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I

(Legislative acts)

REGULATIONS

REGULATION (EU) 2022/1031 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 23 June 2022

on the access of third-country economic operators, goods and services to the Union's public procurement and concession markets and procedures supporting negotiations on access of Union economic operators, goods and services to the public procurement and concession markets of third countries (International Procurement Instrument – IPI)

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 207(2) thereof,

Having regard to the proposal from the European Commission,

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

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

After consulting the Committee of the Regions,

Acting in accordance with the ordinary legislative procedure ⁽²⁾,

Whereas:

- (1) In accordance with Article 21 of the Treaty on European Union (TEU), the Union is to define and pursue common policies and actions, and improve cooperation in all fields in international relations in order, inter alia, to encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade.
- (2) Pursuant to Article 206 of the Treaty on the Functioning of the European Union (TFEU), the Union, by establishing a customs union, is to contribute, in the common interest, to the harmonious development of world trade, to the progressive abolition of restrictions on international trade and on foreign direct investment, and to the lowering of customs and other barriers
- (3) In accordance with Article 26 TFEU, the Union is to adopt measures with the aim of establishing or ensuring the functioning of the internal market, comprising an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the Treaties. The access of third-country economic operators, goods and services to the public procurement or concession markets of the Union falls within the scope of the common commercial policy.

⁽¹⁾ OJ C 264, 20.7.2016, p. 110.

⁽²⁾ Position of the European Parliament of 9 June 2022 (not yet published in the Official Journal) and decision of the Council of 17 June 2022.

- (4) Article III:8 of the General Agreement on Tariffs and Trade 1994 and Article XIII of the General Agreement on Trade in Services exclude government procurement from the main multilateral World Trade Organization (WTO) disciplines.
- (5) Within the framework of the WTO and through its bilateral relations, the Union advocates an ambitious opening of the international public procurement and concession markets of the Union and its trading partners, in a spirit of reciprocity and mutual benefit.
- (6) The plurilateral WTO Agreement on Government Procurement and the Union trade agreements that include provisions on public procurement provide for market access for Union economic operators only to the public procurement or concession markets of third countries that are parties to those agreements.
- (7) Where a third country is a Party to the WTO Agreement on Government Procurement or has concluded a trade agreement with the Union that includes provisions on public procurement, the Commission should follow the consultation mechanisms or dispute settlement procedures set out in those agreements where the restrictive practices relate to public procurement covered by market access commitments undertaken by that third country towards the Union.
- (8) Many third countries are reluctant to open their public procurement or concession markets to international competition, or to improve access to those markets. As a consequence, Union economic operators face restrictive public procurement practices in many third countries which result in the loss of substantial trading opportunities.
- (9) Regulation (EU) No 654/2014 of the European Parliament and of the Council ⁽³⁾ lays down rules and procedures in order to ensure the exercise of the Union's rights under international trade agreements concluded by the Union. No such rules and procedures exist for the treatment of economic operators, goods and services that are not covered by such international agreements.
- (10) International market access commitments undertaken by the Union towards third countries in the field of public procurement and concessions require, inter alia, the equal treatment of economic operators from those third countries. Consequently, measures adopted under this Regulation can only apply to economic operators, goods or services from third countries that are not parties to the plurilateral WTO Agreement on Government Procurement or to bilateral or multilateral trade agreements concluded with the Union that include commitments on access to public procurement or concession markets, or to economic operators, goods or services from countries that are parties to such agreements but only with respect to public procurement procedures for goods, services or concessions that are not covered by those agreements. In accordance with Directives 2014/23/EU ⁽⁴⁾, 2014/24/EU ⁽⁵⁾ and 2014/25/EU ⁽⁶⁾ of the European Parliament and the Council and as clarified by the communication of the Commission of 24 July 2019 on Guidance on the participation of third-country bidders and goods in the EU procurement market, economic operators from third countries, which do not have any agreement providing for the opening of the EU procurement market, or whose goods, services and works are not covered by such an agreement, do not have secured access to procurement procedures in the EU and may be excluded.
- (11) The effective application of any measure adopted under this Regulation with a view to improving the access of Union economic operators to the public procurement or concession markets of certain third countries requires a clear set of rules of origin for economic operators, goods and services.

⁽³⁾ Regulation (EU) No 654/2014 of the European Parliament and of the Council of 15 May 2014 concerning the exercise of the Union's rights for the application and enforcement of international trade rules and amending Council Regulation (EC) No 3286/94 laying down Community procedures in the field of common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organization (OJ L 189, 27.6.2014, p. 50).

⁽⁴⁾ Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ L 94, 28.3.2014, p. 1).

⁽⁵⁾ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ L 94, 28.3.2014, p. 65).

⁽⁶⁾ Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ L 94, 28.3.2014, p. 243).

- (12) The origin of a good should be determined in accordance with Article 60 of Regulation (EU) No 952/2013 of the European Parliament and of the Council ⁽⁷⁾.
- (13) The origin of a service should be determined on the basis of the origin of the natural or legal person providing it. The origin of a legal person should be considered to be the country under the laws of which a legal person is constituted or otherwise organised and in the territory of which the legal person is engaged in substantive business operations. Legal persons constituted or otherwise organised under the laws of a Member State should only be considered to have their origin in the Union if they have a direct and effective link with the economy of a Member State. To avoid a possible circumvention of an International Procurement Instrument (IPI) measure, the origin of foreign-controlled or owned legal persons that are not engaged in substantive business operations in the territory of a third country or in the territory of a Member State, under the laws of which they are constituted or otherwise organised, may also need to be determined by taking into account other elements, such as the origin of the owners or other persons exercising a dominant influence over that legal person.
- (14) When assessing whether specific measures or practices exist in a third country that could result in an impairment of access of Union economic operators, goods or services to the public procurement or concession markets of that third country, the Commission should examine to what degree laws, rules or other measures on the public procurement or concession markets of the third country concerned ensure transparency in line with international standards, and do not result in serious and recurrent restrictions against Union economic operators, goods, or services. In addition, the Commission should examine to what degree individual third-country contracting authorities or contracting entities adopt or maintain restrictive practices against Union economic operators, goods or services.
- (15) The Commission should be able to initiate at any time a transparent investigation into allegedly restrictive measures or practices adopted or maintained by a third country.
- (16) Given the overall policy objective of the Union to support the economic growth of least developed countries and their integration into global value chains, the Commission should not start an investigation in respect of countries benefitting from the 'Everything But Arms' arrangement as listed in Annex IV of Regulation (EU) No 978/2012 of the European Parliament and of the Council ⁽⁸⁾.
- (17) When conducting the investigation, the Commission should invite the third country concerned to enter into consultations with a view to eliminating or remedying any restrictive measures or practices and thereby improving the tendering opportunities for Union economic operators, goods and services regarding public procurement or concession markets in that third country.
- (18) It is of the utmost importance that the investigation is carried out in a transparent manner. A report on the main findings of the investigation should therefore be publicly available.
- (19) Where the investigation confirms the existence of restrictive measures or practices, and the consultations with the third country concerned do not lead to satisfactory corrective actions that remedy the serious and recurrent impairment of access for Union economic operators, goods and services within a reasonable timeframe or where the third country concerned declines to enter into consultations, the Commission should adopt under this Regulation, if it considers such adoption to be in the interest of the Union, an IPI measure in the form of a score adjustment or of an exclusion of tenders.
- (20) The determination of whether the adoption of an IPI measure is in the interest of the Union should be based on an appreciation of all the various interests taken as a whole, including the interests of the Union's economic operators. The Commission should weigh the consequences of adopting such a measure against its impact on the Union's broader interests. It is important that special consideration is given to the general objective of achieving reciprocity by opening third-country markets and improving market access opportunities for Union economic operators. The objective of limiting any unnecessary administrative burden for contracting authorities and contracting entities as well as economic operators should also be taken into account.

⁽⁷⁾ Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (OJ L 269, 10.10.2013, p. 1).

⁽⁸⁾ Regulation (EU) No 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008 (OJ L 303, 31.10.2012, p. 1).

- (21) A score adjustment should be applied only for the purpose of the evaluation of tenders submitted by economic operators originating in the third country concerned. Such a measure should not affect the price to be paid under the contract to be concluded with the successful tenderer. When contracting authorities or contracting entities decide to base their evaluation of tenders on a price or cost as the only contract award criterion, the level of score adjustment should be set significantly higher to ensure comparable effectiveness of the IPI measure.
- (22) IPI measures should apply to public procurement procedures falling under the scope of this Regulation, including framework agreements and dynamic purchasing systems. Where a specific contract is awarded under a dynamic purchasing system to which an IPI measure applies, IPI measures should also apply to that specific contract. However, IPI measures should not apply to contracts below a certain threshold with a view to limiting the overall administrative burden for contracting authorities and contracting entities. In order to avoid a possible double application of IPI measures, such measures should not apply to contracts awarded based on a framework agreement if IPI measures have already been applied at the stage of concluding that framework agreement.
- (23) To avoid a possible circumvention of an IPI measure, appropriate obligations should be imposed on successful tenderers. Those obligations should apply only to public procurement procedures which are subject to an IPI measure, as well as to contracts awarded based on a framework agreement where the value of such contracts are equal to or above a certain threshold and where that framework agreement is subject to an IPI measure.
- (24) Where a third country engages in substantive and advanced negotiations with the Union concerning market access in the field of public procurement, with a view to eliminating or remedying the impairment of access of Union economic operators, goods or services to its public procurement or concession markets, the Commission should be able to, during the negotiations, suspend IPI measures which refer to the third country concerned.
- (25) It is important that IPI measures are uniformly applied in the Union by contracting authorities and contracting entities. To take into account the diversity of administrative capacity of contracting authorities and contracting entities, Member States should be able to request the exemption from IPI measures for a limited list of local contracting authorities under certain strict requirements. When checking the lists of local contracting authorities as proposed by the Member States, it is important that the Commission take into consideration the particular situation of those contracting authorities as regards, inter alia, the levels of population and the geographical situation. Such exemption could also refer to public procurement procedures that those contracting authorities should be able to carry out under framework agreements or dynamic purchasing systems.
- (26) It is imperative that contracting authorities and contracting entities have access to a range of high-quality products meeting their purchasing requirements at a competitive price. Contracting authorities and contracting entities should therefore be able not to apply IPI measures limiting access of non-covered goods and services where there are no Union or covered goods or services available which meet the requirements of the contracting authority or contracting entity or to safeguard essential public policy needs, for example regarding overriding reasons relating to public health or protection of the environment. When contracting authorities or contracting entities apply those exceptions, the Commission should be informed in a timely and comprehensive manner thereof to allow for appropriate monitoring of the implementation of this Regulation.
- (27) In the case of a misapplication by contracting authorities or contracting entities of IPI measures that negatively affects the chances of economic operators having a right to participate in the public procurement procedure, Council Directives 89/665/EEC ⁽⁹⁾ and 92/13/EEC ⁽¹⁰⁾ should be applicable. The affected economic operators should be able to initiate a review procedure in accordance with the national law implementing those Directives if, for example, those economic operators consider that a competing economic operator should have been excluded or a

⁽⁹⁾ Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ L 395, 30.12.1989, p. 33).

⁽¹⁰⁾ Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ L 76, 23.3.1992, p. 14).

bid should have been ranked lower due to the application of an IPI measure. The Commission should also be able to apply the corrective mechanism in accordance with Article 3 of Directive 89/665/EEC or Article 8 of Directive 92/13/EEC.

- (28) In order to ensure uniform conditions for the implementation of this Regulation, implementing powers should be conferred on the Commission. Those powers should be exercised in accordance with Regulation (EU) No 182/2011 of the European Parliament and of the Council ⁽¹¹⁾.
- (29) The examination procedure should be used for the adoption of implementing acts regarding the adoption, withdrawal, suspension, reinstatement or extension of an IPI measure and the Commission should be assisted by the Trade Barriers Committee established by Regulation (EU) 2015/1843 of the European Parliament and of the Council ⁽¹²⁾. Given that IPI measures could have different effects on the Union's public procurement or concession markets, the comitology procedure applicable to draft implementing acts providing for the exclusion of tenders should be adapted and in such cases Article 5(4), third subparagraph, of Regulation (EU) No 182/2011 should apply.
- (30) If necessary and for matters affecting the application of the Union's legal framework on public procurement, the Commission should be able to seek the advice of the Advisory Committee for Public Contracts established by Council Decision 71/306/EEC ⁽¹³⁾.
- (31) Information received pursuant to this Regulation should only be used for the purpose for which it was requested and with due respect to the applicable Union and national data protection and confidentiality requirements. Regulation (EC) No 1049/2001 of the European Parliament and the Council ⁽¹⁴⁾ as well as Article 28 of Directive 2014/23/EU, Article 21 of Directive 2014/24/EU and Article 39 of Directive 2014/25/EU should apply accordingly.
- (32) In line with the Interinstitutional Agreement of 13 April 2016 on Better Law-Making ⁽¹⁵⁾ and with a view to, inter alia, reducing administrative burden, in particular on Member States, the Commission should regularly review the scope, functioning and efficiency of this Regulation. Such review would address, inter alia, the possibility of making use of any means available in order to facilitate the exchange of information, including electronic procurement facilities such as the standard forms for the publication of notices in the field of public procurement, pursuant to Commission Implementing Regulation (EU) 2019/1780 ⁽¹⁶⁾, as well as the burden incurred by contracting authorities and contracting entities when applying this Regulation. The Commission should report on its assessment to the European Parliament and to the Council and, where appropriate, should submit appropriate legislative proposals.
- (33) Public procurement rules and principles applicable to public contracts awarded by Union institutions on their own account are set out in Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council ⁽¹⁷⁾ and thus fall outside the scope of this Regulation. Under Regulation (EU, Euratom) 2018/1046, those rules are based on

⁽¹¹⁾ Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for the control by the Member States of the Commission's exercise of implementing powers (OJ L 55, 28.2.2011, p. 13).

⁽¹²⁾ Regulation (EU) 2015/1843 of the European Parliament and of the Council of 6 October 2015 laying down Union procedures in the field of the common commercial policy in order to ensure the exercise of the Union's rights under international trade rules, in particular those established under the auspices of the World Trade Organization (OJ L 272, 16.10.2015, p. 1).

⁽¹³⁾ Council Decision 71/306/EEC of 26 July 1971 setting up an Advisory Committee for Public Works Contracts (OJ L 185, 16.8.1971, p. 15).

⁽¹⁴⁾ Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ L 145, 31.5.2001, p. 43).

⁽¹⁵⁾ OJ L 123, 12.5.2016, p. 1.

⁽¹⁶⁾ Commission Implementing Regulation (EU) 2019/1780 of 23 September 2019 establishing standard forms for the publication of notices in the field of public procurement and repealing Implementing Regulation (EU) 2015/1986 ('eForms') (OJ L 272, 25.10.2019, p. 7).

⁽¹⁷⁾ Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012 (OJ L 193, 30.7.2018, p. 1).

the rules set out in Directives 2014/23/EU and 2014/24/EU. It is therefore appropriate to assess whether, in the context of a revision of Regulation (EU, Euratom) 2018/1046, the rules and principles set out in this Regulation should be made applicable also to public contracts awarded by Union institutions.

- (34) To facilitate the application of this Regulation by contracting authorities, contracting entities and economic operators, the Commission should issue guidelines. Those guidelines should provide information, in particular, on the notions of the origin of natural and legal persons, the origin of goods and services, additional obligation and the application of those provisions within the framework of this Regulation. In light of the overall policy objective of the Union to support small and medium-sized enterprises (SMEs), those guidelines should also take into account the specific information needs of SMEs in their application of this Regulation with a view to preventing their overburdening.
- (35) In accordance with the principle of proportionality and in order to achieve the basic objective of improving the access of Union economic operators, goods and services to the public procurement or concession markets of third countries by establishing measures regarding non-covered procurement, it is necessary and appropriate to lay down rules on procedures for the Commission to undertake investigations into alleged third-country measures or practices against Union economic operators, goods and services, and to enter into consultations with the third countries concerned. This Regulation does not go beyond what is necessary in order to achieve the objectives pursued, in accordance with Article 5(4) of the TEU,

HAVE ADOPTED THIS REGULATION:

CHAPTER I

General provisions

Article 1

Subject matter and scope of application

1. This Regulation establishes measures regarding non-covered procurement, intended to improve the access of Union economic operators, goods and services to the public procurement and concession markets of third countries. It lays down procedures for the Commission to undertake investigations into alleged third-country measures or practices against Union economic operators, goods and services, and to enter into consultations with the third countries concerned.

This Regulation provides for the possibility for the Commission to impose IPI measures in relation to such third-country measures or practices to restrict the access of economic operators, goods or services from third countries to Union public procurement procedures.

2. This Regulation shall apply to public procurement procedures covered by the following acts:

- (a) Directive 2014/23/EU;
- (b) Directive 2014/24/EU;
- (c) Directive 2014/25/EU.

3. This Regulation shall be without prejudice to any international obligations of the Union or to measures that Member States or their contracting authorities or contracting entities may take in accordance with the acts referred to in paragraph 2.

4. This Regulation shall apply to public procurement procedures launched after its entry into force. An IPI measure shall apply only to public procurement procedures which are covered by the IPI measure and have been launched between the entry into force of that IPI measure and its expiry, withdrawal or suspension. Contracting authorities and contracting entities shall include a reference to the application of this Regulation and any applicable IPI measure in the public procurement documents for procedures falling within the scope of an IPI measure.

5. Environmental, social and labour requirements shall apply to economic operators in accordance with Directives 2014/23/EU, 2014/24/EU and 2014/25/EU, or other Union law.

Article 2

Definitions

1. For the purposes of this Regulation, the following definitions apply:

- (a) 'economic operator' means an economic operator as defined in Directives 2014/23/EU, 2014/24/EU and 2014/25/EU;
- (b) 'goods' means goods referred to in the object of a public procurement procedure and in the specifications of the relevant contract, but does not cover any input, material or ingredient incorporated in the supplied goods;
- (c) 'estimated value' means the estimated value of a contract calculated in accordance with Directives 2014/23/EU, 2014/24/EU and 2014/25/EU;
- (d) 'score adjustment' means the relative diminution by a given percentage of the score of a tender, resulting from its evaluation by a contracting authority or a contracting entity, on the basis of the contract award criteria defined in the relevant public procurement documents. In cases where price or cost is the only contract award criterion, the score adjustment means the relative increase, for the purpose of the evaluation of tenders, by a given percentage of the price offered by a tenderer;
- (e) 'evidence' means any information, certificate, supporting document or statement that aims to prove compliance with the obligations set out in Article 8, such as:
 - (i) documents showing that the goods are originating in the Union or a third country;
 - (ii) a description of manufacturing processes, including samples, descriptions or photographs, for goods to be supplied;
 - (iii) an extract of relevant registers or of financial statements for the origin of services, including a value-added tax (VAT) identification number;
- (f) 'contracting authority' means a contracting authority as defined in Directives 2014/23/EU, 2014/24/EU and 2014/25/EU;
- (g) 'contracting entity' means a contracting entity as defined in Directives 2014/23/EU and 2014/25/EU;
- (h) 'interested party' means any person or entity whose interest might be affected by a third-country measure or practice, such as undertakings, associations of undertakings or the main cross-industry organisations representing social partners at Union level;
- (i) 'third-country measure or practice' means any legislative, regulatory or administrative measure, procedure or practice, or combination thereof, adopted or maintained by public authorities or individual contracting authorities or contracting entities in a third country, at any level, that results in a serious and recurrent impairment of access of Union economic operators, goods or services to the public procurement or concession markets of that third country;
- (j) 'TPI measure' means a measure adopted by the Commission in accordance with this Regulation limiting the access of economic operators, goods or services originating in third countries to the Union public procurement or concession markets in the area of non-covered procurement;
- (k) 'non-covered procurement' means public procurement procedures for goods, services or concessions regarding which the Union has not undertaken market access commitments in an international agreement in the field of public procurement or concessions;
- (l) 'contracts' means public contracts as defined in Directive 2014/24/EU, concessions as defined in Directive 2014/23/EU and supply, works and service contracts as defined in Directive 2014/25/EU;
- (m) 'tenderer' means a tenderer as defined in Directives 2014/23/EU, 2014/24/EU and 2014/25/EU;
- (n) 'country' means any State or separate customs territory, without such term having implications for sovereignty;

- (o) 'subcontracting' means arranging the execution of a part of a contract by a third party and does not include the mere delivery of goods or parts that are necessary for the provision of a service.

2. For the purpose of this Regulation, except for Article 6(3) and (7) thereof, the execution of works or a work within the meaning of Directives 2014/23/EU, 2014/24/EU and 2014/25/EU shall be considered as the provision of a service.

Article 3

Determination of origin

1. The origin of an economic operator shall be deemed to be:

- (a) in the case of a natural person, the country of which the person is a national or where that person has a right of permanent residence;
- (b) in the case of a legal person, either of the following:
 - (i) the country under the laws of which the legal person is constituted or otherwise organised and in the territory of which the legal person is engaged in substantive business operations;
 - (ii) if the legal person is not engaged in substantive business operations in the territory of the country in which it is constituted or otherwise organised, the origin of the legal person is to be that of the person or persons who may exercise, directly or indirectly, a dominant influence on the legal person by virtue of their ownership of that legal person, their financial participation therein, or the rules which govern that legal person.

For the purposes of the first subparagraph, point (b)(ii), that person or persons shall be presumed to have a dominant influence on the legal person in any of the following cases in which they, directly or indirectly:

- (a) hold the majority of the legal person's subscribed capital;
- (b) control the majority of the votes attaching to shares issued by the legal person; or
- (c) can appoint more than half of the legal person's administrative, management or supervisory body.

