building and awareness on the Charter including on freedom of expression. The Justice Programme, established by Regulation (EU) 2021/692 ⁽²⁹⁾ provides, inter alia, for the possibility to fund activities linked to judicial training, with a view to fostering a common legal and judicial culture based on the rule of law, and to support and promote the consistent and effective implementation of Union legal instruments that are relevant in the context of the Programme,

⁽²⁶⁾ Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law (OJ L 305, 26.11.2019, p. 17).

⁽²⁷⁾ Register of Commission expert groups and other similar entities (europa.eu).

⁽²⁸⁾ Regulation (EU) 2021/692 of the European Parliament and of the Council of 28 April 2021 establishing the Citizens, Equality, Rights and Values Programme and repealing Regulation (EU) No 1381/2013 of the European Parliament and of the Council and Council Regulation (EU) No 390/2014 (OJ L 156, 5.5.2021, p. 1).

⁽²⁹⁾ Regulation (EU) 2021/692 aims to contribute to develop a European area of justice and to strengthen democracy, the rule of law and the protection of fundamental rights.

HAS ADOPTED THIS RECOMMENDATION:

SUBJECT MATTER

1. This Recommendation sets out guidance for Member States to take effective, appropriate and proportionate measures to address manifestly unfounded or abusive court proceedings against public participation and protect in particular journalists and human rights defenders against such proceedings, in full respect of democratic values and fundamental rights.

APPLICABLE FRAMEWORKS

2. As a general rule, Member States should ensure that their applicable legal frameworks provide for the necessary safeguards to address manifestly unfounded or abusive court proceedings against public participation in full respect of democratic values and fundamental rights, including the right to a fair trial and the right to freedom of expression.
3. Member States should aim to ensure that procedural safeguards to grant an early dismissal of manifestly unfounded court proceedings against public participation are available. They should also aim to provide other remedies against abusive court proceedings against public participation, namely the award of costs meaning that a claimant who has initiated abusive court proceedings against public participation can be ordered to bear all the costs of the proceedings, the compensation of damages for any natural or legal person who has suffered harm as a result of abusive court proceedings against public participation, and the possibility to impose effective, proportionate and dissuasive penalties on the party who initiated abusive court proceedings against public participation.
4. Member States should aim to include in their national laws similar safeguards for domestic cases as those included in Union instruments that seek to address manifestly unfounded and abusive cases against public participation for civil matters with cross-border implications.
5. Member States should ensure that their rules applicable to defamation do not have an unjustified impact on the freedom of expression, on the existence of an open, free and plural media environment, and on public participation.
6. Member States should ensure that their rules applicable to defamation are sufficiently clear, including their concepts, to reduce the risk that they are misused or abused.
7. Member States should also ensure that penalties against defamation are not excessive and disproportionate. Member States should take utmost account of the Council of Europe's guidelines and recommendations ⁽³⁰⁾ addressing the legal framework for defamation, and in particular criminal law. In this context, Member States are encouraged to remove prison sentences for defamation from their legal framework. Member States are encouraged to favour the use of administrative or civil law to deal with defamation cases ⁽³¹⁾, provided that such provisions have a less punitive effect than those of criminal law.

⁽³⁰⁾ See, inter alia, PACE's Resolution 1577 Towards decriminalisation of defamation (2007) <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17588&lang=en>, PACE's Recommendation Towards decriminalisation of defamation 1814 (2007) <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17587&lang=en>, the Secretariat-General of the Council of Europe's study on Freedom of expression and defamation. A study of the case-law of the European Court of Human Rights (2012) <https://rm.coe.int/study-on-the-alignment-of-laws-and-practices-concerning-alignment-of-l/16804915c5>, and most recently the Council of Europe's study of the case law of the European Court of Human Rights (2016) <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806ac95b>

⁽³¹⁾ Beyond the Council of Europe (see previous footnote), there is a growing international demand to decriminalise defamation. See United Nations' Human Rights Committee's General comment No 34 Article 19: Freedoms of opinion and expression of 12 September 2011, <https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf> and the Organization for Security and Cooperation in Europe's Office of the Representative on Freedom of the Media's Special report legal harassment and abuse of the judicial system against the media, 23 November 2021, https://www.osce.org/files/f/505075_0.pdf

8. Member States should strive for an adequate articulation in their legislation between the right to the protection of personal data and the right to freedom of expression and information to reconcile those two rights, as required by Article 85(2) of the Regulation (EU) 2016/679.
9. Member States should take appropriate measures to ensure that the deontological rules that govern the conduct of legal professionals and the disciplinary sanctions for violation of those rules consider and include appropriate measures to discourage manifestly unfounded or abusive court proceedings against public participation. Member States should encourage self-regulatory bodies and associations of legal professionals to align their deontological standards, including their codes of conduct, with this recommendation. Appropriate awareness raising and training is also recommended.