2. Where an economic operator is a group of natural or legal persons, public entities or any combination thereof, and at least one of such persons or entities originates from a third country whose economic operators, goods or services are subject to an IPI measure, that IPI measure shall also apply to tenders submitted by that group.

However, where the participation of such persons or entities in a group amounts to less than 15 % of the value of a tender submitted by that group, that IPI measure shall not apply to that tender, unless those persons or entities are necessary in order to fulfil the majority of at least one of the selection criteria in a public procurement procedure.

3. Contracting authorities or contracting entities may, at any time during the public procurement procedure, request the economic operator to submit, supplement, clarify or complete the information or documentation related to the verification of the economic operator's origin within an appropriate time limit, provided that such requests are made in compliance with the principles of equal treatment and transparency. Where the economic operator fails to provide such information or documentation without any reasonable explanation, and thereby prevents the verification of the economic operator's origin by contracting authorities or contracting entities or makes such a verification practically impossible or very difficult, that economic operator shall be excluded from participation in the public procurement procedure concerned.

4. The origin of a good shall be determined in accordance with Article 60 of Regulation (EU) No 952/2013, and the origin of a service shall be determined on the basis of the origin of the economic operator providing it.

*Article 4***Exemption for goods and services originating in least developed countries**

The Commission shall not initiate an investigation in respect of least developed countries listed in Annex IV to Regulation (EU) No 978/2012, unless there is evidence of a circumvention of any IPI measure imputable to the listed third country or their economic operators.

*CHAPTER II****Investigations, consultations, measures and obligations****Article 5***Investigations and consultations**

1. On its own initiative or upon a substantiated complaint of a Union interested party or a Member State, the Commission may initiate an investigation into an alleged third-country measure or practice by publishing a notice in the *Official Journal of the European Union*. Such a notice of initiation shall include the Commission's preliminary assessment of the third-country measure or practice and invite interested parties and Member States to provide relevant information to the Commission within a specified period of time.

The Commission shall make an online tool available on its website. Member States and Union interested parties shall use that tool in order to submit a substantiated complaint.

2. Upon publication of the notice referred to in paragraph 1, the Commission shall invite the third country concerned to submit its views, provide relevant information and enter into consultations with the Commission in order to eliminate or remedy the alleged third-country measure or practice. The Commission shall regularly inform Member States on the progress of the investigation and consultations within the Trade Barriers Committee established by Article 7 of Regulation (EU) 2015/1843.

3. The investigation and consultations shall be concluded within a period of nine months after the date of their initiation. In justified cases, the Commission may extend this period by five months by publishing a notice in the *Official Journal of the European Union* and informing the third country, interested parties and Member States of that extension.

4. Upon conclusion of the investigation and the consultations, the Commission shall make publicly available a report setting out the main findings of the investigation and a proposed course of action. The Commission shall present that report to the European Parliament and to the Council.

5. Where the Commission finds, following its investigation, that the alleged third-country measure or practice is not maintained or that it does not result in a serious and recurrent impairment of access of Union economic operators, goods or services to the public procurement or concession markets of the third country, the Commission shall terminate the investigation, and publish a notice of termination in the *Official Journal of the European Union*.

6. The Commission may suspend the investigation and the consultations at any time where the third country concerned:

- (a) takes satisfactory corrective actions to eliminate or remedy the serious and recurrent impairment of access of Union economic operators, goods or services to the public procurement or concession markets of the third country, and thereby improve such access; or
- (b) undertakes commitments towards the Union to end or phase out the third-country measure or practice, including by extending the scope of an existing agreement to public procurement, within a reasonable period of time and no later than six months after undertaking such commitments.

7. The Commission shall resume the investigation and the consultations at any time if it concludes that the reasons for the suspension are no longer valid.

8. The Commission shall publish a notice in the *Official Journal of the European Union* in the event of a suspension or resumption of the investigation and consultations.

Article 6

IPI measures

1. Where the Commission finds, following an investigation and consultations pursuant to Article 5, that a third-country measure or practice exists, it shall, if it considers it to be in the interest of the Union, adopt an IPI measure by means of an implementing act. That implementing act shall be adopted in accordance with the examination procedure referred to in Article 11(2).

2. A determination as to whether it is in the Union's interest to adopt an IPI measure shall be based on an appreciation of all the various interests taken as a whole, including the interests of the Union's economic operators. IPI measures shall not be adopted where the Commission, on the basis of all the information available, concludes that it is not in the Union's interest to adopt such measures.

3. The IPI measure shall be determined in light of available information and on the basis of the following criteria:

- (a) the proportionality of the IPI measure with regard to the third-country measure or practice;
- (b) the availability of alternative sources of supply for the goods and services concerned, in order to avoid or minimise a significant negative impact on contracting authorities and contracting entities.

4. The IPI measure shall only apply to public procurement procedures with an estimated value above a threshold to be determined by the Commission in light of the results of the investigation and consultations and taking into consideration the criteria set out in paragraph 3. That estimated value should be equal to or above EUR 15 000 000 net of VAT for works and concessions, and equal to or above EUR 5 000 000 net of VAT for goods and services.

5. The IPI measure shall apply in the case of specific contracts awarded under a dynamic purchasing system where the IPI measure also applies to those dynamic purchasing systems, with the exception of specific contracts the estimated value of which is below the respective values set out in Article 8 of Directive 2014/23/EU, Article 4 of Directive 2014/24/EU or Article 15 of Directive 2014/25/EU. The IPI measure shall not apply to public procurement procedures for the award of contracts based on a framework agreement or to contracts for individual lots to be awarded in accordance with Article 5(10) of Directive 2014/24/EU or Article 16(10) of Directive 2014/25/EU.

6. In the IPI measure referred to in paragraph 1, the Commission may decide, within the scope established in paragraph 8, to restrict the access of economic operators, goods or services from a third country to public procurement procedures by requiring contracting authorities or contracting entities to:

- (a) impose a score adjustment on tenders submitted by economic operators originating in that third country; or
- (b) exclude tenders submitted by economic operators originating in that third country.

7. The score adjustment referred to in paragraph 6, point (a), shall apply only for the purpose of the evaluation and ranking of the tenders. It shall not affect the price to be paid under the contract to be concluded with the successful tenderer.

8. In the IPI measure referred to in paragraph 1 the Commission shall specify the scope of application of the IPI measure, including:

- (a) the sectors or the categories of goods, services and concessions based on the Common Procurement Vocabulary as established by Regulation (EC) No 2195/2002 of the European Parliament and of the Council ⁽¹⁸⁾, as well as any applicable exceptions;

⁽¹⁸⁾ Regulation (EC) No 2195/2002 of the European Parliament and of the Council of 5 November 2002 on the Common Procurement Vocabulary (CPV) (OJ L 340, 16.12.2002, p. 1).

- (b) the specific categories of contracting authorities or contracting entities;
- (c) the specific categories of economic operators;
- (d) the specific thresholds equal to or above those set out in paragraph 4;
- (e) where appropriate, the percentage values of a score adjustment referred to in paragraph 6, point (a).

The percentage value of the adjustment as referred to in point (e) of the first subparagraph shall be set up to 50 % of the evaluation score of the tender, depending on the third country and sector of envisaged goods, services, works or concessions. For the purpose of public procurement procedures, where price or cost is the only contract award criterion, the score adjustment shall be twice the percentage value as set out in the first sentence of this subparagraph. An IPI measure shall indicate the respective percentage values separately.

9. When determining the IPI measure based on the options under paragraph 6, point (a) or (b), the Commission shall opt for the kind of measure that would be proportionate and most effectively remedy the level of impairment of access for Union economic operators, goods or services to third-country public procurement or concession markets.

10. Where the Commission considers that the third country takes satisfactory corrective actions to eliminate or remedy the impairment of access for Union economic operators, goods or services to public procurement or concession markets of that third country, thereby improving such access, or if the third country undertakes commitments to end the measure or practice in question, the Commission may withdraw the IPI measure or suspend its application.

Where the Commission considers that the corrective actions or commitments undertaken have been rescinded, suspended or improperly implemented, it shall make its findings publicly available and reinstate the IPI measure at any time.

The Commission may withdraw, suspend or reinstate an IPI measure by means of an implementing act and in such cases, shall publish a notice in the *Official Journal of the European Union*. That implementing act shall be adopted in accordance with the examination procedure referred to in Article 11(2).

11. An IPI measure shall expire five years from its entry into force. An IPI measure may be extended for a duration of five years. The Commission shall initiate a review of the IPI measure in question no later than nine months before the date of expiry of that IPI measure, by publishing a notice in the *Official Journal of the European Union*. Such a review shall be concluded within six months from publication of the relevant notice. Following such a review, the Commission may extend the duration of the IPI measure, adjust it appropriately or replace it with a different IPI measure by means of an implementing act. That implementing act shall be adopted in accordance with the examination procedure referred to in Article 11(2).

Article 7

List of contracting authorities exempted from the application of this Regulation

1. Upon a justified request by a Member State, the Commission may adopt, with a view to a fair distribution among Member States of the award procedures subject to IPI measures, a list of local contracting authorities in that Member State, within administrative units with population below 50 000 inhabitants, that are exempted from the application of this Regulation.

2. In its request, the Member State shall provide detailed information justifying the request for exemption and regarding the value of the contracts that are above the thresholds set out in Article 6(4) of this Regulation, awarded by all listed contracting authorities or contracting entities over the past three years from the 31 December preceding the request for exemption. An exemption may only be granted if the total value of contracts above the thresholds set out in Article 6(4) of this Regulation, and awarded by the contracting authorities or contracting entities which are not to be exempted, exceeds 80 % of the total value of above thresholds contracts falling within the scope of Directives 2014/23/EU, 2014/24/EU and 2014/25/EU awarded in the requesting Member State in the same three-year period.

3. The exemption shall be limited to what is strictly necessary and proportionate, taking into account the administrative capacity of the contracting authorities to be exempted.

4. The Commission shall inform Member States before adopting the list referred to in paragraph 1. That list, to be published in the *Official Journal of the European Union*, shall be valid for a period of three years and may be revised or renewed every three years upon justified request by the Member State concerned.

Article 8

Obligations upon the successful tenderer

1. In the case of public procurement procedures which are subject to an IPI measure, as well as in the case of contracts awarded on the basis of a framework agreement where the estimated value of those contracts is equal to or above the values set out in Article 8 of Directive 2014/23/EU, Article 4 of Directive 2014/24/EU and Article 15 of Directive 2014/25/EU and where those framework agreements were subject to the IPI measure, contracting authorities and contracting entities shall also include in public procurement documents the following obligations on successful tenderers:

- (a) not to subcontract more than 50 % of the total value of the contract to economic operators originating in a third country which is subject to an IPI measure;
- (b) for contracts whose subject matter covers the supply of goods, to ensure for the duration of the contract that goods or services supplied or provided in the execution of the contract and originating in the third country which is subject to the IPI measure represent no more than 50 % of the total value of the contract, irrespective of whether such goods or services are supplied or provided directly by the successful tenderer or by a subcontractor;
- (c) to provide to the contracting authority or to the contracting entity upon their request adequate evidence corresponding to point (a) or (b), at the latest upon completion of the execution of the contract;
- (d) to pay a proportionate charge, in the event of non-observance of the obligations referred in point (a) or (b), of between 10 % and 30 % of the total value of the contract.

2. For the purposes of paragraph 1, point (c), it is sufficient to provide evidence that more than 50 % of the total value of the contract originates in countries other than the third country subject to the IPI measure. The contracting authority or contracting entity shall request relevant evidence where reasonable indications of non-compliance with paragraph 1, point (a) or (b), exist or where the contract is awarded to a group of economic operators comprising a legal person originating in the third country subject to an IPI measure.

3. Contracting authorities and contracting entities shall include a reference to the obligations set out in this Article in the documents for public procurement procedures to which an IPI measure is applicable.

Article 9

Exceptions

1. Contracting authorities and contracting entities may on an exceptional basis decide not to apply an IPI measure with respect to a public procurement procedure where:

- (a) only tenders from economic operators originating in a third country subject to an IPI measure meet the tender requirements; or
- (b) the decision not to apply the IPI measure is justified for overriding reasons relating to the public interest, such as public health or protection of the environment.

2. Where a contracting authority or contracting entity decides not to apply an IPI measure, it shall provide the following information to the Commission, in a manner to be decided by the respective Member State and no later than thirty days after the award of the contract:

- (a) the name and contact details of the contracting authority or contracting entity;

- (b) a description of the object of the contract;
- (c) information on the origin of the economic operators;
- (d) the ground on which the decision not to apply the IPI measure is based, and a detailed justification for the application of the exception;
- (e) where appropriate, any other information deemed useful by the contracting authority or contracting entity.

The Commission may ask the Member States concerned for additional information.

Article 10

Remedies

To ensure the legal protection of economic operators having or having had an interest in obtaining a particular contract falling under the scope of this Regulation, Directives 89/665/EEC and 92/13/EEC shall apply accordingly.

CHAPTER III

Implementing powers, reporting and final provisions

Article 11

Committee procedure

1. The Commission shall be assisted by the Committee established by Article 7 of Regulation (EU) 2015/1843. That committee shall be a committee within the meaning of Article 3 of Regulation (EU) No 182/2011.
2. Where reference is made to this paragraph, Article 5 of Regulation (EU) No 182/2011 shall apply.
3. Where the Committee delivers no opinion for the adoption of draft IPI measure in the form of an exclusion of tenders, pursuant to Article 6, paragraph 6, point (b) of this Regulation, the Commission shall not adopt the draft implementing act and Article 5(4), third subparagraph, of Regulation (EU) No 182/2011 shall apply.

Article 12

Guidelines

To facilitate the application of this Regulation by contracting authorities and contracting entities and by economic operators, the Commission shall, within six months from 29 August 2022, issue guidelines.

Article 13

Reporting

1. By 30 August 2025 and at least every two years thereafter, the Commission shall submit a report to the European Parliament and to the Council on the application of this Regulation and on the progress made in international negotiations, regarding access for Union economic operators to the public procurement or concession markets of third countries, undertaken under this Regulation. That report shall be made public. Member States shall, upon request, provide the Commission with information on the application of measures under this Regulation, including as regards the number of public procurement procedures at central and sub-central level in which a given IPI measure was applied, the number of tenders received from third countries subject to that IPI measure, as well as cases in which a specific exception from the IPI measure was applied.

2. Contracting authorities and contracting entities shall report to the Commission through the Tenders electronic daily about the application of IPI measures, as part of the information on contract awards. Such report shall include, for each relevant procedure, information on the application of IPI measures, the number of tenders received from third countries subject to the relevant IPI measure, the number of tenders for which the exclusion of the tender or score adjustment were applied and the application of specific exceptions from the IPI measure. The Commission shall use this data in its regular reporting required under this Article. Member States shall provide the Commission with additional information on the application of measures under this Regulation upon its request.

Article 14

Review

No later than four years after the adoption of an implementing act or no later than 30 August 2027, whichever the earlier, and every five years thereafter, the Commission shall review the scope, functioning and efficiency of this Regulation, and shall report its findings to the European Parliament and to the Council.

Article 15

Entry into force

This Regulation shall enter into force on the sixtieth 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, 23 June 2022.

For the European Parliament
The President
R. METSOLA

For the Council
The President
F. RIESTER

**Joint statement of the European Parliament and the Council in respect of Regulation (EU) 2022/1031
of the European Parliament and of the Council**

The European Parliament and Council recognise that the rules on comitology agreed in this instrument do not prejudice the outcome of other ongoing or future legislative negotiations and are not to be seen as precedent for other legislative files.

**Statement by the Commission on the review of the International Procurement Instrument
Regulation (Regulation (EU) 2022/1031 of the European Parliament and of the Council)**

When conducting a review of the scope, functioning and efficiency of Regulation (EU) 2022/1031 of the European Parliament and of the Council, in line with its Article 14, the Commission will also assess the need to exempt from its application any of the developing countries that are beneficiaries of the general arrangement referred to in point (a) of Article 1(2) of Regulation (EU) No 978/2012, and in particular the beneficiaries of the special incentive arrangement for sustainable development and good governance as defined in Article 9 of Regulation (EU) No 978/2012. In the review, the Commission will pay particular attention to sectors that are considered strategic in respect of EU public procurement.

REGULATION (EU) 2022/1032 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
of 29 June 2022
amending Regulations (EU) 2017/1938 and (EC) No 715/2009 with regard to gas storage
(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 194(2) thereof,

Having regard to the proposal from the European Commission,

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

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

After consulting the Committee of the Regions,

Acting in accordance with the ordinary legislative procedure ⁽²⁾,

Whereas:

- (1) While short-term gas supply disruptions have occurred in the past, there are several factors which distinguish the situation in 2022 from previous security of gas supply crises. The escalation of the Russian military aggression against Ukraine since February 2022 has led to unprecedented price increases. Those price increases are likely to fundamentally change the incentives to fill underground gas storage facilities in the Union. In the current geopolitical situation, further disruptions of gas supplies cannot be excluded. Such supply disruptions could severely harm citizens and the economy of the Union because the Union is still, to a significant extent, dependent on external gas supplies, which can be affected by the conflict.
- (2) The nature and consequences of recent events are large-scale and Union-wide and therefore require a comprehensive Union response. That response should prioritise measures that can reinforce the security of gas supply at Union level, in particular gas supplies to protected customers. Energy savings and energy efficiency are key contributors to that objective. It is therefore crucial that the Union acts in a coordinated manner to avoid potential risks resulting from possible gas supply disruptions, without prejudice to Member States' right to choose between different energy sources and the general structure of their energy supply in accordance with Article 194 of the Treaty on the Functioning of the European Union (TFEU).
- (3) Underground gas storage facilities contribute to the security of gas supply and well-filled underground gas storage facilities lead to the security of gas supply by providing additional gas in the event of high demand or supply disruptions. Since supply disruptions of pipeline gas can occur at any time, measures regarding the filling level of Union underground gas storage facilities should be introduced to safeguard the security of gas supply for the winter of 2022–2023.
- (4) Regulation (EU) 2017/1938 of the European Parliament and of the Council ⁽³⁾ introduced a solidarity mechanism as an instrument to mitigate the effects of a severe emergency within the Union in which gas supply to solidarity protected customers, as an essential security need and a necessary priority is at stake in a Member State. In the event of a Union emergency, an immediate response ensures that Member States are able to provide enhanced protection to customers.

⁽¹⁾ Opinion of 18 May 2022 (not yet published in the Official Journal).

⁽²⁾ Position of the European Parliament of 23 June 2022 (not yet published in the Official Journal) and decision of the Council of 28 June 2022.

⁽³⁾ Regulation (EU) 2017/1938 of the European Parliament and of the Council of 25 October 2017 concerning measures to safeguard the security of gas supply and repealing Regulation (EU) No 994/2010 (OJ L 280, 28.10.2017, p. 1).

- (5) The impact of the Russian military aggression against Ukraine has shown that the existing security of supply rules are not adapted to sudden major changes in the geopolitical situation, in which supply shortages and price peaks can result not only from the failure of infrastructure or extreme weather conditions but also from intentional major events and from longer-lasting or sudden supply disruptions. It is therefore necessary to address the sudden greatly increased risks resulting from the current changes in the geopolitical situation, including by diversifying the Union's energy supplies.
- (6) Based on the Commission's analysis of, *inter alia*, the adequacy of measures to secure gas supply and the Union-wide reinforced risk preparedness analysis carried out in February 2022 by the Commission and the Gas Coordination Group (the 'GCG') established by Regulation (EU) 2017/1938, each Member State should, in principle, ensure that the underground gas storage facilities that are located on its territory and directly interconnected to a market area of that Member State are filled to at least 90 % of their capacity at Member State level by 1 November of each year (filling target), with a series of intermediate targets for each Member State in May, July, September and February (filling trajectory) of the year thereafter. Some Member States that have significant underground storage capacity would be disproportionately affected by the obligation to meet the filling target for the underground gas storage facilities on their territory. In order to reflect that situation, the obligation to fill their underground gas storage facilities should be reduced to 35 % of their average annual gas consumption over the preceding five years. This should be without prejudice to the obligation of other Member States to contribute to the filling of the underground gas storage facilities concerned. Member States should be able to decide, subject to conditions, to partially meet the filling target by counting liquefied natural gas (LNG) stocks stored in LNG facilities. The filling targets are necessary to ensure that consumers in the Union are adequately protected against gas supply shortages. For 2022, a lower filling target of 80 % and a reduced number of intermediate targets should apply, taking into account the fact that this Regulation is to enter into force after the start of the storage filling season and that Member States will have limited time to implement it.
- (7) When filling their storage facilities, Member States should aim to diversify their gas suppliers with a view to reducing their dependence where that may endanger the security of energy supply or the essential security interests of the Union or of the Member States.
- (8) Each year from 2023, gas storage should be specifically monitored from February to avoid the sudden withdrawal of gas from underground gas storage facilities in the middle of winter, which could cause security of supply challenges before the end of winter. The filling trajectories should enable continuous monitoring throughout the storage filling season.
- (9) Each year from 2023, each Member State with underground gas storage facilities should submit to the Commission a draft filling trajectory for such facilities on its territory and directly interconnected to its market area in an aggregated form. Taking into account the assessment of the GCG, the Commission should take a decision setting the filling trajectory for each Member State in a manner that does not unduly distort the competitive position of underground gas storage facilities in that Member State in comparison with such facilities located in neighbouring Member States.
- (10) In order to set the filling trajectory for each Member State with underground gas storage facilities from 2023 based on the draft filling trajectory submitted by each such Member State, implementing powers should be conferred on the Commission. Those powers should be exercised in accordance with Regulation (EU) No 182/2011 of the European Parliament and of the Council (*).
- (11) The filling trajectory for each Member State with underground gas storage facilities should comprise a series of intermediate targets and should be based on the average filling rate for that Member State during the preceding five years. For Member States for which the filling target is reduced to 35 % of their average annual gas consumption, the intermediate targets of the filling trajectory should be reduced accordingly.