TRAINING

10. Member States should support training opportunities on manifestly unfounded or abusive court proceedings against public participation for legal professionals such as judiciary and judicial staff at all court levels, qualified lawyers as well as for potential targets of such court proceedings. The focus of trainings should lie on building expertise to detect such proceedings and react appropriately.
11. Member States should encourage associations of legal professionals and legal training providers to offer training on how to deal with manifestly unfounded or abusive court proceedings against public participation. The Commission will encourage European level training providers like the European Judicial Training Network to provide such training. Legal practitioners and their professional associations should be involved in the development, organisation, conduct and evaluation of the training.
12. Training should cover the relevant aspects of the EU Charter of Fundamental Rights of the European Union and the European Convention on Human Rights. It should include practical guidance on how to apply Union law, national case law, the case law of the Court of Justice of the European Union and the case law of the European Court of Human Rights, on ascertaining that restrictions to the exercise of the freedom of expression meet the requirements provided for, respectively, by Article 52 of the Charter and by Article 10(2) of the European Convention on Human Rights as well as on the articulation of freedom of expression and information, and with other fundamental rights.
13. Training should also cover the procedural safeguards against manifestly unfounded or abusive court proceedings against public participation, where available, as well as jurisdiction and relevant applicable law in fundamental rights, criminal, administrative, civil and commercial matters.
14. Training activities should also address the obligation for Member States, under Regulation (EU) 2016/679, to reconcile, by law, the protection of personal data with the right to freedom of expression and information. They should cover rules adopted by Member States to this end and the specific exemptions or derogations to Regulation (EU) 2016/679 applicable to data processing carried out for journalistic purposes or the purpose of academic, artistic or literary expression ⁽³²⁾. Due account should be taken of the elements mentioned in the Annex to this Recommendation.
15. Member States should consider embedding such training in training on freedom of expression and legal ethics.
16. Training for journalists, other media professionals and human rights defenders should strengthen their capacity to deal with manifestly unfounded or abusive court proceedings against public participation. It should focus on recognising manifestly unfounded or abusive court proceedings against public participation, how to manage being targeted by such court proceedings and inform them of their rights and obligations in order for them to be able to take the necessary steps to protect themselves against such proceedings. Training for journalists should also include the ethical standards and guidelines set out by national press or media councils.

⁽³²⁾ For more information on the transposition of Article 85 GDPR into national law, see the SWD, p. 26.

17. Member States could encourage higher education institutions to include knowledge on how to identify manifestly unfounded or abusive court proceedings against public participation in their curricula, especially for law and journalism degrees.
18. Training could include testimonials from the targets of manifestly unfounded or abusive court proceedings against public participation. Training could also, making best use of the knowledge developed within the framework of the EU expert group against SLAPP, foster the exchange of experience among Member States.

AWARENESS RAISING

19. Member States are encouraged to support initiatives, including those of National Human Rights Institutions and civil society organisations, aimed at raising awareness and organising information campaigns on manifestly unfounded or abusive court proceedings against public participation. Particular emphasis should be placed on addressing potential targets of such proceedings.
20. Awareness raising activities should aim to explain the issue of manifestly unfounded or abusive court proceedings against public participation in a simple and accessible way so that such proceedings are easily recognised.
21. Awareness raising activities should provide information on existing support structures, including reference to national focal points that gather and share information on available resources. Awareness raising efforts should also provide a clear overview of legal lines of defence available under national frameworks in case of manifestly unfounded or abusive court proceeding against public participation and how they could be used effectively.
22. Awareness raising campaigns combating negative attitudes, stereotypes and prejudices could also address manifestly unfounded or abusive court proceedings against public participation.
23. Promoting better understanding of the nature and extent of the impact of manifestly unfounded or abusive court proceedings against public participation should be included in awareness raising activities on the right to freedom of expression addressed to specific groups, such as media professionals, legal professionals, members of civil society organisations, academics, think tanks, communication professionals, civil servants, politicians, public authorities and private corporations.

SUPPORT MECHANISMS

24. Member States should ensure that targets of manifestly unfounded or abusive court proceedings against public participation have access to individual and independent support. To that end, Member States should identify and buttress organisations that provide guidance and support for such targets. Such organisations may include associations of legal professionals, media and press councils, umbrella associations for human rights defenders, associations at Union and national level, law firms defending targets of manifestly unfounded or abusive court proceedings against public participation *pro bono*, legal clinics of universities and other non-governmental organisations.
25. Each Member State should establish a focal point that gathers and shares information on all organisations that provide guidance and support for targets of manifestly unfounded or abusive court proceedings against public participation.
26. Member States are encouraged to make use of national and Union funding to provide financial support and promote funding available at Union level towards organisations that provide guidance and support for targets of manifestly unfounded or abusive court proceedings against public participation in particular to make sure that they have sufficient resources to react quickly against such proceedings.

27. Member States should ensure that legal assistance is available to defendants of manifestly unfounded or abusive court proceedings against public participation in an affordable and easily accessible manner.
28. Member States should facilitate the exchange of information and best practices between organisations that provide guidance and support for targets of manifestly unfounded or abusive court proceedings against public participation.