(*) Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers (OJ L 55, 28.2.2011, p. 13).

- (12) Where a Member State cannot meet the filling target on time due to technical issues such as problems related to the pipelines feeding the underground gas storage facilities or with injection facilities, the Member State should be allowed to meet the filling target at a later stage. However, each filling target should be met as soon as technically possible, and in any event no later than 1 December of the year concerned, in order to safeguard the security of gas supply for the winter period.
- (13) It is possible that a Member State cannot meet the filling target or an intermediate target due to a regional or Union emergency, such as where the gas supply is insufficient as referred to in Article 11(1), point (c), of Regulation (EU) 2017/1938, which the Commission has declared at the request of one or more Member States, as the case may be, which have declared a national emergency within the meaning of that Regulation. Therefore, the filling targets, including the burden-sharing target, should not apply where, and for as long as, the Commission has declared a regional or Union emergency pursuant to Article 12 of that Regulation.
- (14) To ensure that there is no deviation from the filling trajectories, the competent authorities should continuously monitor the filling levels of the underground gas storage facilities. The filling trajectories should be subject to a margin of five percentage points. Where the filling level of a Member State is more than five percentage points below the level of its filling trajectory, the competent authority should immediately take effective measures to increase it. Member States should inform the Commission and the GCG of such measures.
- (15) Any substantial and sustained deviation by a Member State from its filling trajectory can jeopardise adequate filling levels and the filling target, which are necessary to safeguard the security of gas supply in the Union in a spirit of solidarity. In the event of such a substantial and sustained deviation from the filling trajectory or of a deviation from the filling target, the Commission should be empowered to take effective measures to avoid security of gas supply problems resulting from unfilled storage facilities. When deciding upon such effective measures, the Commission should take into account the specific situation of the Member State concerned, such as the size of the underground gas storage facilities in relation to domestic gas consumption, the importance of the underground gas storage facilities for security of gas supply in the region and any existing LNG storage facilities. As this Regulation is to enter into force after the start of the storage filling season in 2022, any measures taken by the Commission to address deviations from the filling trajectory for 2022 should take into account the limited time available for the implementation of this Regulation at national level. The Commission should ensure that the measures do not go beyond what is necessary to safeguard the security of gas supply, without putting a disproportionate burden on Member States, gas market participants, storage system operators or consumers.
- (16) Member States should take all necessary measures to ensure that the filling targets are met. In so doing, they should aim to use market-based measures as a first recourse, where possible, so as to avoid unnecessary market disruption. Member States should be free to set a higher filling target, so that the Union could strive to reach collectively the filling of 85 % of the capacity of the underground gas storage facilities in the Union for 2022. Given the various regulatory regimes already in place in many Member States to support the filling of storage facilities, no specific instrument to meet the filling trajectories or the filling target should be imposed. Member States should remain free to decide which instrument is most appropriate for their national systems, provided that certain conditions are met. Member States or competent regulatory authorities should therefore have the possibility to determine which market participants are to be required to ensure the filling of the underground gas storage facilities. They should also be able to decide whether regulatory means, such as measures to oblige capacity holders to free up unused capacity, which are possible under existing Union market rules are sufficient to ensure that the filling targets are met, or whether financial incentives or storage tariff rebates are necessary. If a Member State imposes an obligation on suppliers of gas to protected customers on its territory to store gas in underground gas storage facilities, the amount of gas to be stored should be determined on the basis of the amount of natural gas supplied to those protected customers. Member States should coordinate with each other and use instruments such as platforms for the purchase of LNG in order to maximise the utilisation of LNG to fill storage facilities. In addition, Member States should reduce infrastructure and regulatory barriers to the shared use of LNG to fill storage facilities.
- (17) The Commission communication of 8 March 2022 entitled 'REPowerEU: Joint European Action for more affordable, secure and sustainable energy' clarified that Union law allows Member States to provide aid to gas suppliers under Article 107(3), point (c) TFEU in order to ensure the filling of storage facilities, for example in the form of guarantees (two-way contract for difference).

- (18) Any measure taken by Member States to ensure the filling of underground gas storage facilities, including the conditions to be imposed on filling based on burden-sharing and the conditions to be imposed on withdrawal of gas from underground gas storage facilities, should be necessary, clearly defined, transparent, proportionate, non-discriminatory and verifiable, and should not unduly distort competition or the proper functioning of the internal market in gas or endanger the security of gas supply of other Member States or of the Union. In particular, such measures should not lead to the strengthening of a dominant position, or to windfall gains for undertakings that control underground gas storage facilities or that have booked but have not used, storage capacity.
- (19) The efficient use of the existing infrastructure, including cross-border transmission capacities, underground gas storage facilities and LNG facilities, is important to safeguard the security of gas supply in a spirit of solidarity. Open energy borders are key for the security of gas supply, including in times of gas supply disruptions at national, regional or Union level. Therefore, measures taken to ensure the filling of underground gas storage facilities should not block or restrict cross-border capacities allocated in accordance with Commission Regulation (EU) 2017/459 ⁽ⁱ⁾. In addition, Member States should ensure that storage remains available, including to neighbouring Member States and where an emergency as referred to in Article 11(1), point (c), of Regulation (EU) 2017/1938 is declared.
- (20) The storage obligation is likely to impose a financial burden on the relevant market participants in those Member States which have relevant underground gas storage facilities on their territory, while the increase in the level of security of gas supply is intended to benefit all Member States, including those that do not have underground gas storage facilities. To share the burden of ensuring that underground gas storage facilities in the Union are sufficiently filled to safeguard the security of gas supply, in a spirit of solidarity, Member States without underground gas storage facilities should use underground gas storage facilities in other Member States. In the event that a Member State has no interconnection with other Member States or if a Member State's limited cross-border transmission capacity or other technical reasons make it impossible to use underground gas storage facilities in other Member States, that obligation should be reduced accordingly.
- (21) Member States without underground gas storage facilities should ensure that market participants within such Member States have in place arrangements in Member States that have such facilities that provide for the use, by 1 November, of storage volumes corresponding to at least 15 % of their average annual gas consumption over the preceding five years. However, Member States without underground gas storage facilities should also be able to develop an alternative burden-sharing mechanism with one or more Member States that have underground gas storage facilities. Also other existing equivalent measures to safeguard the security of gas supply should be taken into account when considering the burden-sharing mechanism, such as an equivalent obligation with regard to fuels other than natural gas, including oil, subject to certain conditions. Member States should notify such alternative burden-sharing mechanisms to the Commission and demonstrate the technical limitations, and the equivalence of the measures taken.
- (22) It is possible that the measures by which Member States without underground gas storage facilities share the burden of the storage obligation with Member States that have underground gas storage facilities have, in turn, a financial impact on the relevant market participants. Member States without underground gas storage facilities should therefore be allowed to provide financial incentives or compensation to market participants for the shortfall in revenues or for the costs of obligations imposed on them which cannot be covered by revenue. If such measures are financed through a levy, that levy should not be applied to cross-border interconnection points.
- (23) Effective monitoring and reporting is essential for the assessment of the nature and extent of the risks related to security of gas supply as well as for the choice of the appropriate measures to counter such risks. Operators of underground gas storage facilities should report filling levels to the competent authorities on a monthly basis during the storage filling season. Owners and operators of underground gas storage facilities are encouraged to enter the capacity and the filling level for each underground gas storage facility regularly on a central reporting platform.

⁽ⁱ⁾ Commission Regulation (EU) 2017/459 of 16 March 2017 establishing a network code on capacity allocation mechanisms in gas transmission systems and repealing Regulation (EU) No 984/2013 (OJ L 72, 17.3.2017, p. 1).

- (24) The competent authorities play a significant role in monitoring the security of gas supply and ensure balance between the security of gas supply and the cost for consumers arising from the measures. The competent authority of each Member State or another entity designated by the Member State should monitor the filling levels of the underground gas storage facilities on their territory and report the results to the Commission. It should also be possible for the Commission, where appropriate, to invite the European Union Agency for the Cooperation of Energy Regulators (ACER) to assist with monitoring.
- (25) It is vital that the risk assessments carried out pursuant to Article 7 of Regulation (EU) 2017/1938 take into account all risks which could severely affect the security of gas supply. For that purpose, the risk-based approach to assessing the security of gas supply and the establishment of preventive and mitigating measures should also take into account scenarios in which there is a total disruption of a single supply source. To ensure maximum preparedness in order to avoid a disruption of gas supply and to mitigate the effects of such a disruption, the common risk assessment and the national risk assessments should be carried out by taking into account such scenarios. This would enable the coordination of measures to mitigate the effects of an emergency and the optimisation of resources to guarantee a continued supply, in the event of a total disruption of supply.
- (26) The role of the GCG should be reinforced, with an explicit mandate to monitor Member States' performance and to develop best practices, with regard to the security of gas supply. The Commission should therefore regularly report to the GCG and the GCG should assist the Commission in monitoring the filling targets and in ensuring that they are met.
- (27) The GCG acts as a key adviser to the Commission to facilitate the coordination of security of supply measures, assisting the Commission at all times and, more specifically, in the event of a crisis. As necessary, in order to ensure maximum preparedness and to facilitate the quick exchange of information, the Commission will convene, without delay, the crisis management formation of the GCG, in anticipation of a possible crisis. The GCG crisis management formation should be available to assist the Commission for as long as necessary. To that end, the GCG should maintain channels of communication with Member States and all relevant market participants in the security of gas supply and collect information relevant to the security of gas supply at national, regional and Union level.
- (28) The storage system sector is of high importance to the Union, the security of its energy supplies and other essential security interests of the Union. Accordingly, underground gas storage facilities are considered to be critical infrastructure within the meaning of Council Directive 2008/114/EC ⁽⁶⁾. The Member States are encouraged to take into account the measures introduced by this Regulation in their national energy and climate plans and in the progress reports adopted pursuant to Regulation (EU) 2018/1999 of the European Parliament and of the Council ⁽⁷⁾.
- (29) Additional safeguards are necessary in the storage system network to avoid threats to public order and public security in the Union or to the welfare of Union citizens. Member States should ensure that each storage system operator, including storage system operators that are controlled by transmission system operators, is certified by the national regulatory authority or by another competent authority designated by the Member State, in order to ensure that the security of energy supply or any other essential security interest in the Union or any Member State is not endangered by the influence over the storage system operator. For the analysis of possible security of energy supply risks, coordination between Member States in carrying out the security of supply assessment is important. That assessment should not discriminate between market participants but should fully comply with the principles of a well-functioning internal market. In order to quickly alleviate the risk resulting from low filling levels, that certification should be prioritised and carried out faster for larger underground storage facilities which have recently been filled at consistently low levels, so as to ensure that potential security of gas supply problems resulting from control over such large storage facilities can be excluded or, if possible, rectified. Considering the average filling level of the preceding six years of all Union underground storage facilities on 31 March being 35 % of their maximum capacity, the threshold for the definition of an unusually low filling level in March 2021 and March 2022 should be set at 30 %.

⁽⁶⁾ Council Directive 2008/114/EC of 8 December 2008 on the identification and designation of European critical infrastructures and the assessment of the need to improve their protection (OJ L 345, 23.12.2008, p. 75).

⁽⁷⁾ Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018 on the Governance of the Energy Union and Climate Action, amending Regulations (EC) No 663/2009 and (EC) No 715/2009 of the European Parliament and of the Council, Directives 94/22/EC, 98/70/EC, 2009/31/EC, 2009/73/EC, 2010/31/EU, 2012/27/EU and 2013/30/EU of the European Parliament and of the Council, Council Directives 2009/119/EC and (EU) 2015/652 and repealing Regulation (EU) No 525/2013 of the European Parliament and of the Council (OJ L 328, 21.12.2018, p. 1).

- (30) National regulatory authorities or another competent authority designated by the Member States concerned (in either case, 'certifying authority') should refuse certification where they conclude that a person who directly or indirectly controls or exercises any right over the storage system operator could endanger the security of energy supply or any other essential security interest at national, regional or Union level. In making that assessment, the certifying authority should take into account commercial relationships that could negatively affect the incentives and ability of the storage system operator to fill the underground gas storage facility, as well as the international obligations of the Union and any other specific facts and circumstances of the case. To ensure the consistent application of certification rules across the Union, the observance of the international obligations of the Union and solidarity and energy security within the Union, the certifying authority should take the utmost account of the Commission's opinion when it takes decisions on certification, including by revising its draft decision, where appropriate. Where a certifying authority refuses certification, it should have the power to require any person to dispose of the shareholding or rights they have over the storage system owner or storage system operator and to set a time limit for such disposal, to order any other appropriate measure to ensure that that person is not able to exercise any control or right over that storage system owner or storage system operator, and to decide on appropriate compensatory measures. Any measure taken in the certification decision to address security of gas supply risks or other essential security interests should be necessary, clearly defined, transparent, proportionate and non-discriminatory.
- (31) This Regulation respects fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union (the 'Charter'). In particular, it respects the right not to be deprived of one's possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss as provided for in Article 17 of the Charter and the right to an effective judicial remedy and to a fair trial as provided for in Article 47 of the Charter.
- (32) If undertakings are due to purchase more gas when the price of gas is high, this could further drive up prices. Therefore regulatory authorities should be able to apply a discount of up to 100 % to entry and exit tariffs for transmission and distribution capacity to and from storage, to both underground gas storage facilities and LNG facilities, making storage more attractive for market participants. National regulatory authorities and competition authorities are also encouraged to use their powers to effectively exclude undue increases of storage tariffs.
- (33) In view of the current exceptional circumstances and the uncertainties related to future changes in the geopolitical situation, Member States are encouraged to meet the filling targets as quickly as possible.
- (34) Considering the imminent danger for the security of gas supply brought about by the Russian military aggression against Ukraine, this Regulation should enter into force on the day after its publication. Due to the exceptional nature of the current circumstances, certain provisions introduced by this Regulation should apply only until 31 December 2025.
- (35) This Regulation should, as a matter of urgency, become part of the Energy Community *acquis* in accordance with the Energy Community Treaty, which was signed in Athens on 25 October 2005 and entered into force on 1 July 2006.
- (36) Regulation (EU) 2017/1938 and Regulation (EC) No 715/2009 of the European Parliament and of the Council (*) should therefore be amended accordingly,

HAVE ADOPTED THIS REGULATION:

Article 1

Amendments to Regulation (EU) 2017/1938

Regulation (EU) 2017/1938 is amended as follows:

- (1) in Article 2, the following points are added:

(*) Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005 (OJ L 211, 14.8.2009, p. 36).

- (27) “filling trajectory” means a series of intermediate targets for the underground gas storage facilities of each Member State, as listed in Annex Ia for 2022 and, for the following years, set in accordance with Article 6a;
- (28) “filling target” means a binding target for the filling level of the aggregated capacity of the underground gas storage facilities;
- (29) “strategic storage” means underground storage or part of underground storage of non-liquefied natural gas which is purchased, managed and stored by transmission systems operators, an entity designated by the Member States or an undertaking, and which may be released only after prior notification or public authority authorisation for release, and is generally released in the case of:
- (a) major supply scarcity;
 - (b) a supply disruption; or
 - (c) the declaration of an emergency as referred to in Article 11(1), point (c);
- (30) “balancing stock” means non-liquefied natural gas which is:
- (a) purchased, managed and stored underground by transmission system operators or by an entity designated by the Member State, for the sole purposes of carrying out the functions of transmission system operators and of the security of gas supply; and
 - (b) dispatched only where required to keep the system in operation under secure and reliable conditions in accordance with Article 13 of Directive 2009/73/EC and with Articles 8 and 9 of Regulation (EU) No 312/2014;
- (31) “underground gas storage facility” means a storage facility as defined in Article 2, point (9), of Directive 2009/73/EC that is used for the stocking of natural gas, including balancing stock, and that is connected to a transmission or distribution system, excluding above-ground spherical or linepack storage.’;
- (2) the following articles are inserted:

‘Article 6a

Filling targets and filling trajectories

1. Subject to paragraphs 2 to 5, Member States shall meet the following filling targets for the aggregated capacity of all underground gas storage facilities that are located on their territory and directly interconnected to a market area in their territory and for storage facilities listed in Annex Ib by 1 November each year:

- (a) for 2022: 80 %;
- (b) from 2023: 90 %.

For the purpose of complying with this paragraph, Member States shall take into account the objective of safeguarding the security of gas supply in the Union in accordance with Article 1.

2. Notwithstanding paragraph 1 and without prejudice to the obligations of other Member States to fill the underground gas storage facilities concerned, the filling target for each Member State in which the underground gas storage facilities are located shall be reduced to a volume corresponding to 35 % of the average annual gas consumption over the preceding five years for that Member State.

3. Notwithstanding paragraph 1 and without prejudice to the obligations of other Member States to fill the underground gas storage facilities concerned, the filling target for each Member State in which the underground gas storage facilities are located shall be reduced by the volume which was supplied to third countries during the reference period 2016 to 2021 if the average volume supplied was more than 15 TWh per year during the gas storage withdrawal period (October – April).

4. For the underground gas storage facilities listed in Annex Ib, the filling targets pursuant to paragraph 1 and the filling trajectories pursuant to paragraph 7 shall apply. The details of the obligations of each Member State will be determined in a bilateral agreement in accordance with Annex Ib.

5. A Member State may partially meet the filling target by counting the LNG physically stored and available in its LNG facilities if both of the following conditions are met:

- (a) the gas system includes significant capacity of LNG storage, accounting annually for more than 4 % of the average national consumption over the preceding five years;
- (b) the Member State has imposed an obligation on gas suppliers to store minimum volumes of gas in underground gas storage facilities and/or LNG facilities in accordance with Article 6b(1), point (a).

6. Member States shall take the necessary measures to meet the intermediate targets or to ensure that they are met as follows:

- (a) for 2022: as set out in Annex Ia; and
- (b) from 2023: in accordance with paragraph 7.

7. For 2023 and the following years, each Member State with underground gas storage facilities shall submit to the Commission, by 15 September of the previous year, a draft filling trajectory with intermediary targets for February, May, July and September, including technical information, for the underground gas storage facilities on its territory and directly interconnected to its market area in an aggregated form. The filling trajectory and the intermediate targets shall be based on the average filling rate during the preceding five years.

For Member States for which the filling target is reduced to 35 % of their average annual gas consumption pursuant to paragraph 2, the intermediate targets of the filling trajectory shall be reduced accordingly.

Based on the technical information provided by each Member State and taking into account the assessment of the GCG, the Commission shall adopt implementing acts setting the filling trajectory for each Member State. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 18a(2). They shall be adopted by 15 November of the preceding year, where necessary and including where a Member State has submitted an updated draft filling trajectory. They shall be based on an assessment of the general security of gas supply situation and the development of gas demand and supply in the Union and individual Member States, and set in a manner that safeguards the security of gas supply, while avoiding unnecessary burdens on Member States, gas market participants, storage system operators or customers and not unduly distorting competition between storage facilities located in neighbouring Member States.

8. Where, in any given year, a Member State is not able to meet its filling target by 1 November due to the specific technical characteristics of one or more underground gas storage facilities within its territory, such as exceptionally low injection rates, it shall be allowed to meet it by 1 December. The Member State shall inform the Commission by 1 November, providing reasons for the delay.

9. The filling target shall not apply where and for as long as the Commission has declared a regional or Union emergency pursuant to Article 12 at the request, as the case may be, of one or more Member States that have declared a national emergency.

10. The competent authority of each Member State shall continuously monitor compliance with the filling trajectory and shall report regularly to the GCG. If the filling level of a given Member State is more than five percentage points below the level of the filling trajectory, the competent authority shall, without delay, take effective measures to increase it. Member States shall inform the Commission and the GCG of the measures taken.

11. In the event of a substantial and sustained deviation by a Member State from the filling trajectory, which compromises the meeting of the filling target or in the event of a deviation from the filling target, the Commission shall, after consulting the GCG and the Member States concerned, issue a recommendation to that Member State or to the other Member States concerned regarding measures to be taken immediately.

Where the deviation is not significantly reduced within one month of receipt of the Commission's recommendation, the Commission shall, after consulting the GCG and the Member State concerned, take a decision as a measure of last resort to require the Member State concerned to take measures that effectively remedy the deviation, including, where appropriate, one or more of the measures provided for in Article 6b(1), or any other measure to ensure that the filling target pursuant to this Article is met.

In deciding which measures to take pursuant to the second subparagraph, the Commission shall take into account the specific situation of the Member States concerned, such as the size of the underground gas storage facilities in relation to the domestic gas consumption, the importance of the underground gas storage facilities for the security of gas supply in the region and any existing LNG storage facilities.

Any measures taken by the Commission to address deviations from the filling trajectory or the filling target for 2022 shall take into account the short timeframe for the implementation of this Article at national level, which may have contributed to the deviation from the filling trajectory or the filling target for 2022.

The Commission shall ensure that the measures taken pursuant to this paragraph do not:

- (a) go beyond what is necessary to safeguard the security of gas supply;
- (b) place a disproportionate burden on Member States, gas market participants, storage system operators or customers.