DATA COLLECTION, REPORTING AND MONITORING

29. Member States should, taking into account their institutional arrangements on judicial statistics, entrust one or more authorities to be responsible to collect and aggregate, in full respect of data protection requirements, data on manifestly unfounded or abusive court proceedings against public participation initiated in their jurisdiction. Member States should ensure that one authority is responsible to coordinate the information and report the aggregated data collected at national level to the Commission on a yearly basis starting by the end of 2023, in full respect of data protection requirements. The Commission will publish a yearly summary of the received contributions.
30. Where necessary, the EU expert group against SLAPP could support the development and best use of standards and templates on data collection.
31. Data referred to in point 29 should include:
 - (a) the number of manifestly unfounded or abusive court proceedings against public participation cases, initiated in the relevant year;
 - (b) the number of manifestly unfounded or abusive court proceedings against public participation cases dismissed early in the relevant year starting from 2022, both dismissed on merits and for procedural reasons;
 - (c) the number of court proceedings, classified by type of defendant (e.g. journalist, human rights defender, press outlet);
 - (d) the number of court proceedings, classified by type of plaintiff (e.g. politician, private person, company, whether the plaintiff is a foreign entity);
 - (e) figures about acts of public participation on the account of which court proceedings were launched;
 - (f) figures on the estimated amount of initial damages requested by plaintiffs;
 - (g) description of the different legal bases employed by plaintiffs and related figures;
 - (h) figures on the length of the proceedings, including all instances;
 - (i) figures on cross-border elements; and
 - (j) as available, other data including on judicial costs of proceedings and, as relevant and appropriate, relevant figures on historical backgrounds of cases.
32. The authority ensuring coordination, referred to in point 29, should publish the data, in accessible formats on its website, and as relevant via other appropriate tools, while taking the necessary arrangements to ensure the protection of the rights of those involved in manifestly unfounded or abusive court proceedings against public participation.

FINAL PROVISIONS

33. Member States should make full use of the funding support available at Union level to implement the specific provisions of this Recommendation, and promote the funding opportunities available for public and private entities, including civil society organisations, in particular under the CERV Programme and the Justice Programme.

34. Member States should transmit by the end of 2023 and subsequently on request, in compliance with data protection rules, a report to the Commission on the implementation of this Recommendation containing aggregated data consolidated at Member States' level. The Commission will hold, as necessary, discussions with Member States and stakeholders, in relevant forums, on the measures and actions taken to apply the Recommendation.
35. No later than 5 years after the date of adoption, the Commission will assess the impact of this Recommendation on the evolution of manifestly unfounded or abusive court proceedings against public participation in the European Union. On this basis, the Commission will determine whether additional steps are required to ensure the adequate protection of targets of such proceedings, taking into account the findings of the Commission's Rule of Law Reports and other relevant information, including external data.

Done at Brussels, 27 April 2022.

For the Commission
Didier REYNERS
Member of the Commission

ANNEX

Elements that could be included in the training on data protection claims in the context of manifestly unfounded or abusive court proceedings against public participation (commonly known as 'SLAPP'):

- The legislation adopted by Member States to reconcile the right to the protection of personal data with the right to freedom of expression and information, which shall provide for exemptions or derogations from the provisions listed in Article 85(2) GDPR for processing carried out for journalistic purposes or the purpose of academic, artistic or literary expression, if they are necessary to reconcile these two rights.
 - For the exercise of the data subject's rights under the GDPR, Article 12(5) GDPR lays down that requests which are manifestly unfounded or excessive, may be refused (or charged by a reasonable fee).
 - The right to rectification in Article 16 GDPR concerns only situations where personal data is inaccurate. In addition, the right to have incomplete personal data completed is not automatic and depends on the purpose of the processing.
 - For the exercise of the right to be forgotten, the GDPR provides that this right shall not apply to the extent that processing is necessary for the right of freedom of expression and information (Article 17(3)(a) GDPR).
 - As a barrier to forum shopping, Article 79(2) GDPR provides that proceedings against a data controller or processor – e.g. the journalist, right defender, civil society actor, media company, etc. – may be brought before the courts of the Member State where the controller or processor has an establishment or, unless the controller or processor is a public authority of a Member State exercising its public powers, where the data subject has his or her habitual residence. That provision leaves no scope for actions claiming a violation of data protection rules before other courts without any relation to the processing of the personal data, the establishment of the journalist or media or the habitual residence of the plaintiff, including for damages.
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RULES OF PROCEDURE

MANAGEMENT BOARD DECISION 28/2022

of 4 April 2022

on internal rules concerning restrictions of certain data subject rights in relation to the processing of personal data in the framework of activities carried out by the European Border and Coast Guard Agency

THE MANAGEMENT BOARD,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 16 thereof,

Having regard to 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 ⁽¹⁾ (hereinafter the 'Regulation'), and in particular Article 25 thereof,

Having regard to the Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624 ⁽²⁾ (hereinafter the 'EBCG Regulation'), in particular Article 86(2) thereof,