Article 6b

Implementation of filling targets

1. Member States shall take all necessary measures, including providing for financial incentives or compensation to market participants, to meet the filling targets set pursuant to Article 6a. When ensuring that the filling targets are met, Member States shall prioritise, where possible, market-based measures.

To the extent that any of the measures provided for in this Article are duties and powers of the national regulatory authority pursuant to Article 41 of Directive 2009/73/EC, the national regulatory authorities shall be responsible for taking those measures.

Measures taken pursuant to this paragraph may, in particular, include:

- (a) requiring gas suppliers to store minimum volumes of gas in storage facilities, including in underground gas storage facilities and/or in LNG storage facilities, those volumes to be determined on the basis of the amount of gas supplied by gas suppliers to protected customers;
- (b) requiring storage system operators to tender their capacities to market participants;
- (c) requiring transmission system operators or entities designated by the Member State to purchase and manage balancing stock exclusively for carrying out their functions as transmission system operators and, where necessary, imposing an obligation on other designated entities for the purpose of safeguarding the security of gas supply in the case of an emergency as referred to in Article 11(1), point (c);
- (d) using coordinated instruments, such as platforms for the purchase of LNG, with other Member States to maximise the utilisation of LNG and to reduce infrastructure and regulatory barriers to the shared use of LNG to fill underground gas storage facilities;
- (e) using voluntary mechanisms for the joint procurement of natural gas, regarding the application of which the Commission may, if necessary, issue guidance by 1 August 2022;
- (f) providing financial incentives for market participants, including for storage system operators, such as contracts for difference, or providing compensation to market participants for the shortfall in revenues or for costs incurred by them as a result of obligations on market participants, including storage system operators which cannot be covered by revenue;
- (g) requiring storage capacity holders to use or release unused booked capacities, while still obliging the storage capacity holder not using the storage capacity to pay the agreed price for the whole term of the storage contract;
- (h) adopting effective instruments for the purchase and management of strategic storage by public or private entities, provided that such instruments do not distort competition or the proper functioning of the internal market;
- (i) appointing a dedicated entity tasked with meeting the filling target in the event that the filling target would not otherwise be met;
- (j) providing discounts on storage tariffs;

- (k) collecting the revenues needed to recover the capital and operational expenditures related to regulated storage facilities as storage tariffs and as a dedicated charge incorporated into transmission tariffs collected only from exit points to final customers located within the same Member States, provided that revenues collected through tariffs are not larger than the allowed revenues.
2. The measures taken by the Member States pursuant to paragraph 1 shall be limited to what is necessary to meet the filling trajectories and filling targets. They shall be clearly defined, transparent, proportionate, non-discriminatory and verifiable. They shall not unduly distort competition or the proper functioning of the internal market in gas or endanger the security of gas supply of other Member States or of the Union.
3. Member States shall take all necessary measures to ensure the use of the existing infrastructure at national and regional level for the benefit of the security of gas supply in an efficient way. Those measures shall under no circumstances block or restrict the cross-border use of storage facilities or LNG facilities and shall not limit cross-border transmission capacities allocated in accordance with Commission Regulation (EU) 2017/459 (*).
4. When taking measures pursuant to this Article, Member States shall apply the energy efficiency first principle, while still achieving the objectives of their respective measures, in accordance with Regulation (EU) 2018/1999 of the European Parliament and of the Council (**).

Article 6c

Storage arrangements and burden-sharing mechanism

1. A Member State without underground gas storage facilities shall ensure that market participants within that Member State have in place arrangements with underground storage system operators or other market participants in Member States with underground gas storage facilities. Those arrangements shall provide for the use, by 1 November, of storage volumes corresponding to at least 15 % of the average annual gas consumption over the preceding five years of the Member State without underground gas storage facilities. However, where cross-border transmission capacity or other technical limitations prevent a Member State without underground gas storage facilities from fully using 15 % of those storage volumes, that Member State shall store only those volumes that are technically possible.

In the event that technical limitations do not allow a Member State to comply with the obligation laid down in the first subparagraph, and that Member State has in place an obligation to store other fuels to replace gas, the obligation laid down in the first subparagraph may exceptionally be met by an equivalent obligation to store fuels other than gas. The technical limitations and the equivalence of the measure shall be demonstrated by the Member State concerned.

2. By way of derogation from paragraph 1, a Member State without underground gas storage facilities may develop a burden-sharing mechanism with one or more Member States with underground gas storage facilities (burden-sharing mechanism).

The burden-sharing mechanism shall be based on the relevant data from the latest risk assessment pursuant to Article 7 and shall take into account all of the following parameters:

- (a) the cost of financial support for meeting the filling target, exclusive of the costs of meeting any strategic storage obligations;
- (b) the gas volumes needed to meet the demand of protected customers in accordance with Article 6(1);
- (c) any technical limitations, including the available underground storage capacity, technical cross-border transmission capacity and withdrawal rates.

Member States shall notify the burden-sharing mechanism to the Commission by 2 September 2022. In the absence of an agreement on a burden sharing mechanism by that date, Member States without underground gas storage facilities shall demonstrate that they comply with paragraph 1 and shall notify the Commission accordingly.

3. As a transitional measure, Member States without underground gas storage facilities, but which have underground gas storage facilities included in the last list of projects of common interest referred to in Regulation (EU) 2022/869 of the European Parliament and of the Council (***) may partially comply with paragraph 1 by counting LNG stocks in existing floating storage units, until their underground gas storage facilities are in operation.

4. Member States without underground gas storage facilities may provide incentives or financial compensation to market participants or transmission system operators, as relevant, for the shortfall in revenues, or for costs incurred by them, as a result of their compliance with their storage obligations pursuant to this Article, where such a shortfall or such costs cannot be covered by revenue, in order to ensure compliance with their obligation to store gas in other Member States pursuant to paragraph 1 or the implementation of the burden-sharing mechanism. If the incentive or financial compensation is financed through a levy, that levy shall not be applied to cross-border interconnection points.

5. Notwithstanding paragraph 1, where a Member State has underground gas storage facilities located on its territory and the aggregated capacity of those facilities is larger than the annual gas consumption of that Member State, the Member States without underground gas storage facilities that have access to those facilities shall either:

- (a) ensure that by 1 November storage volumes correspond at least to the average usage of the storage capacity over the preceding five years, determined, *inter alia*, by taking into account the flows during withdrawal season over the preceding five years from the Member States where the storage facilities are located; or
- (b) demonstrate that storage capacity equivalent to the volume covered by the obligation under point (a) has been booked.

If the Member State without underground gas storage facilities can demonstrate that storage capacity equivalent to the volume covered by the obligation under point (a) of the first subparagraph has been booked, paragraph 1 shall apply.

The obligation under this paragraph shall be limited to 15 % of the average annual gas consumption over the preceding five years in the Member State concerned.

6. Unless otherwise specified in Annex Ib, in the case of underground gas storage facilities located in one Member State that are not covered by paragraph 5 but that are directly connected to the market area of another Member State, that other Member State shall ensure that by 1 November storage volumes correspond to at least the average of the storage capacity booked at the relevant cross-border point over the preceding five years.

Article 6d

Monitoring and enforcement

1. Storage system operators shall report the filling level to the competent authority in each Member State where the underground gas storage facilities concerned are located and, if applicable, to an entity designated by that Member State (the “designated entity”) as follows:

- (a) for 2022: on each of the intermediate targets set out in Annex Ia; and
- (b) from 2023: as set pursuant to Article 6a(4).

2. The competent authority and, if applicable, the designated entity of each Member State shall monitor the filling levels of the underground gas storage facilities on their territory at the end of each month and report the results to the Commission without undue delay.

The Commission may, where appropriate, invite the European Union Agency for the Cooperation of Energy Regulators (ACER) to assist with such monitoring.

3. Based on the information provided by the competent authority and, if applicable, the designated entity of each Member State, the Commission shall report regularly to the GCG.

4. The GCG shall assist the Commission in the monitoring of the filling trajectories and the filling targets, and shall develop guidance for the Commission on adequate measures to ensure compliance in the event that Member States deviate from the filling trajectories or do not meet the filling targets.

5. Member States shall take the necessary measures to meet the filling trajectories and the filling targets and to enforce upon market participants the storage obligations which are required to meet them, including by imposing sufficiently deterrent sanctions and fines on those market participants.

Member States shall inform the Commission without delay of the enforcement measures taken pursuant to this paragraph.

6. Where commercially sensitive information is to be exchanged, the Commission may convene meetings of the GCG that are restricted to itself and Member States.

7. Any information exchanged shall be limited to that which is necessary for the purpose of monitoring compliance with this Regulation.

The Commission, the national regulatory authorities and the Member States shall preserve the confidentiality of commercially sensitive information received for the purposes of carrying out their obligations.

(*) Commission Regulation (EU) 2017/459 of 16 March 2017 establishing a network code on capacity allocation mechanisms in gas transmission systems and repealing Regulation (EU) No 984/2013 (OJ L 72, 17.3.2017, p. 1).

(**) Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018 on the Governance of the Energy Union and Climate Action, amending Regulations (EC) No 663/2009 and (EC) No 715/2009 of the European Parliament and of the Council, Directives 94/22/EC, 98/70/EC, 2009/31/EC, 2009/73/EC, 2010/31/EU, 2012/27/EU and 2013/30/EU of the European Parliament and of the Council, Council Directives 2009/119/EC and (EU) 2015/652 and repealing Regulation (EU) No 525/2013 of the European Parliament and of the Council (OJ L 328, 21.12.2018, p. 1).

(***) Regulation (EU) 2022/869 of the European Parliament and of the Council of 30 May 2022 on guidelines for trans-European energy infrastructure, amending Regulations (EC) No 715/2009, (EU) 2019/942 and (EU) 2019/943 and Directives 2009/73/EC and (EU) 2019/944, and repealing Regulation (EU) No 347/2013 (OJ L 152, 3.6.2022, p. 45).;

(3) Article 7 is amended as follows:

(a) paragraph 1 is replaced by the following:

‘1. By 1 September 2022, ENTSOG shall carry out a Union-wide simulation of gas supply and infrastructure disruption scenarios, including scenarios of a prolonged disruption of a single supply source. The simulation shall include the identification and assessment of emergency gas supply corridors and shall also identify which Member States can address identified risks, including in relation to LNG. The gas supply and infrastructure disruption scenarios and the methodology for the simulation shall be defined by ENTSOG in cooperation with the GCG. ENTSOG shall ensure an appropriate level of transparency and access to the modelling assumptions used in its scenarios. The Union-wide simulation of gas supply and infrastructure disruption scenarios shall be repeated every four years unless circumstances warrant more frequent updates.’;

(b) in paragraph 4, the following point is added:

‘(g) taking into account scenarios of a prolonged disruption of a single supply source.’;

(4) in Article 16, the following paragraph is added:

‘3. Member States shall ensure storage obligations under this Regulation are met by using storage facilities in the Union. However, Member States and the Energy Community Contracting Parties’ cooperation may include voluntary arrangements to use storage capacity provided by Energy Community Contracting Parties to store additional volumes of gas for the Member States.’;

- (5) the following article is inserted:

'Article 17a

Commission reporting

1. By 28 February 2023 and annually thereafter, the Commission shall submit reports to the European Parliament and to the Council, containing:

- (a) an overview of the measures taken by Member States to fulfil the storage obligations;
- (b) an overview of the time needed for the certification procedure set out in Article 3a of Regulation (EC) No 715/2009;
- (c) an overview of the measures requested by the Commission in order to ensure compliance with the filling trajectories and the filling targets;
- (d) an analysis of the potential effects of this Regulation on gas prices and potential gas savings in relation to Article 6b(4).;

- (6) the following article is inserted:

'Article 18a

Committee procedure

1. The Commission shall be assisted by a committee. That committee shall be a committee within the meaning of Regulation (EU) No 182/2011 of the European Parliament and of the Council (*).

2. Where reference is made to this paragraph, Article 5 of Regulation (EU) No 182/2011 shall apply.

(*) Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers (OJ L 55, 28.2.2011, p. 13).;

- (7) in Article 20, the following paragraph is added:

'4. Articles 6a to 6d shall not apply to Ireland, Cyprus or Malta for as long as they are not directly interconnected to the gas interconnected system of any other Member States.;

- (8) in Article 22, the following paragraph is added:

'Article 2, points (27) to (31), Articles 6a to 6d, Article 16(3), Article 17a, Article 18a, Article 20(4), and Annexes Ia and Ib shall apply until 31 December 2025.;

- (9) the text set out in the Annex to this Regulation is inserted as Annexes Ia and Ib.

Article 2

Amendments to Regulation (EC) No 715/2009

Regulation (EC) No 715/2009 is amended as follows:

- (1) the following Article is inserted:

'Article 3a

Certification of storage system operators

1. Member States shall ensure that each storage system operator, including any storage system operator controlled by a transmission system operator, is certified in accordance with the procedure laid down in this Article, either by the national regulatory authority or by another competent authority designated by the Member State concerned pursuant to Article 3(2) of Regulation (EU) 2017/1938 of the European Parliament and of the Council (*) (in either case, "certifying authority").

This Article also applies to storage system operators controlled by transmission system operators which have already been certified under the unbundling rules laid down in Articles 9, 10 and 11 of Directive 2009/73/EC.

2. The certifying authority shall issue a draft certification decision in respect of storage system operators that operate underground gas storage facilities with a capacity of over 3,5 TWh where, regardless of the number of storage system operators, total storage facilities were filled on 31 March 2021 and on 31 March 2022 at a level which, on average, was less than 30 % of their maximum capacity by 1 February 2023 or within 150 working days of the date of receipt of a notification pursuant to paragraph 9.

In respect of storage system operators as referred to in the first subparagraph, the certifying authority shall make its best efforts to issue a draft certification decision by 1 November 2022.

In respect of all other storage system operators, the certifying authority shall issue a draft certification decision by 2 January 2024 or within 18 months of the date of receipt of a notification pursuant to paragraph 8 or 9.

3. In considering the risk to the security of energy supply in the Union, the certifying authority shall take into account any security of gas supply risk at national, regional or Union-wide level as well as any mitigation of such risk, resulting, *inter alia*, from:

- (a) ownership, supply or other commercial relationships that could negatively affect the incentives and the ability of the storage system operator to fill the underground gas storage facility;
- (b) the rights and obligations of the Union with respect to a third country arising under international law, including any agreement concluded with one or more third countries to which the Union is a party and which addresses the issue of the security of energy supply;
- (c) the rights and obligations of the Member States concerned with respect to a third country arising under agreements concluded by the Member States concerned with one or more third countries, in so far as those agreements comply with Union law; or
- (d) any other specific facts and circumstances of the case.

4. If the certifying authority concludes that a person who directly or indirectly controls, or exercises any right over, the storage system operator within the meaning of Article 9 of Directive 2009/73/EC could endanger the security of energy supply or the essential security interests of the Union or of any Member State, the certifying authority shall refuse the certification. Alternatively, the certifying authority may issue a certification decision subject to conditions to ensure the sufficient mitigation of the risks which could negatively influence the filling of the underground gas storage facilities, provided that the practicability of the conditions can be fully ensured by effective implementation and monitoring. Such conditions may include, in particular, a requirement that the storage system owner or storage system operator transfer management of the storage system.

5. Where the certifying authority concludes that the gas supply risks cannot be mitigated by conditions pursuant to paragraph 4, including by requiring the storage system owner or storage system operator to transfer management of the storage system, and therefore refuses the certification, it shall:

- (a) require the storage system owner or storage system operator or any person that it considers could endanger the security of energy supply or the essential security interests of the Union or of any Member State to dispose of the shareholding or rights they have over the storage system ownership or storage system operator ownership, and set a time limit for such disposal;
- (b) order, where appropriate, interim measures, to ensure that such a person is not able to exercise any control or right over that storage system owner or storage system operator until the disposal of the shareholding or rights; and
- (c) provide for appropriate compensatory measures in accordance with national law.

6. The certifying authority shall notify its draft certification decision to the Commission without delay, together with all relevant information.

The Commission shall deliver an opinion on the draft certification decision to the certifying authority within 25 working days of such notification. The certifying authority shall take the utmost account of the Commission's opinion.

7. The certifying authority shall issue the certification decision within 25 working days of receipt of the Commission's opinion.

8. Before a newly built underground gas storage facility is put into operation, the storage system operator shall be certified in accordance with paragraphs 1 to 7. The storage system operator shall notify the certifying authority of its intention to put the storage facility into operation.

9. Storage system operators shall notify the relevant certifying authority of any planned transaction which would require a reassessment of their compliance with the certification requirements set out in paragraphs 1 to 4.

10. Certifying authorities shall continuously monitor storage system operators as regards compliance with the certification requirements set out in paragraphs 1 to 4. They shall open a certification procedure to reassess compliance in any of the following circumstances:

- (a) upon receipt of a notification by the storage system operator pursuant to paragraph 8 or 9;
- (b) on their own initiative where they have knowledge that a planned change in rights or in influence over a storage system operator could lead to non-compliance with the requirements of paragraphs 1, 2 and 3;
- (c) upon a reasoned request from the Commission.

11. Member States shall take all necessary measures to ensure the continuous operation of the underground gas storage facilities on their respective territories. Those underground gas storage facilities may cease operations only where technical and safety requirements are not met or where the certifying authority concludes, after having conducted an assessment and having taken into account the opinion of ENTSO for Gas, that such a cessation would not weaken the security of gas supply at Union or national level.

Appropriate compensatory measures shall be taken, where appropriate, if cessation of operations is not allowed.

12. The Commission may issue guidance on the application of this Article.

13. This Article shall not apply to parts of LNG facilities that are used for storage.

(*) Regulation (EU) 2017/1938 of the European Parliament and of the Council of 25 October 2017 concerning measures to safeguard the security of gas supply and repealing Regulation (EU) No 994/2010 (OJ L 280, 28.10.2017, p. 1).

(2) in Article 13, the following paragraph is added:

'3. The national regulatory authority may apply a discount of up to 100 % to capacity-based transmission and distribution tariffs at entry points from, and exit points to, underground gas storage facilities and LNG facilities, unless and to the extent that such a facility which is connected to more than one transmission or distribution network is used to compete with an interconnection point.

This paragraph shall apply until 31 December 2025.'

Article 3

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, 29 June 2022.

For the European Parliament
The President
R. METSOLA

For the Council
The President
F. RIESTER

ANNEX

‘ANNEX Ia ⁽¹⁾**Filling trajectory with intermediate targets and filling target for 2022 for Member States with underground gas storage facilities**

Member State	1 August intermediate target	1 September intermediate target	1 October intermediate target	1 November filling target
AT	49 %	60 %	70 %	80 %
BE	49 %	62 %	75 %	80 %
BG	49 %	61 %	75 %	80 %
CZ	60 %	67 %	74 %	80 %
DE	45 %	53 %	80 %	80 %
DK	61 %	68 %	74 %	80 %
ES	71 %	74 %	77 %	80 %
FR	52 %	65 %	72 %	80 %
HR	49 %	60 %	70 %	80 %
HU	51 %	60 %	70 %	80 %
IT	58 %	66 %	73 %	80 %
LV	57 %	65 %	72 %	80 %
NL	54 %	62 %	71 %	80 %
PL	80 %	80 %	80 %	80 %
PT	72 %	75 %	77 %	80 %
RO	46 %	57 %	66 %	80 %
SE	40 %	53 %	67 %	80 %
SK	49 %	60 %	70 %	80 %

ANNEX Ib

Shared responsibility for the filling target and the filling trajectory

With regard to the filling target and the filling trajectory pursuant to Article 6a, the Federal Republic of Germany and the Republic of Austria share the responsibility concerning the storage facilities Haidach and 7Fields. The exact ratio and extent of that responsibility of the Federal Republic of Germany and the Republic of Austria is subject to a bilateral agreement of those Member States.’

⁽¹⁾ This Annex is subject to the *pro rata* obligations of each Member State under this Regulation, in particular Articles 6a, 6b and 6c. For Member States falling under Article 6a(2), the *pro rata* intermediate target shall be calculated by multiplying the value indicated in the table by the limit of 35 % and by dividing the result by 80 %.

REGULATION (EU) 2022/1033 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**of 29 June 2022****amending Regulation (EU) No 1305/2013 as regards a specific measure to provide exceptional temporary support under the European Agricultural Fund for Rural Development (EAFRD) in response to the impact of Russia's invasion of Ukraine**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 42 and Article 43(2) thereof,

Having regard to the proposal from the European Commission,

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

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

Acting in accordance with the ordinary legislative procedure ⁽²⁾,

Whereas:

- (1) Farmers and rural businesses in the Union have been affected by the consequences of Russia's invasion of Ukraine in an unprecedented manner. Increasing input prices, particularly for energy, fertiliser and animal feed, have created economic disruption to the Union's agricultural sector and rural communities and have led to liquidity problems for farmers and small rural businesses active in processing, marketing or development of agricultural products. That has created an exceptional situation which needs to be addressed by a new exceptional measure.
- (2) In order to respond to the impact of Russia's invasion of Ukraine on the Union's agricultural and food sectors, a new exceptional and temporary measure should be provided for in this Regulation addressing the liquidity problems that put at risk the continuity of farming activities and of small businesses active in processing, marketing or development of agricultural products.
- (3) The support under the measure provided for in this Regulation, which aims to secure competitiveness of agri-food businesses and farm viability in the Union, should concentrate the available resources on beneficiaries who are affected the most by the consequences of Russia's invasion of Ukraine and be granted on the basis of objective and non-discriminatory criteria. In the case of farmers, it should be possible for such criteria to include production sectors, types of farming or farm structures and, in the case of small and medium-sized enterprises (SMEs), sectors, types of activity, types of regions or other specific constraints.
- (4) The current serious crisis in the Union's agricultural sector confirms the need to accelerate the transition towards sustainability to better prepare for future crises. The support under the measure provided for in this Regulation should therefore not result in a reduction of the overall share of the European Agricultural Fund for Rural Development (EAFRD) contribution reserved for the measures referred to in Article 59(6) of Regulation (EU) No 1305/2013 of the European Parliament and of the Council ⁽³⁾.

⁽¹⁾ Opinion of 16 June 2022 (not yet published in the Official Journal).

⁽²⁾ Position of the European Parliament of 23 June 2022 (not yet published in the Official Journal) and decision of the Council of 28 June 2022.

⁽³⁾ Regulation (EU) No 1305/2013 of the European Parliament and of the Council of 17 December 2013 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) and repealing Council Regulation (EC) No 1698/2005 (OJ L 347, 20.12.2013, p. 487).

- (5) Because of the urgency and the temporary and exceptional character of the measure provided for in this Regulation, a one-off payment and an end date for application of the measure should be set. The principle that payments by the Commission are to be made in accordance with budget appropriations and subject to available funding should also be complied with.
- (6) In order to give higher support to farmers or SMEs that are the most severely affected, it is appropriate to allow Member States to adjust the level of the lump-sums for certain categories of eligible beneficiaries, for instance by fixing certain ranges or broad categories, based on objective and non-discriminatory criteria.
- (7) In order to ensure adequate funding of the measure provided for in this Regulation without jeopardising other objectives of the rural development programmes, a maximum share of the Union contribution to that measure should be fixed.
- (8) Regulation (EU) No 1305/2013 should therefore be amended accordingly.
- (9) In view of Russia's invasion of Ukraine and the urgency of addressing the impact of that invasion on the Union's agricultural and food sectors, it is considered to be appropriate to invoke the exception to the eight-week period provided for in Article 4 of Protocol No 1 on the role of national Parliaments in the European Union, annexed to the Treaty on European Union (TEU), to the Treaty on the Functioning of the European Union and to the Treaty establishing the European Atomic Energy Community.
- (10) Since the objective of this Regulation, namely to address the exceptional situation created in the Union's agricultural and food sectors by the impact of the Russia's invasion of Ukraine, cannot be sufficiently achieved by the Member States but can rather, by reason of the scale and effects of the action, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 TEU. In accordance with the principle of proportionality as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve that objective.
- (11) Given the urgency of the situation relating to the impact of Russia's invasion of Ukraine on the Union's agricultural and food sectors, this Regulation should enter into force on the day of its publication in the *Official Journal of the European Union*,

HAVE ADOPTED THIS REGULATION:

Article 1

Regulation (EU) No 1305/2013 is amended as follows:

- (1) the following Article is inserted:

'Article 39c

Exceptional temporary support to farmers and SMEs particularly affected by the impact of Russia's invasion of Ukraine

1. Support under this measure shall provide emergency assistance to farmers and SMEs particularly affected by the impact of Russia's invasion of Ukraine, aiming at ensuring continuity of their business activity, subject to the conditions set out in this Article.
2. Support shall be granted to farmers or SMEs active in processing, marketing or development of agricultural products covered by Annex I to the TFEU or cotton, except fishery products. The output of the production process may be a product not covered by that Annex.
3. Member States shall target the support to beneficiaries who are most affected by the impact of Russia's invasion of Ukraine, by determining, on the basis of available evidence, eligibility conditions and, where considered appropriate by the Member State concerned, selection criteria, which shall be objective and non-discriminatory. The support provided by the Member States shall contribute to food security or address market imbalances and shall support farmers or SMEs engaging in one or more of the following activities pursuing those goals:

- (a) circular economy;
- (b) nutrient management;
- (c) efficient use of resources;
- (d) environmental and climate friendly production methods.

4. The support shall take the form of a lump sum payment to be paid by 15 October 2023, based on applications for support approved by the competent authority by 31 March 2023. The subsequent reimbursement by the Commission shall be made in accordance with budget appropriations and subject to available funding. The level of payment may be differentiated by categories of beneficiaries, in accordance with objective and non-discriminatory criteria.

5. The maximum amount of support shall not exceed EUR 15 000 per farmer and EUR 100 000 per SME.

6. When granting support under this Article, Member States shall take into account the support granted under other national or Union support instruments or private schemes to respond to the impact of Russia's invasion of Ukraine.';

(2) in Article 49, paragraph 2 is replaced by the following:

'2. The Member State authority responsible for the selection of operations shall ensure that operations, with the exception of operations under Article 18(1), point (b), Article 24(1), point (d), and Articles 28 to 31, 33, 34 and 36 to 39c, are selected in accordance with the selection criteria referred to in paragraph 1 of this Article and according to a transparent and well documented procedure.';

(3) in Article 59, the following paragraph is inserted:

'6b. The EAFRD support provided under Article 39c shall not exceed 5 % of the total EAFRD contribution to the rural development programme for the years 2021-2022 as provided for in Part Two of Annex I.'

Article 2

This Regulation shall enter into force on the day 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, 29 June 2022.

For the European Parliament
The President
R. METSOLA

For the Council
The President
F. RIESTER

REGULATION (EU) 2022/1034 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**of 29 June 2022****amending Regulation (EU) 2021/953 on a framework for the issuance, verification and acceptance of interoperable COVID-19 vaccination, test and recovery certificates (EU Digital COVID Certificate) to facilitate free movement during the COVID-19 pandemic****(Text with EEA relevance)**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 21(2) thereof,

Having regard to the proposal from the European Commission,

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

Acting in accordance with the ordinary legislative procedure ⁽¹⁾,

Whereas:

- (1) Regulation (EU) 2021/953 of the European Parliament and of the Council ⁽²⁾ lays down the framework for the issuance, verification and acceptance of interoperable COVID-19 vaccination, test and recovery certificates (EU Digital COVID Certificate) for the purpose of facilitating the holders' exercise of their right to free movement during the COVID-19 pandemic. It also contributes to facilitating the gradual lifting of restrictions to free movement put in place by the Member States, in accordance with Union law, to limit the spread of SARS-CoV-2, in a coordinated manner.
- (2) According to Regulation (EU) 2021/953, test certificates are to be issued on the basis of two types of tests for SARS-CoV-2 infection, namely molecular nucleic acid amplification tests (NAAT tests), including those using reverse transcription polymerase chain reaction (RT-PCR), and rapid antigen tests, which rely on the detection of viral proteins (antigens) using a lateral flow immunoassay that gives results in less than 30 minutes, provided they are carried out by health professionals or by skilled testing personnel.
- (3) Regulation (EU) 2021/953 does not cover laboratory-based antigenic assays, such as enzyme-linked immunosorbent assays or automated immunoassays. From July 2021, the technical working group on COVID-19 diagnostic tests, which is responsible for preparing updates to the EU common list of COVID-19 antigen tests agreed by the Health Security Committee established pursuant to Article 17 of Decision No 1082/2013/EU of the European Parliament and of the Council ⁽³⁾, has been reviewing the proposals put forward by Member States and manufacturers for COVID-19 laboratory-based antigenic assays. Those proposals have been assessed against the same criteria as those used for rapid antigen tests, and the Health Security Committee has established a list of the laboratory-based antigenic assays that meet those criteria.

⁽¹⁾ Position of the European Parliament of 23 June 2022 (not yet published in the Official Journal) and decision of the Council of 28 June 2022.

⁽²⁾ Regulation (EU) 2021/953 of the European Parliament and of the Council of 14 June 2021 on a framework for the issuance, verification and acceptance of interoperable COVID-19 vaccination, test and recovery certificates (EU Digital COVID Certificate) to facilitate free movement during the COVID-19 pandemic (OJ L 211, 15.6.2021, p. 1).

⁽³⁾ Decision No 1082/2013/EU of the European Parliament and of the Council of 22 October 2013 on serious cross-border threats to health and repealing Decision No 2119/98/EC (OJ L 293, 5.11.2013, p. 1).

- (4) As a result of those developments and to enlarge the scope of the different types of diagnostic tests that may be used for the issuance of an EU Digital COVID Certificate, the definition of rapid antigen tests should be amended to include laboratory-based antigenic assays. It should thus be possible for Member States to issue test certificates and, following the adoption of Commission Delegated Regulation (EU) 2022/256 ^(*), certificates of recovery on the basis of the antigen tests included in the EU common list of COVID-19 antigen tests agreed, and regularly updated, by the Health Security Committee as meeting the established quality criteria. Given that Member States' COVID-19 testing strategies differ, the possibility for Member States to use antigen tests for the issuance of recovery certificates should thus remain optional, to be used in particular when there is a shortage of NAAT capacity due to a high number of infections in the area concerned or for another reason. Where sufficient NAAT capacity is available, Member States can continue to issue certificates of recovery only on the basis of NAAT tests, which are considered as the most reliable methodology for the testing of COVID-19 cases and contacts. Similarly, during periods in which there is an increase in SARS-CoV-2 infections, resulting in high demand for testing or a shortage of NAAT tests, Member States could have the possibility, temporarily, of issuing certificates of recovery based on antigen tests. When infections decrease, Member States can continue to issue certificates of recovery only on the basis of NAAT tests.
- (5) In accordance with Article 5 of Regulation (EU) 2021/953, vaccination certificates issued by Member States are to include the number of doses administered to the holder. It is necessary to clarify that this requirement is intended to reflect all doses administered, in any Member State, not just those administered in the Member State issuing the vaccination certificate. To include only those previous doses received in the Member State issuing the vaccination certificate could lead to a discrepancy between the total number of doses actually administered to a person and the number indicated on the vaccination certificate, and could prevent holders from making use of their vaccination certificate when exercising the right to free movement within the Union. The administration of previous doses in other Member States is proven by means of a valid EU Digital COVID Certificate. A Member State should not require additional information or evidence from Union citizens holding such vaccination certificates, such as the batch number of previous doses. It should be possible for a Member State to require a person to present valid proof of identity and a previous vaccination certificate or certificate of recovery. In this context, the rules for accepting vaccination certificates issued by other Member States set out in Article 5(5) of Regulation (EU) 2021/953 apply. In addition, certificates covered by an implementing act adopted pursuant to Articles 3(10) and 8(2) of Regulation (EU) 2021/953 are, for the purpose of facilitating the holders' exercise of their right to free movement, to be accepted under the same conditions as EU Digital COVID Certificates issued by Member States. In accordance with Article 3(4) of Regulation (EU) 2021/953, the holder of an EU Digital COVID Certificate is entitled to request the issuance of a new certificate if the personal data contained in the original certificate are not accurate, including with regard to the vaccination of the holder.
- (6) In accordance with Article 5(1) of Regulation (EU) 2021/953, the Member State in which a COVID-19 vaccine was administered is to issue a vaccination certificate to the person concerned. Nevertheless, this should not be understood as preventing a Member State from issuing vaccination certificates referred to in point (a) of Article 3(1) of Regulation (EU) 2021/953 to persons who provide proof that they have been vaccinated in another Member State.
- (7) In particular in light of the emergence of new SARS-CoV-2 variants of concern, the continued development and study of COVID-19 vaccines is a crucial factor in the fight against the COVID-19 pandemic. In that context, it is important to facilitate the participation of volunteers in clinical trials, that is, studies performed to investigate the safety or efficacy of a medicine, such as a COVID-19 vaccine. Clinical research plays a fundamental role in the development of vaccines and voluntary participation in clinical trials therefore needs to be encouraged. Preventing participants in clinical trials from obtaining vaccination certificates could constitute a major disincentive to participating in such trials, delaying the conclusion of such trials and, more generally, having a negative impact on public health. In addition, the integrity of clinical trials, including in terms of data blinding and confidentiality, should be preserved to ensure the validity of their results. It should therefore be possible for Member States to issue vaccination certificates to participants in clinical trials that have been approved by Member States' ethical committees and competent authorities, regardless of whether the participant received the COVID-19 vaccine candidate or, to avoid undermining the studies, the dose administered to the control group.

^(*) Commission Delegated Regulation (EU) 2022/256 of 22 February 2022 amending Regulation (EU) 2021/953 of the European Parliament and of the Council as regards the issuance of certificates of recovery based on rapid antigen tests (OJ L 42, 23.2.2022, p. 4).

- (8) In addition, it is necessary to clarify that it should be possible for other Member States to accept vaccination certificates for COVID-19 vaccines undergoing clinical trials in order to waive restrictions to free movement put in place, in accordance with Union law, in response to the COVID-19 pandemic. The acceptance period of such vaccination certificates should not be longer than that of certificates issued based on COVID-19 vaccines that have been granted a marketing authorisation pursuant to Regulation (EC) No 726/2004 of the European Parliament and of the Council ⁽³⁾. The acceptance period of such vaccination certificates can differ, depending on whether the vaccine was administered as part of the primary vaccination series or as a booster. Within that period, Member States can accept such vaccination certificates unless they have been revoked following the conclusion of the clinical trial, in particular where the COVID-19 vaccine is subsequently not granted a marketing authorisation or where the vaccination certificates were issued for a placebo administered to the control group as part of a blinded trial. In this regard, the issuance of vaccination certificates to participants in clinical trials for COVID-19 vaccines and the acceptance of those certificates is a Member State competence. If a COVID-19 vaccine undergoing clinical trials is subsequently granted a marketing authorisation pursuant to Regulation (EC) No 726/2004, vaccination certificates for that vaccine fall, from the date of the issuance of that marketing authorisation, within the scope of the first subparagraph of Article 5(5) of Regulation (EU) 2021/953. To ensure a coherent approach, the Commission should be empowered to ask the Health Security Committee, the European Centre for Disease Prevention and Control (ECDC) or the European Medicines Agency (EMA) to issue guidance with regard to the acceptance of certificates issued for a COVID-19 vaccine undergoing clinical trials that has not yet been granted a marketing authorisation pursuant to Regulation (EC) No 726/2004, which should take into account the ethical and scientific criteria necessary for carrying out clinical trials.
- (9) Since the adoption of Regulation (EU) 2021/953, the epidemiological situation with regard to the COVID-19 pandemic has evolved considerably. Despite there being variations in the level of vaccination in different Member States, by 31 January 2022, more than 80 % of the adult population in the Union had completed their primary vaccination cycle and more than 50 % had received a booster dose. Increasing vaccine uptake remains a crucial objective in the fight against the COVID-19 pandemic, given the increased protection against hospitalisation and severe disease afforded by vaccination, and thus plays an important role in ensuring that restrictions to the free movement of persons can be lifted.
- (10) In addition, the spread of the SARS-CoV-2 variant of concern 'Delta' in the second half of 2021 caused an increase in the number of infections, hospitalisation and deaths, requiring Member States to adopt strict public health measures in an effort to protect healthcare system capacity. In early 2022, the SARS-CoV-2 variant of concern 'Omicron' caused sharp increases in the number of COVID-19 infections, rapidly replacing Delta and reaching an unprecedented intensity of community transmission across the Union. As noted by the ECDC in its Rapid Risk Assessment of 27 January 2022, Omicron infections appear less likely to lead to a severe clinical outcome requiring hospitalisation or admission to intensive care units. Although the reduction in severity is partially due to inherent characteristics of the virus, results from vaccine effectiveness studies have shown that vaccination plays a significant role in preventing severe clinical outcomes from Omicron infection, with effectiveness against severe illness increasing significantly among people having received three vaccine doses. Furthermore, given the very high levels of community transmission, leading to many people being ill at the same time, Member States are likely to undergo a period of substantial pressure on their healthcare systems and on the functioning of the society as a whole, mainly through absence from work and education.
- (11) After the peak in Omicron infections in early 2022, a high proportion of the population is expected to enjoy, at least for a certain period, protection from COVID-19 either due to vaccination or prior infection, or both. As a result of the COVID-19 vaccines currently available, a significantly higher percentage of the population is also better protected from falling seriously ill and dying from COVID-19. However, it is not possible to predict the impact of a possible increase in infections in the second half of 2022. In addition, the possibility of a worsening of the COVID-19 pandemic because of the emergence of new SARS-CoV-2 variants of concern cannot be ruled out. As also noted by the ECDC, significant uncertainties remain at this stage of the COVID-19 pandemic.

⁽³⁾ Regulation (EC) No 726/2004 of the European Parliament and of the Council of 31 March 2004 laying down Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency (OJ L 136, 30.4.2004, p. 1).

- (12) In view of the remaining uncertainties regarding the further evolution of the COVID-19 pandemic, it cannot be excluded that Member States continue to require Union citizens and their family members exercising their right to free movement to present proof of COVID-19 vaccination, test result or recovery after 30 June 2022, the date on which Regulation (EU) 2021/953 is due to expire. It is thus important to avoid a situation in which, in the event that certain restrictions to free movement based on public health remain in place after 30 June 2022, Union citizens and their family members are deprived of the possibility of using their EU Digital COVID Certificates, which are an effective, secure and privacy-preserving way of proving COVID-19 vaccination, test result or recovery, where their possession is required by Member States in order to exercise their right to free movement.
- (13) In that context, Member States should require Union citizens and their family members exercising their right to free movement to present proof of COVID-19 vaccination, a test result or recovery, or should impose additional restrictions such as additional travel-related testing for SARS-CoV-2 infections or travel-related quarantine or self-isolation, only where such restrictions are non-discriminatory, and necessary and proportionate for the purpose of safeguarding public health based on the latest available scientific evidence, including epidemiological data published by the ECDC on the basis of Council Recommendation (EU) 2022/107 ⁽⁹⁾, and in line with the precautionary principle.
- (14) When imposing restrictions to free movement on grounds of public health, Member States should pay particular attention to the specificities of the outermost regions, exclaves and geographically isolated areas and the likely impact of such restrictions on cross-border regions, given the strong social and economic ties of those regions.
- (15) Any verification of the certificates making up the EU Digital COVID Certificate should not lead to further restrictions to the freedom of movement within the Union or to restrictions on travel within the Schengen area.
- (16) At the same time, given that any restrictions to the free movement of persons within the Union put in place to limit the spread of SARS-CoV-2, including a requirement to present EU Digital COVID Certificates, should be lifted as soon as the epidemiological situation allows, the extension of the period of application of Regulation (EU) 2021/953 should be limited to 12 months. In addition, the extension of the period of application of that Regulation should not be understood as requiring Member States, in particular those that lift domestic public health measures, to maintain or impose restrictions to free movement. The power to adopt acts in accordance with Article 290 of the Treaty on the Functioning of the European Union delegated to the Commission pursuant to Regulation (EU) 2021/953 should also be extended. It is necessary to ensure that the EU Digital COVID Certificate framework can adapt to new evidence regarding COVID-19 vaccination, reinfection after recovery, or testing and to scientific progress in containing the COVID-19 pandemic.
- (17) By 31 December 2022, the Commission should submit a third report to the European Parliament and to the Council on the application of Regulation (EU) 2021/953. The report should contain, in particular, an overview of the information received pursuant to Article 11 of that Regulation regarding the restrictions to free movement put in place by the Member States to limit the spread of SARS-CoV-2, an overview describing all developments regarding domestic and international uses of the EU Digital COVID Certificate, any relevant updates regarding the assessment included in the second report, and an assessment of the appropriateness of the continued use of EU Digital COVID Certificates for the purposes of that Regulation, taking into account epidemiological developments and the latest available scientific evidence, and in the light of the principles of necessity and proportionality. When drawing up the report, the Commission should request guidance from the ECDC and the Health Security Committee. Without prejudice to the Commission's right of initiative, the report should be accompanied by a legislative proposal to shorten the period of application of Regulation (EU) 2021/953 taking into account the evolution of the epidemiological situation with regard to the COVID-19 pandemic and any recommendations from the ECDC and the Health Security Committee to that effect.

⁽⁹⁾ Council Recommendation (EU) 2022/107 of 25 January 2022 on a coordinated approach to facilitate safe free movement during the COVID-19 pandemic and replacing Recommendation (EU) 2020/1475 (OJ L 18, 27.1.2022, p. 110).

- (18) Regulation (EU) 2021/953 should therefore be amended accordingly.
- (19) Since the objective of this Regulation, namely to facilitate the exercise of the right to free movement within the Union during the COVID-19 pandemic by establishing a framework for the issuance, verification and acceptance of interoperable COVID-19 certificates on a person's COVID-19 vaccination, test result or recovery, cannot be sufficiently achieved by the Member States but can rather, by reason of the scale and effects of the action, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve that objective.
- (20) In order to allow for its prompt and timely application to ensure the continuity of the EU Digital COVID Certificate, this Regulation should enter into force on the day of its publication in the *Official Journal of the European Union*.
- (21) The European Data Protection Supervisor and the European Data Protection Board were consulted in accordance with Article 42(1) and (2) of Regulation (EU) 2018/1725 of the European Parliament and of the Council ⁽⁷⁾ and delivered a joint opinion on 14 March 2022 ⁽⁸⁾,

HAVE ADOPTED THIS REGULATION:

Article 1

Regulation (EU) 2021/953 is amended as follows:

- (1) in Article 2, point 5 is replaced by the following:
- ‘(5) “antigen test” means one of the following categories of test which relies on the detection of viral proteins (antigens) to reveal the presence of SARS-CoV-2:
- (a) rapid antigen tests, such as lateral flow immunoassays that give results in less than 30 minutes;
 - (b) laboratory-based antigenic assays, such as enzyme-linked immunosorbent assays or automated immunoassays for the detection of antigens;’
- (2) Article 3 is amended as follows:
- (a) paragraph 1 is amended as follows:
- (i) in the first subparagraph, points (b) and (c) are replaced by the following:
 - ‘(b) a certificate confirming that the holder has been subject to a NAAT test, or an antigen test listed in the EU common list of COVID-19 antigen tests agreed by the Health Security Committee, carried out by health professionals or by skilled testing personnel in the Member State issuing the certificate and indicating the type of test, the date on which it was carried out and the result of the test (test certificate);
 - (c) a certificate confirming that, following a positive result of a NAAT test, or an antigen test listed in the EU common list of COVID-19 antigen tests agreed by the Health Security Committee, carried out by health professionals or by skilled testing personnel, the holder has recovered from a SARS-CoV-2 infection (certificate of recovery).’;
 - (ii) the second subparagraph is replaced by the following:

‘The Commission shall publish the EU common list of COVID-19 antigen tests agreed by the Health Security Committee, including any updates.’;

⁽⁷⁾ Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC (OJ L 295, 21.11.2018, p. 39).