Having consulted the European Data Protection Supervisor on 16 November 2021,

Whereas:

- (1) The European Border and Coast Guard Agency ('Agency') is empowered to conduct administrative inquiries, pre-disciplinary, disciplinary and suspension proceedings, in accordance with the Staff Regulations of Officials of the European Union and the Conditions of Employment of Other Servants of the European Union, laid down in Council Regulation (EEC, Euratom, ECSC) No 259/68 ⁽³⁾ ('Staff Regulations'), and with Management Board Decision 26/2018 of 25 October 2018 adopting implementing provisions regarding the conduct of administrative inquiries and disciplinary proceedings. If required, it also notifies cases to OLAF.
- (2) The Agency's staff members are under an obligation to report potentially illegal activities, including fraud and corruption, which are detrimental to the interests of the Union. Staff members are also obliged to report conduct relating to the discharge of professional duties which may constitute a serious failure to comply with the obligations of officials of the Union. This is regulated by Management Board Decision 17/2019 of 18 July 2019 adopting the Frontex Guidelines on Whistleblowing.
- (3) The Agency has put in place a policy to prevent and deal effectively with actual or potential cases of psychological or sexual harassment in the workplace, as provided for in its Management Board Decision 16/2019 of 18 July 2019 adopting implementing measures pursuant to the Staff Regulations. The Decision establishes an informal procedure whereby the alleged victim of the harassment can contact the Agency's 'confidential' counsellors.
- (4) The Agency can also conduct investigations into potential breaches of security rules for European Union classified information ('EUCI'), based on its security rules for protecting EUCI.

⁽¹⁾ OJ L 295, 21.11.2018, p. 39.

⁽²⁾ OJ L 295, 14.11.2019, p. 1.

⁽³⁾ Regulation (EEC, Euratom, ECSC) No 259/68 of the Council of 29 February 1968 laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Communities and instituting special measures temporarily applicable to officials of the Commission (OJ L 56, 4.3.1968, p. 1).

- (5) The Agency is subject to both internal and external audits concerning its activities including by the European Court of Auditors. The internal audits are conducted by the Internal Audit Capability of the Agency set up by Management Board Decision 43/2020 of 9 December 2020 adopting the Agency's amended organisational structure and relevant Decision of the Executive Director in accordance with Article 80 of the Management Board Decision 19/2019 of 23 July 2019 adopting Frontex Financial Regulation.
- (6) The Agency handles external complaints in particular those received in the context of the complaints mechanism set up in accordance with Article 111 of the EBCG Regulation to monitor and ensure respect for fundamental rights in all the activities of the Agency.
- (7) Participants in Frontex activities are under the obligation to report serious incidents in accordance with Article 38(3)(h) of the EBCG Regulation and Decision of the Executive Director of 19 April 2021 on Standard Operating Procedure (SOP) – Serious Incident Reporting ⁽⁴⁾. The Agency has also established a supervisory mechanism to monitor the application of the provisions of the EBCG Regulation on use of force by statutory staff, including rules on reporting and specific measures, such as those of a disciplinary nature, with regard to the use of force during deployments. This is regulated by Management Board Decision 7/2021 of 20 January 2021 establishing a supervisory mechanism to monitor the application of the provisions on the use of force by statutory staff of the European Border and Coast Guard Standing Corps. The Agency also monitors use of force by staff seconded to the Agency by the Member States for a long term, staff provided by Member States for short-term deployments and staff forming part of the reserve for rapid reaction for rapid border interventions while applying force in Frontex operational activities in accordance with the relevant Decision of the Executive Director.
- (8) In the context of such administrative inquiries, audits, examination of complaints and investigations, reporting of serious incidents and monitoring activities the Agency cooperates with Member States' ⁽⁵⁾ competent authorities, other Union institutions, bodies, offices and agencies.
- (9) The Agency can cooperate with third countries' competent authorities and international organisations, either at their request or on its own initiative.
- (10) The Agency is involved in cases before the Court of Justice of the European Union and national courts when it either refers a matter to the Court, defends a decision it has taken and which has been challenged before the Court, or intervenes in cases relevant to its tasks. In this context, the Agency might need to preserve the confidentiality of personal data contained in documents obtained by the parties or the interveners.
- (11) To fulfil its tasks, the Agency collects and processes information and several categories of personal data, including identification data of natural persons, contact information, professional roles and tasks, information on private and professional conduct and performance, and financial data. Hence, the Agency acts as data controller.
- (12) Under the Regulation, the Agency is therefore obliged to provide information to data subjects on those processing activities and to respect their rights as data subjects.
- (13) The Agency might be required to reconcile those rights with the objectives of administrative inquiries, audits, investigations, reporting of serious incidents and monitoring of the application of the provisions of the EBCG Regulation on the use of force, and court proceedings. It might also be required to balance a data subject's rights against the fundamental rights and freedoms of other data subjects. To that end, Article 25 of the Regulation and Article 86(2) of the EBCG Regulation give the Agency the possibility to restrict, under strict conditions, the application of Articles 14 to 22, 35 and 36 of the Regulation, as well as Article 4 thereof in so far as its provisions correspond to the rights and obligations provided for in Articles 14 to 20. Unless restrictions are provided for in a legal act adopted on the basis of the Treaties, it is necessary to adopt internal rules under which the Agency is entitled to restrict those rights.