⁽⁸⁾ Not yet published in the Official Journal.

- (b) paragraph 11 is replaced by the following:

‘11. Where necessary, the Commission shall ask the Health Security Committee, the ECDC or EMA to issue guidance on the available scientific evidence on the effects of medical events documented in the certificates referred to in paragraph 1, in particular with regard to new SARS-CoV-2 variants of concern, and on the acceptance of COVID-19 vaccines undergoing clinical trials in the Member States.’;

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

‘2. The trust framework shall be based on a public key infrastructure and allow for the reliable and secure issuance and verification of the authenticity, validity and integrity of the certificates referred to in Article 3(1). The trust framework shall allow for the detection of fraud, in particular forgery. In addition, it shall enable the exchange of certificate revocation lists containing the unique certificate identifiers of revoked certificates. Such certificate revocation lists shall not contain any other personal data. The verification of the certificates referred to in Article 3(1) and, where applicable, certificate revocation lists shall not give rise to the issuer being notified of the verification.’;

- (4) Article 5 is amended as follows:

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

‘(b) information about the COVID-19 vaccine and the number of doses administered to the holder, regardless of the Member State in which those doses were administered’;

- (b) in paragraph 5, the following subparagraphs are added:

‘Member States may also issue vaccination certificates to persons participating in a COVID-19 vaccine clinical trial that has been approved by Member States’ ethical committees and competent authorities, regardless whether the participant received the COVID-19 vaccine candidate or the dose administered to the control group. The information about the COVID-19 vaccine to be included in the vaccination certificate in accordance with the specific data fields set out in point 1 of the Annex shall not undermine the integrity of the clinical trial.

Member States may accept vaccination certificates issued by other Member States in accordance with the fourth subparagraph in order to waive restrictions to free movement put in place, in accordance with Union law, to limit the spread of SARS-CoV-2, unless their acceptance period has expired or they have been revoked following the conclusion of the clinical trial, in particular on the grounds that the COVID-19 vaccine was subsequently not granted a marketing authorisation or that the vaccination certificates were issued for a placebo administered to the control group as part of a blinded trial.’;

- (5) in Article 6(2), point (b) is replaced by the following:

‘(b) information about the NAAT test or antigen test to which the holder was subject’;

- (6) Article 7 is amended as follows:

- (a) paragraph 1 is replaced by the following:

‘1. Each Member State shall issue, upon request, certificates of recovery referred to in point (c) of Article 3(1) following a positive result of a NAAT test carried out by health professionals or by skilled testing personnel.

Member States may also issue, upon request, certificates of recovery referred to in point (c) of Article 3(1) following a positive result of an antigen test listed in the EU common list of COVID-19 antigen tests agreed by the Health Security Committee carried out by health professionals or by skilled testing personnel.

Member States may issue certificates of recovery based on antigen tests carried out by health professionals or by skilled testing personnel on or after 1 October 2021, provided that the antigen test used was included in the EU common list of COVID-19 antigen tests agreed by the Health Security Committee on the date on which the positive test result was produced.

Certificates of recovery shall be issued at the earliest 11 days after the date on which a person was first subject to a NAAT test or antigen test that produced a positive result.

The Commission is empowered to adopt delegated acts in accordance with Article 12 to amend the number of days after which a certificate of recovery is to be issued, on the basis of guidance received from the Health Security Committee in accordance with Article 3(11) or on scientific evidence reviewed by the ECDC.;

(b) paragraph 4 is replaced by the following:

‘4. On the basis of guidance received pursuant to Article 3(11), the Commission is empowered to adopt delegated acts in accordance with Article 12 to amend paragraph 1 of this Article and point (c) of Article 3(1) to allow for the issuance of the certificate of recovery on the basis of a positive antigen test, antibody test, including a serological test for antibodies against SARS-CoV-2, or any other scientifically validated method. Such delegated acts shall also amend point 3 of the Annex by adding, modifying or removing the data fields falling under the categories of personal data referred to in points (b) and (c) of paragraph 2 of this Article.’;

(7) in Article 10, paragraph 5 is replaced by the following:

‘5. No certificate revocation lists that have been exchanged pursuant to Article 4(2) shall be retained after the end of the period of application of this Regulation.’;

(8) Article 11 is replaced by the following:

‘Article 11

Restrictions to free movement and information exchange

1. Without prejudice to Member States’ competence to impose restrictions to free movement on grounds of public health, where Member States accept vaccination certificates, test certificates indicating a negative result or certificates of recovery, they shall refrain from imposing additional restrictions to free movement, unless such restrictions are non-discriminatory, and necessary and proportionate for the purpose of safeguarding public health based on the latest available scientific evidence, including epidemiological data published by the ECDC on the basis of Council Recommendation (EU) 2022/107 (*), and in line with the precautionary principle.

2. Where a Member State imposes, in accordance with Union law, including the principles set out in paragraph 1 of this Article, additional restrictions on holders of the certificates referred to in Article 3(1), in particular as a result of a SARS-CoV-2 variant of concern or interest, it shall inform the Commission and the other Member States accordingly, if possible 48 hours in advance of the introduction of such new restrictions. To that end, the Member State shall provide the following information:

- (a) the reasons for such restrictions, including all relevant epidemiological data and scientific evidence supporting those restrictions that are available and accessible at that stage;
- (b) the scope of such restrictions, specifying which certificate holders are subject to or exempt from such restrictions;
- (c) the date and duration of such restrictions.

2a. Where a Member State imposes restrictions in accordance with paragraphs 1 and 2, it shall pay particular attention to the likely impact of such restrictions on cross-border regions and to the specificities of outermost regions, exclaves and geographically isolated areas.

3. Member States shall inform the Commission and the other Member States of the issuance and the conditions of acceptance of the certificates referred to in Article 3(1), including the COVID-19 vaccines they accept pursuant to the second subparagraph of Article 5(5).

4. Member States shall provide the public with clear, comprehensive and timely information with regard to paragraphs 1, 2 and 3. As a general rule, Member States shall make that information publicly available 24 hours before new restrictions come into effect, taking into account that some flexibility is required for epidemiological emergencies. In addition, the information provided by the Member States may be made publicly available by the Commission in a centralised manner.

(*) Council Recommendation (EU) 2022/107 of 25 January 2022 on a coordinated approach to facilitate safe free movement during the COVID-19 pandemic and replacing Recommendation (EU) 2020/1475 (OJ L 18, 27.1.2022, p. 110).;

(9) in Article 12, paragraph 2 is replaced by the following:

‘2. The power to adopt delegated acts referred to in Article 5(2), Article 6(2) and Article 7(1) and (2) shall be conferred on the Commission for a period of 24 months from 1 July 2021.’;

(10) Article 16 is amended as follows:

(a) in paragraph 2, the third subparagraph is deleted;

(b) the following paragraph is added:

‘3. By 31 December 2022, the Commission shall submit a report to the European Parliament and to the Council on the application of this Regulation.

The report shall contain, in particular:

- (a) an overview of the information received pursuant to Article 11 regarding the restrictions to free movement put in place by the Member States to limit the spread of SARS-CoV-2;
- (b) an overview describing all the developments regarding the domestic and international uses of the certificates referred to in Article 3(1) and the adoption of implementing acts pursuant to Article 8(2) on COVID-19 certificates issued by third countries;
- (c) any relevant updates regarding the assessment, set out in the report submitted pursuant to paragraph 2 of this Article, of the impact of this Regulation on the facilitation of free movement, including on travel and tourism and the acceptance of the different types of vaccine, fundamental rights and non-discrimination, as well as the protection of personal data during the COVID-19 pandemic;
- (d) an assessment of the appropriateness of the continued use of the certificates referred to in Article 3(1) for the purposes of this Regulation, taking into account epidemiological developments and the latest available scientific evidence.

When drawing up the report, the Commission shall request guidance from the ECDC and the Health Security Committee, which shall be annexed to that report.

The report may be accompanied by a legislative proposal, in particular to shorten the period of application of this Regulation, taking into account the evolution of the epidemiological situation with regard to the COVID-19 pandemic and any recommendations from the ECDC and the Health Security Committee to that effect.’;

(11) in Article 17, the second paragraph is replaced by the following:

‘It shall apply from 1 July 2021 to 30 June 2023.’;

(12) in the Annex, point 2(i) is replaced by the following:

‘(i) testing centre or facility (optional for antigen test)’.

Article 2

This Regulation shall enter into force on the day 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, 29 June 2022.

For the European Parliament
The President
R. METSOLA

For the Council
The President
F. RIESTER

REGULATION (EU) 2022/1035 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**of 29 June 2022****amending Regulation (EU) 2021/954 on a framework for the issuance, verification and acceptance of interoperable COVID-19 vaccination, test and recovery certificates (EU Digital COVID Certificate) with regard to third-country nationals legally staying or residing in the territories of Member States during the COVID-19 pandemic**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 77(2), point (c) thereof,

Having regard to the proposal from the European Commission,

Acting in accordance with the ordinary legislative procedure ⁽¹⁾,

Whereas:

- (1) Under the Schengen *acquis*, in particular Regulation (EU) 2016/399 of the European Parliament and of the Council ⁽²⁾ (the Schengen Borders Code), third-country nationals legally staying or residing in the Union and third-country nationals who have legally entered the territory of a Member State may move freely within the territories of all other Member States during a period of 90 days in any 180-day period.
- (2) The EU Digital COVID Certificate was established by Regulation (EU) 2021/953 of the European Parliament and the Council ⁽³⁾, which set out a common framework for the issuance, verification and acceptance of interoperable COVID-19 vaccination, test or recovery certificates to facilitate the exercise of the right to free movement of Union citizens and their family members during the COVID-19 pandemic. That Regulation was accompanied by Regulation (EU) 2021/954 of the European Parliament and of the Council ⁽⁴⁾, which extended the EU Digital COVID Certificate framework to third-country nationals who are legally staying or residing in the territories of Member States and who are entitled to travel to other Member States in accordance with Union law.
- (3) Regulations (EU) 2021/953 and (EU) 2021/954 are due to expire on 30 June 2022. However, the COVID-19 pandemic is still ongoing and outbreaks of variants of concern may continue to have a negative impact on travel within the Union. Consequently, the period of application of those Regulations should be extended so that the EU Digital COVID Certificate can continue to be used.
- (4) The period of application of Regulation (EU) 2021/953 is to be extended by 12 months. Since the objective of Regulation (EU) 2021/954 is to extend the application of Regulation (EU) 2021/953 to certain categories of third-country nationals legally staying or residing in the Union, the duration of its application should be directly linked to that of Regulation (EU) 2021/953. Regulation (EU) 2021/954 should therefore be amended accordingly.

⁽¹⁾ Position of the European Parliament of 23 June 2022 (not yet published in the Official Journal) and decision of the Council of 28 June 2022.

⁽²⁾ Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ L 77, 23.3.2016, p. 1).

⁽³⁾ Regulation (EU) 2021/953 of the European Parliament and of the Council of 14 June 2021 on a framework for the issuance, verification and acceptance of interoperable COVID-19 vaccination, test and recovery certificates (EU Digital COVID Certificate) to facilitate free movement during the COVID-19 pandemic (OJ L 211, 15.6.2021, p. 1).

⁽⁴⁾ Regulation (EU) 2021/954 of the European Parliament and of the Council of 14 June 2021 on a framework for the issuance, verification and acceptance of interoperable COVID-19 vaccination, test and recovery certificates (EU Digital COVID Certificate) with regard to third-country nationals legally staying or residing in the territories of Member States during the COVID-19 pandemic (OJ L 211, 15.6.2021, p. 24).

- (5) This Regulation should not be understood as facilitating or encouraging the adoption of travel restrictions in response to the COVID-19 pandemic. In addition, any requirement for verification of certificates established by Regulation (EU) 2021/953 does not as such justify the temporary reintroduction of border control at internal borders. Checks at internal borders should remain a measure of last resort, subject to specific rules set out in the Schengen Borders Code.
- (6) In accordance with Articles 1 and 2 of Protocol No 22 on the position of Denmark, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, Denmark is not taking part in the adoption of this Regulation and is not bound by it or subject to its application. Given that this Regulation builds upon the Schengen *acquis*, Denmark shall, in accordance with Article 4 of that Protocol, decide within a period of six months after the Council has decided on this Regulation whether it will implement it in its national law.
- (7) This Regulation constitutes a development of the provisions of the Schengen *acquis* in which Ireland does not take part, in accordance with Council Decision 2002/192/EC ⁽⁵⁾; Ireland is therefore not taking part in the adoption of this Regulation and is not bound by it or subject to its application. In order to allow Member States to accept, under the conditions set out in Regulation (EU) 2021/953, COVID-19 certificates issued by Ireland to third-country nationals legally staying or residing in its territory for the purposes of facilitating travel within the territories of the Member States, Ireland should issue those third-country nationals with COVID-19 certificates that comply with the requirements of the EU Digital COVID Certificate trust framework. Ireland and the other Member States should accept certificates issued to third-country nationals covered by this Regulation on a reciprocal basis.
- (8) As regards Cyprus, Bulgaria, Romania and Croatia, this Regulation constitutes an act building upon, or otherwise relating to, the Schengen *acquis* within, respectively, the meaning of Article 3(1) of the 2003 Act of Accession, Article 4(1) of the 2005 Act of Accession and Article 4(1) of the 2011 Act of Accession.
- (9) As regards Iceland and Norway, this Regulation constitutes a development of the provisions of the Schengen *acquis* within the meaning of the Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the latter's association with the implementation, application and development of the Schengen *acquis* ⁽⁶⁾ which fall within the area referred to in Article 1, point C, of Council Decision 1999/437/EC ⁽⁷⁾.
- (10) As regards Switzerland, this Regulation constitutes a development of the provisions of the Schengen *acquis* within the meaning of the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen *acquis* ⁽⁸⁾ which fall within the area referred to in Article 1, point C, of Decision 1999/437/EC read in conjunction with Article 3 of Council Decision 2008/146/EC ⁽⁹⁾.
- (11) As regards Liechtenstein, this Regulation constitutes a development of provisions of the Schengen *acquis* within the meaning of the Protocol between the European Union, the European Community, the Swiss Confederation and the Principality of Liechtenstein on the accession of the Principality of Liechtenstein to the Agreement between the

⁽⁵⁾ Council Decision 2002/192/EC of 28 February 2002 concerning Ireland's request to take part in some of the provisions of the Schengen *acquis* (OJ L 64, 7.3.2002, p. 20).

⁽⁶⁾ OJ L 176, 10.7.1999, p. 36.

⁽⁷⁾ Council Decision 1999/437/EC of 17 May 1999 on certain arrangements for the application of the Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the association of those two States with the implementation, application and development of the Schengen *acquis* (OJ L 176, 10.7.1999, p. 31).

⁽⁸⁾ OJ L 53, 27.2.2008, p. 52.

⁽⁹⁾ Council Decision 2008/146/EC of 28 January 2008 on the conclusion, on behalf of the European Community, of the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen *acquis* (OJ L 53, 27.2.2008, p. 1).

European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen *acquis* ⁽¹⁰⁾ which fall within the area referred to in Article 1 point C, of Decision 1999/437/EC read in conjunction with Article 3 of Council Decision 2011/350/EU ⁽¹¹⁾.

- (12) Regulation (EU) 2021/954 should therefore be amended accordingly.
- (13) Since the objective of this Regulation, namely to facilitate the travel of third-country nationals legally staying or residing in the territories of the Member States during the COVID-19 pandemic by establishing a framework for the issuance, verification and acceptance of interoperable COVID-19 certificates on a person's COVID-19 vaccination, test result or recovery, cannot be sufficiently achieved by the Member States but can rather, by reason of the scale and effects of the action, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 TEU. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve that objective.
- (14) In order to allow for its prompt and timely application to ensure the continuity of EU Digital COVID Certificate, this Regulation should enter into force on the day of its publication in the *Official Journal of the European Union*.
- (15) The European Data Protection Supervisor and the European Data Protection Board were consulted in accordance with Article 42(1) and (2) of Regulation (EU) 2018/1725 of the European Parliament and of the Council ⁽¹²⁾ and delivered a joint opinion on 14 March 2022 ⁽¹³⁾,

HAVE ADOPTED THIS REGULATION:

Article 1

Article 3 of Regulation (EU) 2021/954 is replaced by the following:

'Article 3

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

It shall apply from 1 July 2021 for as long as Regulation (EU) 2021/953 is applicable.'

Article 2

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

⁽¹⁰⁾ OJ L 160, 18.6.2011, p. 21.

⁽¹¹⁾ Council Decision 2011/350/EU of 7 March 2011 on the conclusion, on behalf of the European Union, of the Protocol between the European Union, the European Community, the Swiss Confederation and the Principality of Liechtenstein on the accession of the Principality of Liechtenstein to the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen *acquis*, relating to the abolition of checks at internal borders and movement of persons (OJ L 160, 18.6.2011, p. 19).

⁽¹²⁾ Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC (OJ L 295, 21.11.2018, p. 39).

⁽¹³⁾ Not yet published in the Official Journal.

This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaties.

Done at Brussels, 29 June 2022.

For the European Parliament
The President
R. METSOLA

For the Council
The President
F. RIESTER

II

(Non-legislative acts)

REGULATIONS

COMMISSION DELEGATED REGULATION (EU) 2022/1036**of 29 June 2022****amending Regulation (EU) 2020/1429 of the European Parliament and of the Council, as regards the extension of the reference period****(Text with EEA relevance)**

THE EUROPEAN COMMISSION,

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

Having regard to Regulation (EU) 2020/1429 of the European Parliament and of the Council of 7 October 2020 establishing measures for a sustainable rail market in view of the COVID-19 outbreak ⁽¹⁾, and in particular Article 5(2) thereof,

Whereas:

- (1) The COVID-19 pandemic has led to a sharp drop in rail traffic because of a significant fall in demand and direct measures taken by the Member States to contain the pandemic.
- (2) Those circumstances are beyond the control of railway undertakings, that have continuously faced considerable liquidity problems, major losses and in some cases are risking insolvency.
- (3) In order to counteract the negative economic effects of the COVID-19 pandemic and support railway undertakings, Regulation (EU) 2020/1429 enables Member States to authorise infrastructure managers to reduce, waive or defer charges for accessing rail infrastructure. That possibility had been granted for a limited reference period that was lastly extended by Regulation (EU) 2022/312 of the European Parliament and of the Council ⁽²⁾ until 30 June 2022.
- (4) Limitations imposed on mobility during the period of the pandemic had a significant impact on the use of rail passenger services. Rail freight services were also impacted in a more limited way. On the basis of the data provided by Union rail infrastructure managers, the pandemic hit the passenger service segment hardest. The most affected was the commercial passenger service segment, with a significant reduction of its offer across all Member States, which is not yet back to 2019 levels.
- (5) There was a recovery as regards the number of freight trains circulating on the network, with 2021 levels only 0.1% lower when compared to 2019. The number of public service obligation (PSO) passenger trains circulating on the network in 2021 was 2% higher than in 2019, while in 2020 it was 5.1% lower when compared to 2019. However, given that the number of passengers both in 2020 and 2021 did not reach two thirds of the number of passengers travelling in 2019, the reduced impact of the pandemic and the following recovery were likely helped by the continued financial support of the competent authorities under the PSO contracts. In fact, in 2021, the number of passenger commercial trains was still 18.2% lower when compared to the number in 2019. In 2020 it was 22.9% lower when compared to 2019, hence showing no significant recovery.

⁽¹⁾ OJ L 333, 12.10.2020, p. 1.

⁽²⁾ Regulation (EU) 2022/312 of the European Parliament and of the Council of 24 February 2022 amending Regulation (EU) 2020/1429 as regards the duration of the reference period for the application of temporary measures concerning the levying of charges for the use of railway infrastructure (OJ L 55, 28.2.2022, p. 1).