⁽⁴⁾ Executive Director Decision No R-ED-2021-51 of 19.4.2021 on Standard Operating Procedure (SOP) – Serious Incident Reporting.

⁽⁵⁾ For the purpose of this Decision, the term 'Member States' includes also the States participating in the relevant development of the Schengen acquis within the meaning of the Treaty on the Functioning of the European Union and its Protocol (No 19) on the Schengen acquis integrated into the framework of the European Union.

- (14) The Agency might, for instance, need to restrict the information it provides to a data subject about the processing of his or her personal data during the preliminary assessment phase of an administrative inquiry or during the inquiry itself, prior to a possible dismissal of case or at the pre-disciplinary stage or where the data subject may potentially be subject to specific measures, such as those of a disciplinary nature, with regard to the use of force during deployments. In certain circumstances, providing such information might seriously affect the Agency's capacity to conduct the inquiry or exercise its monitoring of the use of force function in an effective way, whenever, for example, there is a risk that the person concerned might destroy evidence or interfere with potential witnesses before they are interviewed.
- (15) The Agency might also need to protect the rights and freedoms of witnesses as well as those of other persons involved. Similarly, the Agency might need to restrict the information it provides to a data subject about the processing of his or her personal data where providing this information might seriously affect the assessment and validation steps of reporting serious incidents process in accordance with Article 38(3)(h) of the EBCG Regulation.
- (16) It might be necessary to protect the anonymity of a witness or whistle-blower who has asked not to be identified. In such a case, the Agency might decide to restrict access to the identity, statements and other personal data of such persons, in order to protect their rights and freedoms. In particular, the Agency might need to protect the anonymity of witnesses or other persons reporting incidents involving the use of force in accordance with supervisory mechanism to monitor the application of the provisions of the EBCG Regulation on the use of force. Similarly, in the context of reporting of serious incidents in accordance with Article 38(3)(h) of the EBCG Regulation, the Agency might need to protect the anonymity of participants in a Frontex activity who reported such an incident.
- (17) It might be necessary to protect confidential information concerning a staff member who has contacted the Agency's confidential counsellors. In such cases, the Agency might need to restrict access to the identity, statements and other personal data of the alleged victim, the alleged harasser and other persons involved, in order to protect the rights and freedoms of all concerned.
- (18) The Agency processes personal data of its statutory staff on medical and psychological fitness, including where necessary for the authorisation to carry and use weapons in accordance with Article 82(7) of the EBCG Regulation and Management Board Decision 3/2021 of 15 January 2021 ⁽⁶⁾. Considering the sensitive nature of the medical data and in order to protect the data subject from direct access to files that could be harmful to the health and mental status of the concerned data subject, the Agency shall provide indirect access to the relevant medical information through the Agency's medical advisor or an external medical provider for the relevant medical information and advice.
- (19) The Agency should apply restrictions only when they respect the essence of fundamental rights and freedoms, are strictly necessary and are a proportionate measure in a democratic society. The Agency should give reasons explaining the justification for those restrictions.
- (20) In application of the principle of accountability, the Agency should keep a record of its application of restrictions.
- (21) When processing personal data exchanged with other organisations in the context of its tasks, the Agency and those organisations should consult each other on potential grounds for imposing restrictions and the necessity and proportionality of those restrictions, unless this would jeopardise the activities of the Agency.
- (22) Article 25(6) of the Regulation obliges the controller to inform data subjects of the principal reasons on which the application of the restriction is based and of their right to lodge a complaint with the EDPS.

⁽⁶⁾ Management Board Decision 3/2021 of 15 January 2021 adopting rules for the Executive Director to authorise statutory staff to carry and use weapons, including on mandatory cooperation with the competent national authorities, and ensuring that the conditions for issuing such authorisations continue to be met by statutory staff.

- (23) Pursuant to Article 25(8) of the Regulation, the Agency is entitled to defer, omit or deny the provision of information on the reasons for the application of a restriction to the data subject if this would in any way cancel the effect of the restriction. The Agency should assess on a case-by-case basis whether the communication of the restriction would cancel its effect.
- (24) The Agency should lift the restriction as soon as the conditions that justify the restriction no longer apply and assess those conditions on a regular basis.
- (25) To guarantee utmost protection of the rights and freedoms of data subjects and in accordance with Article 44(1) of the Regulation, the Agency's Data Protection Officer ('DPO') should be consulted in due time of any restrictions that may be applied and verify their compliance with this Decision.
- (26) The Agency has laid down separate rules regarding the processing of operational personal data, in accordance with Article 90 of the EBCG Regulation, including specific internal rules on data retention of operational personal data and rules on restrictions applied to the relevant data subject rights ⁽⁷⁾,

HAS DECIDED AS FOLLOWS:

Article 1

Subject matter, scope and controllership

1. This Decision lays down rules relating to the conditions under which the Agency may restrict the application of Article 4, 14 to 22, 35 and 36 of the Regulation, pursuant to Article 25 of the Regulation and Article 86(2) of the EBCG Regulation.

This Decision applies to the processing of personal data by the Agency for the purpose of administrative tasks in accordance with Article 87(1)(h) of the EBCG Regulation.

2. In accordance with paragraph 1 and subject to the conditions set out in this Decision, the restrictions may be applied to the following rights: right of information to be provided to the data subject, right of access by the data subject, right of the data subject to rectification, erasure and restriction of processing and rights to communication of a personal data breach to the data subject and confidentiality of electronic communications.

3. The categories of personal data concerned by this Decision are both objective/hard data (e.g. identification data, contact data, professional data, administrative data, data received from specific sources, electronic communications and traffic data) and subjective/soft data (e.g. reasoning, behavioural data, appraisals, data related to performance and conduct and data related to, or brought forward in connection with, the subject matter of the procedure or activity in question).

4. The Agency, as the controller, is represented by the Executive Director. The Agency's rules implementing the Regulation in respect of data controllership shall apply ⁽⁸⁾.

5. Data subjects shall be informed of the designated controllers through information or records published on the website and/or the intranet of the Agency.

Article 2

Restrictions

1. The Agency may restrict the application of Articles 14 to 22, 35 and 36 of the Regulation, and Article 4 thereof in so far as its provisions correspond to the rights and obligations provided for in Articles 14 to 22 in the context of the purpose of processing personal data indicated in Article 1(1) of the Decision:

⁽⁷⁾ Management Board Decision 69/2021 of 21 December 2021 adopting rules on processing operational personal data by the Agency.

⁽⁸⁾ Management Board Decision 56/2021 of 15 October 2021 adopting implementing rules on the application of Regulation (EU) 2018/1725 concerning the tasks, duties and powers of the Data Protection Officer as well as rules concerning Designated Controllers in Frontex.

- (a) pursuant to Article 25(1)(b), (c), (f), (g) and (h) of the Regulation, when conducting administrative inquiries, pre-disciplinary, disciplinary or suspension proceedings under Article 86 and Annex IX of the Staff Regulations and Management Board Decision 26/2018 of 25 October 2018 adopting general implementing provisions on the conduct of administrative inquiries and disciplinary procedures, when notifying cases to OLAF and pursuant to Article 25(1)(c), (g) and (h) of the Regulation, when the DPO investigates matters directly related to his/her tasks in particular when conducting inquiries on processing activities carried out at the Agency pursuant to Article 5(11) of Management Board Decision 56/2021 of 15 October 2021. ⁽⁹⁾ The Agency may restrict some of the rights referred to in Article 1(2) of the Decision of a staff member, a person concerned or a third party in relation to any information capable of seriously affecting future or ongoing inquiries, pre-disciplinary, disciplinary or suspension proceedings including statements of witnesses and other documents;
- (b) pursuant to Article 25(1)(h) of the Regulation, when ensuring that Agency staff members may report facts confidentially where they believe there are serious irregularities, as set out in Management Board Decision 17/2019 of 18 July 2019 adopting the Frontex Guidelines on Whistleblowing The Agency may restrict some of the rights referred to in Article 1(2) of the Decision of data subjects potentially implicated in the alleged wrongdoings in relation to any information which could compromise the anonymity of person reporting a serious irregularity;
- (c) pursuant to Article 25(1)(h) of the Regulation, when ensuring that Agency staff members may use the support of the confidential counsellors, as defined by Management Board Decision 16/2019 of 18 July 2019 on the Frontex policy on protecting the dignity of the person and preventing psychological harassment and sexual harassment. The Agency may restrict some of the rights referred to in Article 1(2) of the Decision of alleged harassers, where necessary, to protect the anonymity of the potential victim of harassment and the anonymity of witnesses;
- (d) pursuant to Article 25(1)(c), (g) and (h) of the Regulation, when conducting internal and external audits in relation to activities or departments of the Agency in particular when internal audits are conducted by the Internal Audit Capability of the Agency. The Agency may restrict some of the rights referred to in Article 1(2) of data subjects in relation to information capable of compromising the confidentiality of information gathered from the audit or interfering with the conduct of an ongoing audit;
- (e) pursuant to Article 25(1)(b), (e), (g) and (h) of the Regulation, in the context of investigations from the European Public Prosecutor's Office (EPPO). The Agency may restrict some of the rights referred to in Article 1(2) of this Decision of data subjects in relation to information necessary for ensuring proper conduct and confidentiality of investigations by the EPPO;
- (f) pursuant to Article 25(1)(c), (e), (g) and (h) of the Regulation, when handling complaints including those received by the Agency in the context of the complaints mechanism set up in accordance with Article 111 of the EBCG Regulation to monitor and ensure respect for fundamental rights in all the activities of the Agency and the relevant Decision of the Executive Director. The Agency may restrict some of the rights referred to in Article 1(2) of this Decision of a staff member involved in an Agency activity ⁽¹⁰⁾, who is subject to a complaint, in relation to any information capable of seriously affecting the review and handling of the complaint;
- (g) pursuant to Article 25(1)(c), (e), (g) and (h) of the Regulation, when handling incident reports under Article 38(3)(h) of the EBCG Regulation and Decision of the Executive Director of 19 April 2021 on Standard Operating Procedure (SOP) – Serious Incident Reporting. The Agency may restrict some of the rights referred to in Article 1(2) of this Decision of data subjects contained in the Serious Incident Report in relation to information capable of seriously affecting the validation and assessment of the Serious Incident Report as well as follow up actions and the anonymity of witnesses or other persons reporting incidents including migrants and returnees;