- (6) Similar trends can be observed when traffic is expressed in train-km. Train-km run by freight trains circulating on the network showed signs of recovery, at levels just 0.5% lower in 2021 when compared to 2019. Passenger PSO services expressed in train-km were 1.1% higher in 2021 when compared to 2019. However, in 2021 passenger commercial services expressed in train-km remained 18.7% lower than 2019 levels, a slight improvement when compared to 2020.
- (7) Therefore it is evident that there is a persistent reduction in the level of rail traffic resulting from the impact of the COVID-19 pandemic on the passenger segment, which in 2018 represented around 80% of all traffic expressed in train-km.
- (8) The World Health Organisation data shows that the number of daily recorded cases of COVID-19 in Europe sharply increased at the beginning of 2022 to levels never reached before in the pandemic. Moreover, the number of daily cases reported remains very high.
- (9) A persistent negative impact of the pandemic on rail traffic is likely and railway undertakings' difficult financial situation is equally likely to persist until end 2022.
- (10) It is therefore necessary to extend the reference period established in Article 1 of Regulation (EU) 2020/1429 until 31 December 2022.
- (11) If the European Parliament and the Council were to scrutinise this Regulation for the full period of objection provided for in Article 6(6) of Regulation (EU) 2020/1429, this Regulation would only enter into force after the end of the reference period currently envisaged in Article 1 of Regulation (EU) 2020/1429. In order to avoid legal uncertainty this Regulation should be adopted under the urgency procedure provided for in Article 7 of Regulation (EU) 2020/1429, and should enter into force as a matter of urgency on the day following that of its publication in the *Official Journal of the European Union*,

HAS ADOPTED THIS REGULATION:

Article 1

Article 1 of Regulation (EU) 2020/1429 is replaced by the following:

'Article 1

This Regulation lays down temporary rules on the levying of charges for the use of railway infrastructure as set out in Chapter IV of Directive 2012/34/EU. It applies to the use of railway infrastructure for domestic and international rail services covered by that Directive, during the period from 1 March 2020 until 31 December 2022 ("the reference period").

Article 2

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, 29 June 2022.

For the Commission
The President
Ursula VON DER LEYEN

COMMISSION REGULATION (EU) 2022/1037**of 29 June 2022****amending Annex II to Regulation (EC) No 1333/2008 of the European Parliament and of the Council and the Annex to Commission Regulation (EU) No 231/2012 as regards the use of glycolipids as a preservative in beverages****(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 1333/2008 of the European Parliament and of the Council of 16 December 2008 on food additives ⁽¹⁾, and in particular Articles 10(3) and 14 thereof,

Having regard to Regulation (EC) No 1331/2008 of the European Parliament and of the Council of 16 December 2008 establishing a common authorisation procedure for food additives, food enzymes and food flavourings ⁽²⁾, and in particular Article 7(5) thereof,

Whereas:

- (1) Annex II to Regulation (EC) No 1333/2008 lays down a Union list of food additives approved for use in foods and their conditions of use.
- (2) The Annex to Commission Regulation (EU) No 231/2012 ⁽³⁾ lays down specifications for food additives listed in Annexes II and III to Regulation (EC) No 1333/2008.
- (3) The Union list of food additives and the specifications for food additives may be updated in accordance with the common procedure referred to in Article 3(1) of Regulation (EC) No 1331/2008, either on the initiative of the Commission or following an application from a Member State or an interested party.
- (4) In December 2019, an application was submitted to the Commission for the authorisation of use of glycolipids as a preservative in flavoured drinks, some other products falling under the category 14.1 'non-alcoholic beverages' and alcohol free beer and malt beverages.
- (5) The European Food Safety Authority ('the Authority') evaluated the safety of the proposed use of glycolipids as a food additive. In the Authority's opinion ⁽⁴⁾ adopted on 4 May 2021, an acceptable daily intake ('ADI') of 10 mg/kg bw per day was established. The Authority noted that the highest estimate of exposure of 3,1 mg/kg bw per day, in toddlers, is within the established ADI and concluded that the exposure to glycolipids does not raise a safety concern at the uses and use levels proposed by the applicant.
- (6) Glycolipids are produced by fungus *Dacryopinax spathularia* in a fermentation process. Glycolipids, when used as a preservative, prolong the shelf life of beverages by protecting them against deterioration caused by micro-organisms and inhibit the growth of pathogenic micro-organisms. Glycolipids are active against yeast, moulds and gram-positive bacteria and can serve as an alternative to other preservatives currently authorised in beverages.
- (7) It is therefore appropriate to authorise the use of glycolipids as a preservative in the beverages covered by the application and to assign E 246 as the E-number to that additive.

⁽¹⁾ OJ L 354, 31.12.2008, p. 16.

⁽²⁾ OJ L 354, 31.12.2008, p. 1.

⁽³⁾ Commission Regulation (EU) No 231/2012 of 9 March 2012 laying down specifications for food additives listed in Annexes II and III to Regulation (EC) No 1333/2008 of the European Parliament and of the Council (OJ L 83, 22.3.2012, p. 1).

⁽⁴⁾ EFSA Journal 2021;19(6):6609

- (8) The specifications for glycolipids (E 246) should be included in the Annex to Regulation (EU) No 231/2012 as this additive is included in the Union list of food additives laid down in Annex II to Regulation (EC) No 1333/2008 for the first time.
- (9) Regulations (EC) No 1333/2008 and (EU) No 231/2012 should therefore be amended accordingly.
- (10) 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

Annex II to Regulation (EC) No 1333/2008 is amended in accordance with Annex I to this Regulation.

Article 2

The Annex to Regulation (EU) No 231/2012 is amended in accordance with Annex II to this Regulation.

Article 3

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, 29 June 2022.

For the Commission
The President
Ursula VON DER LEYEN

ANNEX I

Annex II to Regulation (EC) No 1333/2008 is amended as follows:

- (a) in Part B, point 3 'Additives other than colours and sweeteners', the following new entry is inserted after the entry for food additive E 243:

E 246	Glycolipids
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- (b) Part E is amended as follows:

- (1) in Category 14.1.4 (Flavoured drinks), the entry for E 246 (Glycolipids) is inserted after the entry for E 242:

E 246	Glycolipids	50		excluding dairy based drinks'
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- (2) in Category 14.1.5.2 (Other), the entry for E 246 (Glycolipids) is inserted after the entry for E 242:

E 246	Glycolipids	20	(93)	only liquid tea concentrates and liquid fruit and herbal infusion concentrates'
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- (3) in Category 14.2.1 (Beer and malt beverages), the entry for E 246 (Glycolipids) is inserted after the entry for E 220 – 228:

E 246	Glycolipids	50		only alcohol free beer and malt beverages'
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ANNEX II

In the Annex to Regulation (EU) No 231/2012, the following new entry is inserted after the entry for food additive E 243:

E 246 glycolipids**Synonyms****Definition**

The naturally occurring glycolipids are obtained by a fermentation process using the wild type strain MUCL 53181 of the fungus *Dacryopinax spathularia* (edible sweet osmanthus ear mushroom). Glucose is used as a carbon source. The solvent-free downstream process includes filtration and microfiltration to remove microbial cells, precipitation and washing with buffered water to purify. The product is pasteurized and spray-dried. The production process does not chemically modify the glycolipids or change their innate composition.

CAS number

2205009-17-0

Chemical name

Glycolipids from *Dacryopinax spathularia*

Assay

Not less than 93 % total glycolipid content on the dried basis.

Description

Beige to light brown powder, weak characteristic odour

Identification

Solubility

Complies (10 g/l in water)

pH

Between 5,0 and 7,0 (10 g/l in water)

Turbidity

Not more than 28 NTU (10 g/l in water)

Purity

Water content

Not more than 5 % (Karl Fischer Method)

Protein

Not more than 3 % (factor N x 6,25)

Fat

Not more than 2 % (gravimetric)

Sodium

Not more than 3,3 %

Arsenic

Not more than 1 mg/kg

Lead

Not more than 0,7 mg/kg

Cadmium

Not more than 0,1 mg/kg

Mercury

Not more than 0,1 mg/kg

Nickel

Not more than 2 mg/kg

Microbiological criteria

Total aerobic count

Not more than 100 colonies per gram

Yeast and moulds

Not more than 10 colonies per gram

Coliforms

Not more than 3 MPN per gram

Salmonella spp.

Absent in 25 g'

COMMISSION REGULATION (EU) 2022/1038**of 29 June 2022****amending Annex II to Regulation (EC) No 1333/2008 of the European Parliament and of the Council as regards the use of polyvinylpyrrolidone (E1201) in food for special medical purposes, in tablet and coated tablet forms****(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 1333/2008 of the European Parliament and of the Council of 16 December 2008 on food additives ⁽¹⁾, and in particular Article 10(3) thereof,

Having regard to Regulation (EC) No 1331/2008 of the European Parliament and of the Council of 16 December 2008 establishing a common authorisation procedure for food additives, food enzymes and food flavourings ⁽²⁾, and in particular Article 7(5) thereof,

Whereas:

- (1) Annex II to Regulation (EC) No 1333/2008 lays down a Union list of food additives approved for use in foods and their conditions of use.
- (2) That list may be updated in accordance with the common procedure referred to in Article 3(1) of Regulation (EC) No 1331/2008, either on the initiative of the Commission or following an application.
- (3) In accordance with Annex II to Regulation (EC) No 1333/2008, polyvinylpyrrolidone (E1201) is authorised for use as a food additive in table-top sweeteners in tablets and in food supplements supplied in a solid form, excluding food supplements for infants and young children.
- (4) On 29 October 2018, an application was submitted for authorisation of the use of polyvinylpyrrolidone (E1201) as a food additive in food for special medical purposes, in tablet and coated tablet forms, as a tablet binder. The application was made available to the Member States pursuant to Article 4(1), second subparagraph, of Regulation (EC) No 1331/2008.
- (5) Polyvinylpyrrolidone (E 1201) was evaluated by the Scientific Committee for Food in 1990 ⁽³⁾. In its 1 July 2020 scientific opinion ⁽⁴⁾, the European Food Safety Authority ('the Authority') re-evaluated the safety of polyvinylpyrrolidone (E1201) as a food additive and considered the extension of its use in food for special medical purposes in tablet and coated tablet forms. In that opinion, the Authority concluded that such an extension of use, at the proposed maximum permitted level and recommended consumption level, is not expected to be of a safety concern.
- (6) There is a technological need for the addition of polyvinylpyrrolidone (E1201) during the production of the tablets for special medical purposes to strongly bind the ingredients, ensure their cohesion and slow down their disintegration. It is therefore appropriate to authorise the use of this additive as a stabiliser of food for special medical purposes in tablet and coated tablet forms.

⁽¹⁾ OJ L 354, 31.12.2008, p. 16.

⁽²⁾ OJ L 354, 31.12.2008, p. 1.

⁽³⁾ Report of the Scientific Committee for Food, twenty-sixth series. Report EUR 13 913.

⁽⁴⁾ EFSA Journal 2020;18(8):6215.

- (7) The authorisation of the use of polyvinylpyrrolidone (E1201) as a food additive in category 13.2 'Dietary foods for special medical purposes defined in Directive 1999/21/EC (excluding products from food category 13.1.5)' of Part E of Annex II to Regulation (EC) No 1333/2008 does not entail the classification of a product processed with that food additive as a food for special medical purposes under Regulation (EU) No 609/2013 of the European Parliament and of the Council ⁽³⁾.
- (8) Regulation (EC) No 1333/2008 should therefore be amended accordingly.
- (9) 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

In Part E of Annex II to Regulation (EC) No 1333/2008, in food category 13.2 'Dietary foods for special medical purposes defined in Directive 1999/21/EC (excluding products from food category 13.1.5)', the following entry is added:

	'E 1201	Polyvinylpyrrolidone	<i>quantum satis</i>		only in tablet and coated tablet forms'
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Article 2

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, 29 June 2022.

For the Commission
The President
Ursula VON DER LEYEN

⁽³⁾ Regulation (EU) No 609/2013 of the European Parliament and of the Council of 12 June 2013 on food intended for infants and young children, food for special medical purposes, and total diet replacement for weight control and repealing Council Directive 92/52/EEC, Commission Directives 96/8/EC, 1999/21/EC, 2006/125/EC and 2006/141/EC, Directive 2009/39/EC of the European Parliament and of the Council and Commission Regulations (EC) No 41/2009 and (EC) No 953/2009 (OJ L 181, 29.6.2013, p. 35).

COMMISSION IMPLEMENTING REGULATION (EU) 2022/1039**of 29 June 2022****laying down rules for the application of Regulation (EU) No 978/2012 of the European Parliament and of the Council as regards the suspension for the year 2023 of certain tariff preferences granted to certain GSP beneficiary countries**

THE EUROPEAN COMMISSION,

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

Having regard to Regulation (EU) No 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008 ⁽¹⁾, and in particular Article 8(3) thereof,

After consulting the Generalised Preferences Committee, within the meaning of Article 39 of Regulation (EU) No 978/2012,

Whereas:

- (1) Pursuant to Article 8(1) of Regulation (EU) No 978/2012 the tariff preferences of the general arrangement of the generalised scheme of preferences (GSP) are to be suspended in respect of products of a GSP section originating in a GSP beneficiary country when the average value of Union imports of such products over three consecutive years from that GSP beneficiary country exceeds the thresholds listed in Annex VI of that Regulation.
- (2) In accordance with Article 8(2) of Regulation (EU) No 978/2012 and based on trade statistics concerning calendar years 2015-2017, Commission Implementing Regulation (EU) 2019/249 ⁽²⁾ established the list of product sections for which the tariff preferences were suspended from 1 January 2020 until 31 December 2022.
- (3) Pursuant to Article 8(3) of Regulation (EU) No 978/2012, the Commission is to review that list, every three years, and adopt an implementing act to suspend or re-establish the tariff preferences.
- (4) As Regulation (EU) No 978/2012 is set to expire on 31 December 2023, the revised list should apply for one year as of 1 January 2023. The list is based on trade statistics concerning calendar years 2018-2020 as available on 1 September 2021 and takes into account imports from GSP beneficiary countries listed in Annex II of Regulation (EU) No 978/2012 as applicable on that date. However, the value of imports from GSP beneficiaries which, as from 1 January 2023, no longer benefit from the tariff preferences under point (b) of Article 4(1) of Regulation (EU) No 978/2012 is not taken into account,

HAS ADOPTED THIS REGULATION:

Article 1

The tariff preferences referred to in Article 7 of Regulation (EU) No 978/2012 are suspended in respect of the GSP beneficiary countries concerned, for the list of products of GSP sections 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 303, 31.10.2012, p. 1.

⁽²⁾ Commission Implementing Regulation (EU) 2019/249 of 12 February 2019 suspending the tariff preferences for certain GSP beneficiary countries in respect of certain GSP sections in accordance with Regulation (EU) No 978/2012 of the European Parliament and of the Council applying a scheme of generalised tariff preferences (OJ L 42, 13.2.2019, p. 6).

It shall apply from 1 January 2023 until 31 December 2023.

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

Done at Brussels, 29 June 2022.

For the Commission
The President
Ursula VON DER LEYEN

ANNEX

The list of GSP sections for which the tariff preferences referred to in Article 7 of Regulation (EU) No 978/2012 are suspended in respect of a GSP beneficiary country concerned:

Column A: name of country

Column B: GSP section (Article 2(j) of GSP Regulation)

Column C: description

A	B	C
India	S-6a	Inorganic and organic chemicals
	S-7a	Plastics and articles thereof
	S-8b	Articles of leather; fur skins and artificial fur
	S-11a	Textiles
	S-13	Articles of stone, plaster, cement, asbestos, mica or similar materials; ceramic products; glass and glassware
	S-14	Pearls and precious metals
	S-15a	Iron, steel and articles of iron and steel
	S-15b	Base metals (excl. iron and steel), articles of base metals (excl. iron and steel)
	S-16	Machinery and mechanical appliances; electrical machinery and equipment and parts thereof
	S-17a	Railway or tramway locomotives, rolling-stock
Indonesia	S-1a	Live animals and animal products excluding fish
	S-3	Animal or vegetable oils, fats and waxes
	S-5	Mineral products
	S-9a	Wood and articles of wood; wood charcoal
Kenya	S-2a	Live plants and floricultural products

COMMISSION IMPLEMENTING REGULATION (EU) 2022/1040**of 29 June 2022****amending Annexes VI and XV to Implementing Regulation (EU) 2021/404 as regards the lists of third countries, territories or zones thereof authorised for the entry into the Union of certain captive birds and germinal products thereof and meat products from poultry****(Text with EEA relevance)**

THE EUROPEAN COMMISSION,

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

Having regard to Regulation (EU) 2016/429 of the European Parliament and of the Council of 9 March 2016 on transmissible animal diseases and amending and repealing certain acts in the area of animal health ('Animal Health Law') ⁽¹⁾, and in particular Article 230(1) thereof,

Whereas:

- (1) Regulation (EU) 2016/429 lays down, inter alia, the animal health requirements for the entry into the Union of consignments of animals, germinal products and products of animal origin, and it applies from 21 April 2021. One of those animal health requirements is that those consignments must come from a third country, territory or zone or compartment thereof, listed in accordance with Article 230(1) of that Regulation.
- (2) Commission Delegated Regulation (EU) 2020/692 ⁽²⁾ supplements Regulation (EU) 2016/429 as regards the animal health requirements for the entry into the Union of consignments of certain species and categories of animals, germinal products and products of animal origin from third countries or territories, or zones or compartments thereof. Delegated Regulation (EU) 2020/692 provides that consignments of animals, germinal products and products of animal origin falling within its scope may only be permitted to enter into the Union if they come from a third country or territory, or zone or compartment thereof, listed for the particular species and categories of animals, germinal products and products of animal origin, in accordance with the animal health requirements laid down in that Delegated Regulation.
- (3) Commission Implementing Regulation (EU) 2021/404 ⁽³⁾ lays down the lists of third countries, territories, or zones or compartments thereof, from which the entry into the Union of those species and categories of animals, germinal products and products of animal origin, that fall within the scope of Delegated Regulation (EU) 2020/692, is permitted. The lists and certain general rules concerning the lists are set out in Annexes I to XXII to that Implementing Regulation.
- (4) Annex VI, Part 1, Section A, to Implementing Regulation (EU) 2021/404 sets out the list of third countries or territories, or zones thereof, authorised for entry into the Union of consignments of captive birds and germinal products of captive birds, other than captive birds covered by the derogations referred to in Article 62 of Delegated Regulation (EU) 2020/692.
- (5) The United Kingdom have submitted to the Commission an application to authorise the entry into the Union of consignments of captive birds and germinal products thereof, other than the captive birds referred to in Article 62 of Delegated Regulation (EU) 2020/692, from the Crown Dependencies of the Isle of Man and Jersey and provided guarantees regarding the capacities of the competent authorities of those Crown Dependencies to ensure reliable official certification and compliance with the relevant animal health requirements for such consignments of captive birds and germinal products thereof intended for the entry into the Union. Those Crown Dependencies should therefore be listed in Annex VI to Implementing Regulation (EU) 2021/404.

⁽¹⁾ OJ L 84, 31.3.2016, p. 1.

⁽²⁾ Commission Delegated Regulation (EU) 2020/692 of 30 January 2020 supplementing Regulation (EU) 2016/429 of the European Parliament and of the Council as regards rules for entry into the Union, and the movement and handling after entry of consignments of certain animals, germinal products and products of animal origin (OJ L 174, 3.6.2020, p. 379).

⁽³⁾ Commission Implementing Regulation (EU) 2021/404 of 24 March 2021 laying down the lists of third countries, territories or zones thereof from which the entry into the Union of animals, germinal products and products of animal origin is permitted in accordance with Regulation (EU) 2016/429 of the European Parliament and of the Council (OJ L 114, 31.3.2021, p. 1).

- (6) Annex VI to Implementing Regulation (EU) 2021/404 should therefore be amended accordingly.
- (7) Annex XV, Part 1, Section A, to Implementing Regulation (EU) 2021/404 sets out the list of third countries, territories or zones thereof authorised for the entry into the Union of consignments of meat products from ungulates, poultry and game birds which have undergone the risk-mitigating treatments referred to in Annex XXVI to Delegated Regulation (EU) 2020/692.
- (8) Morocco has submitted an application to the Commission to be authorised for the entry into the Union of consignments of meat products from poultry, other than ratites, and provided guarantees regarding compliance, by that third country, with the requirements on the notification and reporting of the listed diseases referred to in Annex I, point 1, to Delegated Regulation (EU) 2020/692 relevant for poultry, and guarantees regarding compliance by that third country with the relevant Union animal health requirements or with equivalent requirements. Therefore, and taking into account the poultry health situation in Morocco, it is appropriate to include that third country in the list set out in Annex XV, Part 1, Section A, to Implementing Regulation (EU) 2021/404 as regards meat products from poultry, other than ratites, which have undergone the specific risk-mitigating treatment 'D' referred to in Annex XXVI to Delegated Regulation (EU) 2020/692.
- (9) Annex XV to Implementing Regulation (EU) 2021/404 should therefore be amended accordingly.
- (10) Implementing Regulation (EU) 2021/404 should therefore be amended accordingly.
- (11) As Implementing Regulation (EU) 2021/404 applies from 21 April 2021, in the interest of legal certainty and to facilitate trade, the amendments to be made to Implementing Regulation (EU) 2021/404 by this Regulation should take effect as a matter of urgency.
- (12) 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

Annexes VI and XV to Implementing Regulation (EU) 2021/404 are amended in accordance with 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*.

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

Done at Brussels, 29 June 2022.