⁽⁹⁾ Management Board Decision 56/2021 of 15 October 2021 adopting implementing rules on the application of Regulation (EU) 2018/1725 concerning the tasks, duties and powers of the Data Protection Officer as well as rules concerning Designated Controllers in Frontex.

⁽¹⁰⁾ 'Staff involved in an Agency activity' includes members of the teams such as Agency's own staff or members of categories 2, 3 and 4 of the Standing Corps.

- (h) pursuant to Article 25(1)(b), (c), (f), (g) and (h) of the Regulation, when monitoring the application of the provisions on the use of force by statutory staff of the European Border and Coast Guard Standing Corps under Article 55(5)(a) of the EBCG Regulation and Management Board Decision 7/2021 of 20 January 2021 and when monitoring the use of force by staff seconded to the Agency by the Member States for a long term, staff provided by Member States for short-term deployments and staff forming part of the reserve for rapid reaction for rapid border interventions while applying force in Frontex operational activities in accordance with the relevant Decision of the Executive Director. The Agency may restrict some of the rights referred to in Article 1(2) of this Decision of data subjects contained in a report on the use of force in relation to information (including statements of witnesses and other documents) capable of seriously affecting the verification of the report and any future or ongoing follow-up actions including inquiries, pre-disciplinary, disciplinary or suspension proceedings;
 - (i) pursuant to Article 25(1)(b), (c), (d), (g) and (h) of the Regulation, when providing or receiving assistance to or from other Union institutions, bodies, offices and agencies or cooperating with them in the context of activities under points (a) to (h) of this paragraph and pursuant to relevant service level agreements, memoranda of understanding and working arrangements;
 - (j) pursuant to Article 25(1)(b), (c), (g) and (h) of the Regulation, when providing or receiving assistance and cooperation to and from Member States' competent national authorities, either at their request or on its own initiative in particular in the context of activities under points (f) to (h) of this paragraph and pursuant to provisions of the EBCG Regulation and Decisions of the Management Board;
 - (k) pursuant to Article 25(1)(b), (c), (g) and (h) of the Regulation, when providing or receiving assistance to or from competent national authorities of the third countries and international organisations or cooperating with such authorities and organisations in particular pursuant to relevant, memoranda of understanding and working arrangements;
 - (l) pursuant to Article 25(1)(e) of the Regulation, when processing personal data in the context of proceedings before the Court of Justice of the European Union or national courts and tribunals;
 - (m) pursuant to Article 25(1)(h) of the Regulation, when the handling of requests for access by staff members to their medical files related to their medical and psychological fitness, if a direct access to these files could be harmful to the data subject concerned considering the health or mental status of the data subject. In such cases the Agency shall provide indirect access to the relevant medical information through the Agency's medical advisor or an external medical provider;
 - (n) pursuant to Article 25(1)(c), (d), (g) and (h) of the Regulation, when conducting security analyses which may lead to internal investigations related to cyber security incidents or IT system abuse, including external involvement of CERT-EU, ensuring internal security by means of video surveillance, access control and investigation purposes, securing communication and information systems and carrying out technical security counter-measures. The Agency may restrict some of the rights referred to in Article 1(2) of this Decision of data subjects in relation to information capable of seriously affecting those security analyses, means of ensuring internal security including access control, security investigations and technical security counter-measures.
2. Any restriction shall respect the essence of fundamental rights and freedoms and be necessary and proportionate in a democratic society.
3. A necessity and proportionality test shall be carried out on a case-by-case basis before restrictions are applied. Restrictions shall be limited to what is strictly necessary to achieve their objective.
4. For accountability purposes, the Agency shall draw up a record describing the reasons for restrictions that are applied, which grounds among those listed in paragraph 1 apply and the outcome of the necessity and proportionality test. Those records shall be part of a register, which shall be made available on request to the EDPS. The Agency shall prepare and make public periodic reports on the application of Article 25 of the Regulation.
5. When processing personal data received from other organisations in the context of its tasks, the Agency shall consult those organisations on potential grounds for imposing restrictions and the necessity and proportionality of the restrictions concerned, unless this would jeopardise the activities of the Agency.

*Article 3***Risks to the rights and freedoms of data subjects**

1. Assessments of the risks to the rights and freedoms of data subjects of imposing restrictions and details of the period of application of those restrictions shall be registered in the record of processing activities maintained by the Agency under Article 31 of the Regulation. They shall also be recorded in any data protection impact assessments regarding those restrictions conducted under Article 39 of the Regulation.
2. Whenever the Agency assesses the necessity and proportionality of a restriction it shall consider the potential risks to the rights and freedoms of the data subject.
3. Restrictions shall not apply where the exercise of the restricted right would deprive the restriction of its purpose or adversely affect the rights or freedoms of other data subjects.

*Article 4***Safeguards and storage periods**

1. The Agency shall implement safeguards to prevent abuse and unlawful access or transfer of the personal data for which restrictions apply or could be applied. Such safeguards shall include technical and organisational measures and be detailed as necessary in Decisions of the Agency's Management Board, Decisions of the Executive Director, operational plans drawn up in accordance with Article 38 of the EBCG Regulation, internal decisions, procedures and Administrative Notices. The safeguards shall include:
 - (a) a clear definition of roles, responsibilities and procedural steps;
 - (b) if appropriate, a secure electronic environment which prevents unlawful and accidental access or transfer of electronic data to unauthorised persons;
 - (c) if appropriate, secure storage and processing of paper-based documents;
 - (d) due monitoring of restrictions and a periodic review of their application.

The reviews referred to in point (d) shall be conducted at least every six months and may result in lifting restrictions in accordance with paragraph 2. The reviews shall be documented by the designated controller for accountability purposes.

2. Restrictions shall be lifted as soon as the circumstances that justify them no longer apply.
3. The personal data shall be retained in accordance with the applicable Agency retention rules, to be defined in the data protection records maintained under Article 31 of the Regulation. At the end of the retention period, the personal data shall be deleted, anonymised or transferred to archives in accordance with Article 13 of the Regulation.

*Article 5***Involvement of the Data Protection Officer**

1. The DPO shall be informed without undue delay whenever data subject rights are restricted in accordance with this Decision. He or she shall be given access to the associated records and any documents concerning the factual or legal context.
2. The DPO may request a review of the application of a restriction. The Agency shall inform the DPO in writing of the outcome of the review.
3. The Agency shall document the involvement of the DPO in the application of restrictions, including what information is shared with him or her.
4. The designated controllers shall inform the DPO when a restriction has been lifted.

Article 6

Information to data subjects on restrictions of their rights

1. The Agency shall include a section in the data protection notices published on its website and intranet providing general information to data subjects on potential restrictions of data subjects' rights pursuant to Article 2(1). The information shall cover which rights may be restricted, the grounds on which restrictions may be applied and their potential duration.
2. The Agency shall inform data subjects individually, in writing and without undue delay of ongoing or future restrictions of their rights. The Agency shall inform the data subject of the principal reasons on which the application of the restriction is based, of their right to consult the DPO with a view to challenging the restriction and of their rights to lodge a complaint with the EDPS.
3. The Agency may defer, omit or deny the provision of information concerning the reasons for a restriction and the right to lodge a complaint with the EDPS for as long as it would cancel the effect of the restriction. Assessment of whether this would be justified shall take place on a case-by-case basis. As soon as it would no longer cancel the effect of the restriction, the Agency shall provide the information to the data subject.

Article 7

Communication of a personal data breach to the data subject

1. Where the Agency is under an obligation to communicate a data breach under Article 35(1) of the Regulation, it may, in exceptional circumstances, restrict such communication wholly or partly. It shall document in a note the reasons for the restriction, the legal ground for it under Article 2 and an assessment of its necessity and proportionality. The note shall be communicated to the EDPS at the time of the notification of the personal data breach.
2. Where the reasons for the restriction no longer apply, the Agency shall communicate the personal data breach to the data subject concerned and inform him or her of the principal reasons for the restriction and of his or her right to lodge a complaint with the EDPS.

Article 8

Confidentiality of electronic communications

1. In exceptional circumstances, the Agency may restrict the right to confidentiality of electronic communications under Article 36 of the Regulation. Such restrictions shall comply with Directive 2002/58/EC of the European Parliament and of the Council ⁽¹⁾.
2. Where the Agency restricts the right to confidentiality of electronic communications, it shall inform the data subject concerned, in its reply to any request from the data subject, of the principal reasons on which the application of the restriction is based and of his or her right to lodge a complaint with the EDPS.
3. The Agency may defer, omit or deny the provision of information concerning the reasons for a restriction and the right to lodge a complaint with the EDPS for as long as it would cancel the effect of the restriction. Assessment of whether this would be justified shall take place on a case-by-case basis.

Article 9

Entry into force

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

⁽¹⁾ Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ L 201, 31.7.2002, p. 37).

Done by written procedure on 4 April 2022.

For the Management Board
Marko GAŠPERLIN
Chairperson

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