For the Commission
The President
Ursula VON DER LEYEN

ANNEX

Annexes VI and XV to Implementing Regulation (EU) 2021/404 are amended as follows:

(1) in Annex VI, in Part 1, in Section A, the following entries for the Isle of Man and Jersey are inserted between the entries for Israel and New Zealand:

IM Isle of Man	IM-0	Captive birds	CAPTIVE-BIRDS				
		Hatching eggs of captive birds	HE-CAPTIVE-BIRDS				
JE Jersey	JE-0	Captive birds	CAPTIVE-BIRDS				
		Hatching eggs of captive birds	HE-CAPTIVE-BIRDS				

(2) in Annex XV, in Part 1, in Section A, the entry for Morocco is replaced by the following:

MA Morocco	MA-0	B	B	B	B	B	B	B	D	Not authorised	Not authorised	MPST	
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COMMISSION IMPLEMENTING REGULATION (EU) 2022/1041**of 29 June 2022**

making imports of certain lightweight thermal paper originating in the Republic of Korea subject to registration following the re-opening of the investigation in order to implement the judgment of the General Court of 2 April 2020 in Case T-383/17, as upheld by the Court of Justice in Case C-260/20 P, with regard to Commission Implementing Regulation (EU) 2017/763

THE EUROPEAN COMMISSION,

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

Having regard to Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union ⁽¹⁾ ('the basic Regulation'), and in particular Article 14 thereof,

Whereas:

1. PROCEDURE**1.1. Adoption of measures**

- (1) On 17 November 2017, the Commission ('the Commission') published Commission Implementing Regulation (EU) 2016/2005 imposing a provisional anti-dumping duty on imports of certain lightweight thermal paper originating in the Republic of Korea ⁽²⁾. On 3 May 2017, the Commission published Commission Implementing Regulation (EU) 2017/763 imposing a definitive anti-dumping duty and definitively collecting the provisional duty imposed on imports of certain lightweight thermal paper originating in the Republic of Korea ⁽³⁾ ('the regulation at issue').

1.2. The Judgments in cases T-383/17 and C-260/20 P

- (2) By application lodged at the Registry of the General Court on 20 June 2017, the Hansol Group (Hansol Paper Co. Ltd. and Hansol Artone Paper Co. Ltd.) ('Hansol') brought an action for annulment of Implementing Regulation (EU) 2017/763 insofar as it concerned Hansol (Case T-383/17). Hansol challenged the legality of the regulation at issue on a number of accounts. In one of its pleas in law, Hansol disputed the construction of certain normal values pursuant to Article 2(3) of the basic Regulation. In another plea in law, Hansol argued that the Commission had made a manifest error of assessment in the weighting of sales in the European Union to independent customers as compared with sales to related converters. Hansol claimed that this alleged calculation error distorted the calculation of the dumping margin and also, inter alia, the undercutting margin.

⁽¹⁾ OJ L 176, 30.6.2016, p. 21.

⁽²⁾ OJ L 310, 17.11.2016, p. 1.

⁽³⁾ OJ L 114, 3.5.2017, p. 3.

- (3) On 2 April 2020, the Court issued its judgement in Case T-383/17, annulling Implementing Regulation (EU) 2017/763 in so far that it concerned the goods manufactured by Hansol ⁽⁴⁾. The General Court found that the Commission had infringed Article 2(1) of the basic Regulation when determining to construct normal value pursuant to Article 2(3) of the basic Regulation for a product type sold by Hansol Artone Paper Co. Ltd., whereas the same product type had representative domestic sales by Hansol Paper Co. Ltd. The General Court also found that the alleged weighting error was established and that the Commission should have taken into account the quantities sold by Schades Nordic, one of Hansol Group's related converters in the Union, to independent customers. The Commission had therefore infringed Article 2(11) of the basic Regulation as the calculations made by the Commission did not reflect the full extent of dumping practiced by Hansol. Lastly, the General Court held that this weighting error also affected the calculation of the undercutting margin, since the Commission had used the same weighting for that calculation. The General Court also found that the Commission had committed an error when applying Article 2(9) of the basic Regulation by analogy, when it deducted SG&A costs and a profit margin for the resales of the product concerned by the related selling entity in the EU, for the purposes of establishing the export price of that product in the context of the determination of the injury.
- (4) On 11 June 2020, the Commission asked the Court of Justice to set aside the judgement of the General Court by lodging an appeal (Case C-260/20 P). On 12 May 2022, the Second Chamber of the Court rejected the appeal and it upheld the findings of the General Court. ⁽⁵⁾ The Court of Justice noted however that, contrary to what the General Court had found, the Commission did not err when applying Article 2(9) of the basic Regulation by analogy in this case.
- (5) As a result, Implementing Regulation (EU) 2017/763 is annulled insofar as it concerns Hansol.

2. GROUND FOR REGISTRATION

- (6) The Commission analysed whether it is appropriate to make the imports of the product concerned subject to registration. In that context, the Commission took the following considerations into account.
- (7) Article 266 TFEU provides that the Institutions must take the necessary measures to comply with the Courts' judgments. In case of annulment of an act adopted by the Institutions in the context of an administrative procedure, such as anti-dumping investigations, compliance with the General Court's judgement consists in the replacement of the annulled act by a new act, in which the illegality identified by the Court is eliminated ⁽⁶⁾.
- (8) According to the case-law of the Court of Justice, the procedure for replacing the annulled act may be resumed at the very point at which the illegality occurred ⁽⁷⁾. That implies in particular that in a situation where an act concluding an administrative procedure is annulled, that annulment does not necessarily affect the preparatory acts, such as the initiation of the anti-dumping procedure. In a situation where for instance a Regulation imposing definitive anti-dumping measures is annulled, that means that subsequent to the annulment, the anti-dumping proceeding is still open, because the act concluding the anti-dumping proceeding has disappeared from the Union legal order ⁽⁸⁾, except if the illegality occurred at the stage of initiation.
- (9) As explained in the reopening Notice, and since the illegality did not occur at the stage of initiation but at the stage of the investigation, the Commission decided to reopen the investigation in so far as it concerns Hansol and resumed it at the point at which the irregularity occurred.

⁽⁴⁾ ECLI:EU:T:2020:139.

⁽⁵⁾ ECLI:EU:C:2022:370.

⁽⁶⁾ Joined cases 97, 193, 99 and 215/86 *Asteris AE and others and Hellenic Republic v Commission* [1988] ECR 2181, paragraphs 27 and 28; and Case T-440/20 *Jindal Saw v European Commission*, EU:T:2022:318.

⁽⁷⁾ Case C-415/96 *Spain v Commission* [1998] ECR I-6993, paragraph 31; Case C-458/98 P *Industrie des Poudres Sphériques v Council* [2000] I-8147, paragraphs 80 to 85; Case T-301/01 *Alitalia v Commission* [2008] II-1753, paragraphs 99 and 142; Joined Cases T-267/08 and T-279/08 *Région Nord-Pas de Calais v Commission* [2011] II-0000, paragraph 83.

⁽⁸⁾ Case C-415/96 *Spain v Commission* [1998] ECR I-6993, paragraph 31; Case C-458/98 P *Industrie des Poudres Sphériques v Council* [2000] I-8147, paragraphs 80 to 85.

- (10) According to the case-law of the Court of Justice, the resumption of the administrative procedure and the eventual re-imposition of duties cannot be seen as contrary to the rule of non-retroactivity ⁽⁹⁾. The Notice of Re-opening informed interested parties, including importers, that any future liability, if warranted, would emanate from the findings of the re-examination.
- (11) Based on its new findings and the outcome of the reopened investigation, which is unknown at this stage, the Commission may adopt a regulation revising, where warranted, the applicable duty rate. That revised rate, if any, will take effect as from the date on which the Regulation at issue entered into force.
- (12) For this purpose, the Commission requested national customs authorities to await the outcome of the re-examination before deciding on any repayment claim concerning the anti-dumping duties annulled by the General Court with respect to Hansol. Customs authorities are thus directed to put on hold any claims for reimbursements of the annulled duties until the outcome of the re-examination is published in the Official Journal.
- (13) Furthermore, should the re-opening investigation lead to the re-imposition of measures, duties should also be collected for the period during which the re-opening investigation are carried out.
- (14) In this respect, the Commission notes that registration is a tool provided in Articles 14(5) of the basic Regulation so that measures may subsequently be applied against imports from the date of the registration. ⁽¹⁰⁾ In the present case, the Commission deems it appropriate to register imports concerning Hansol with a view to facilitating the collection of anti-dumping duties once their levels are revised in line with the General Court ruling.
- (15) In line with the jurisprudence of the Court of Justice ⁽¹¹⁾, contrary to registration taking place during the period before the adoption of provisional measures, the conditions of Article 10(4) of the basic Regulation are not applicable to the case at hand. Indeed, the purpose of registration in the context of Court implementation is not to allow the possible retroactive collection of duties imposed by trade defence measures as envisaged in those provisions. The purpose is rather to safeguard the effectiveness of the measures in place, without undue interruption from the date of entry into force of the regulations at issue until the re-imposition of the corrected duties, by ensuring that the collection of the correct amount of duties is possible in the future.
- (16) In light of the above considerations, the Commission considered that there were grounds for registration pursuant to Article 14(5) of the basic Regulation.

3. REGISTRATION

- (17) On the basis of the above, imports of the product concerned produced by Hansol (Hansol Paper Co. Ltd. and Hansol Artone Paper Co. Ltd.) must be made subject to registration.
- (18) As indicated in the reopening Notice, the final liability for payment of anti-dumping duty, if any, from the date of entry into force of the anti-dumping regulation at issue will emanate from the findings of the re-examination.
- (19) No duty higher than the duty established in the regulation at issue may be collected for the period between the publication of the notice of re-opening and the date of entry into force of the results of the re-opening investigation.
- (20) The current anti-dumping duty applicable to Hansol is EUR 104,46 per tonne net.

⁽⁹⁾ Case C-256/16 *Deichmann SE v Hauptzollamt Duisburg*, Judgment of the Court of 15 March 2018, paragraph 79 and C & J Clark International Ltd v Commissioners for Her Majesty's Revenue & Customs, judgment of 19 June 2019, paragraph 5.

⁽¹⁰⁾ Case T-440/20 *Jindal Saw v European Commission*, EU:T:2022:318, paragraphs 154 – 159.

⁽¹¹⁾ Case C-256/16 *Deichmann SE v Hauptzollamt Duisburg*, paragraph 79 and Case C-612/16, C & J Clark International Ltd v Commissioners for Her Majesty's Revenue & Customs, judgment of 19 June 2019, paragraph 58.

HAS ADOPTED THIS REGULATION:

Article 1

1. The Customs authorities shall, pursuant to Article 14(5) of Regulation (EU) 2016/1036 and Article 24(5) of Regulation (EU) 2016/1037, take the appropriate steps to register the imports of certain lightweight thermal paper weighing 65 g/m² or less; in rolls of a width of 20 cm or more, a weight of the roll (including the paper) of 50 kg or more and a diameter of the roll (including the paper) of 40 cm or more ('jumbo rolls'); with or without a base coat on one or both sides; coated with a thermos-sensitive substance on one or both sides; and with or without a top coat, currently falling under CN codes ex 4809 90 00, ex 4811 90 00, ex 4816 90 00 and ex 4823 90 85 (TARIC codes: 4809 90 00 10, 4811 90 00 10, 4816 90 00 10, 4823 90 85 20), originating in the Republic of Korea and produced by the Hansol Group (Hansol Paper Co. Ltd. and Hansol Artone Paper Co. Ltd) (TARIC additional code C874).
2. Registration shall expire nine months after the date of entry into force of this Regulation.
3. The rate of the anti-dumping duty that can be collected on imports of certain lightweight thermal paper, currently falling under CN codes ex 4809 90 00, ex 4811 90 00, ex 4816 90 00 and ex 4823 90 85 (TARIC codes: 4809 90 00 10, 4811 90 00 10, 4816 90 00 10, 4823 90 85 20), originating in the Republic of Korea and produced by the Hansol Group (Hansol Paper Co. Ltd. and Hansol Artone Paper Co. Ltd) between the re-opening of the investigation and the date of entry into force of the results of the re-opening investigation shall not exceed that imposed by Implementing Regulation (EU) 2017/763.
4. The national customs authorities shall await the publication of the relevant Commission Implementing Regulation re-imposing the duty before deciding on the claim for repayment and remission of anti-dumping duties insofar as imports concerning the Hansol Group (Hansol Paper Co. Ltd. and Hansol Artone Paper Co. Ltd) are concerned.

Article 2

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, 29 June 2022.

For the Commission
The President
Ursula VON DER LEYEN

DECISIONS

COUNCIL DECISION (EU) 2022/1042

of 21 June 2022

on the position to be adopted, on behalf of the European Union, within the EEA Joint Committee concerning the amendment of Protocol 31 on cooperation in specific fields outside the four freedoms, annexed to the EEA Agreement (Budget line 07 20 03 01 – social security)

(Text with EEA relevance)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Articles 46 and 48 in conjunction with Article 218(9) thereof,

Having regard to Council Regulation (EC) No 2894/94 of 28 November 1994 concerning arrangements for implementing the Agreement on the European Economic Area ⁽¹⁾, and in particular Article 1(3) thereof,

Having regard to the proposal from the European Commission,

Whereas:

- (1) The Agreement on the European Economic Area ⁽²⁾ ('the EEA Agreement') entered into force on 1 January 1994.
- (2) Pursuant to Article 98 of the EEA Agreement, the EEA Joint Committee established by the EEA Agreement (the 'EEA Joint Committee') may decide to amend, inter alia, Protocol 31 on cooperation in specific fields outside the four freedoms, annexed to the EEA Agreement ('Protocol 31').
- (3) It is appropriate to continue the cooperation of the Contracting Parties to the EEA Agreement in Union actions funded from the general budget of the Union regarding the free movement of workers, the coordination of social security schemes and measures for migrants, including migrants from third countries.
- (4) Protocol 31 should therefore be amended accordingly.
- (5) The position of the Union in the EEA Joint Committee should therefore be based on the attached draft Decision of the EEA Joint Committee,

HAS ADOPTED THIS DECISION:

Article 1

The position to be adopted on the Union's behalf within the EEA Joint Committee concerning the amendment of Protocol 31 on cooperation in specific fields outside the four freedoms, annexed to the EEA Agreement, shall be based on the draft Decision of the EEA Joint Committee attached to this Decision.

Article 2

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

⁽¹⁾ OJ L 305, 30.11.1994, p. 6.

⁽²⁾ OJ L 1, 3.1.1994, p. 3.

Done at Luxembourg, 21 June 2022.

For the Council
The President
C. BEAUNE

DRAFT
DECISION OF THE EEA JOINT COMMITTEE No [...]
of ...
amending Protocol 31 to the EEA Agreement, on cooperation in specific fields outside the four freedoms

THE EEA JOINT COMMITTEE,

Having regard to the Agreement on the European Economic Area ('the EEA Agreement'), and in particular Articles 86 and 98 thereof,

Whereas:

- (1) It is appropriate to continue the cooperation of the Contracting Parties to the EEA Agreement in Union actions funded from the general budget of the Union regarding the free movement of workers, coordination of social security schemes and measures for migrants, including migrants from third countries.
- (2) Protocol 31 to the EEA Agreement should therefore be amended in order to allow for this extended cooperation to take place from 1 January 2022,

HAS ADOPTED THIS DECISION:

Article 1

In paragraphs 5 and 14 of Article 5 of Protocol 31 to the EEA Agreement, the words 'financial year 2021' are replaced by the words 'financial years 2021 and 2022'.

Article 2

This Decision shall enter into force on the day following the last notification under Article 103(1) of the EEA Agreement (*).

It shall apply from 1 January 2022.

Article 3

This Decision shall be published in the EEA Section of, and in the EEA Supplement to, the *Official Journal of the European Union*.

Done at Brussels, [...].

For the EEA Joint Committee
The President

The Secretaries
To the EEA Joint Committee

(*) [No constitutional requirements indicated.] [Constitutional requirements indicated.]

COUNCIL DECISION (EU) 2022/1043**of 28 June 2022****appointing a member and two alternate members, proposed by the Kingdom of Spain, of the Committee of the Regions**

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 305 thereof,

Having regard to Council Decision (EU) 2019/852 of 21 May 2019 determining the composition of the Committee of the Regions ⁽¹⁾,

Having regard to the proposals of the Spanish Government,

Whereas:

- (1) Pursuant to Article 300(3) of the Treaty, the Committee of the Regions is to consist of representatives of regional and local bodies who either hold a regional or local authority electoral mandate or are politically accountable to an elected assembly.
- (2) On 3 February 2020, the Council adopted Decision (EU) 2020/144 ⁽²⁾, appointing the members and alternate members of the Committee of the Regions for the period from 26 January 2020 to 25 January 2025.
- (3) A member's seat on the Committee of the Regions has become vacant following the resignation of Mr Juan ESPADAS CEJAS.
- (4) Two alternate members' seats on the Committee of the Regions have become vacant following the resignation of Mr Carlos MARTÍNEZ MÍNGUEZ and the end of the national mandate on the basis of which Mr José Francisco BALLESTA GERMÁN was proposed for appointment.
- (5) The Spanish Government has proposed Mr Julio MILLÁN MUÑOZ, representative of a local body who holds a local authority electoral mandate, *Alcalde del Ayuntamiento de Jaén (Andalucía)* (Mayor of the city council of Jaén (Andalucía)), as a member of the Committee of the Regions for the remainder of the current term of office, which runs until 25 January 2025.
- (6) The Spanish Government has proposed the following representatives of local bodies who hold a local authority electoral mandate as alternate members of the Committee of the Regions for the remainder of the current term of office, which runs until 25 January 2025: Ms Noelia María ARROYO HERNÁNDEZ, *Alcaldesa del Ayuntamiento de Cartagena (Murcia)* (Mayor of the city council of Cartagena (Murcia)), and Mr Óscar PUENTE SANTIAGO, *Alcalde del Ayuntamiento de Valladolid (Castilla y León)* (Mayor of the city council of Valladolid (Castilla y León)),

HAS ADOPTED THIS DECISION:

Article 1

The following representatives of local bodies who hold an electoral mandate are hereby appointed to the Committee of the Regions for the remainder of the current term of office, which runs until 25 January 2025:

(a) as a member:

— Mr Julio MILLÁN MUÑOZ, *Alcalde del Ayuntamiento de Jaén (Andalucía)* (Mayor of the city council of Jaén (Andalucía)),

⁽¹⁾ OJ L 139, 27.5.2019, p. 13.

⁽²⁾ Council Decision (EU) 2020/144 of 3 February 2020 appointing the members and alternate members of the Committee of the Regions for the period from 26 January 2020 to 25 January 2025 (OJ L 32, 4.2.2020, p. 16).

and

(b) as alternate members:

- Ms Noelia María ARROYO HERNÁNDEZ, *Alcaldesa del Ayuntamiento de Cartagena (Murcia)* (Mayor of the city council of Cartagena (Murcia)),
- Mr Óscar PUENTE SANTIAGO, *Alcalde del Ayuntamiento de Valladolid (Castilla y León)* (Mayor of the city council of Valladolid (Castilla y León)).

Article 2

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

Done at Luxembourg, 28 June 2022.

For the Council
The President
A. PANNIER-RUNACHER

POLITICAL AND SECURITY COMMITTEE DECISION (CFSP) 2022/1044**of 28 June 2022****extending the mandate of the Head of Mission of the European Union Police Mission for the Palestinian Territories (EUPOL COPPS) (EUPOL COPPS/1/2022)**

THE POLITICAL AND SECURITY COMMITTEE,

Having regard to the Treaty on European Union, and in particular Article 38, third paragraph, thereof,

Having regard to Council Decision 2013/354/CFSP of 3 July 2013 on the European Union Police Mission for the Palestinian Territories (EUPOL COPPS) ⁽¹⁾, and in particular Article 9(1) thereof,

Whereas:

- (1) Pursuant to Article 9(1) of Decision 2013/354/CFSP, the Political and Security Committee (PSC) is authorised, in accordance with Article 38 of the Treaty, to take the relevant decisions for the purpose of exercising the political control and strategic direction of the European Union Police Mission for the Palestinian Territories (EUPOL COPPS), including the decision to appoint a Head of Mission.
- (2) On 13 October 2020, the PSC adopted Decision (CFSP) 2020/1541 ⁽²⁾, appointing Ms Nataliya APOSTOLOVA as Head of Mission of EUPOL COPPS from 15 November 2020 to 30 June 2021.
- (3) On 28 June 2021, the Council adopted Decision (CFSP) 2021/1066 ⁽³⁾, extending the mandate of EUPOL COPPS until 30 June 2022.
- (4) On 1 July 2021, the PSC adopted Decision (CFSP) 2021/1128 ⁽⁴⁾, extending the mandate of Ms Nataliya APOSTOLOVA as the Head of Mission of EUPOL COPPS until 30 June 2022.
- (5) On 27 June 2022, the Council adopted Decision (CFSP) 2022/1018 ⁽⁵⁾, extending the mandate of EUPOL COPPS from 1 July 2022 until 30 June 2023.
- (6) The High Representative of the Union for Foreign Affairs and Security Policy has proposed to extend the mandate of Ms Nataliya APOSTOLOVA as Head of Mission of EUPOL COPPS from 1 July 2022 to 30 June 2023,

HAS ADOPTED THIS DECISION:

Article 1

The mandate of Ms Nataliya APOSTOLOVA as Head of Mission of the European Union Police Mission for the Palestinian Territories (EUPOL COPPS) is hereby extended from 1 July 2022 to 30 June 2023.

⁽¹⁾ OJ L 185, 4.7.2013, p. 12.

⁽²⁾ Political and Security Committee Decision (CFSP) 2020/1541 of 13 October 2020 on the appointment of the Head of Mission of the European Union Police Mission for the Palestinian Territories (EUPOL COPPS) (EUPOL COPPS/1/2020) (OJ L 353, 23.10.2020, p. 8).

⁽³⁾ Council Decision (CFSP) 2021/1066 of 28 June 2021 amending Decision 2013/354/CFSP on the European Union Police Mission for the Palestinian Territories (EUPOL COPPS) (OJ L 229, 29.6.2021, p. 13).

⁽⁴⁾ Political and Security Committee Decision (CFSP) 2021/1128 of 1 July 2021 extending the mandate of the Head of Mission of the European Union Police Mission for the Palestinian Territories (EUPOL COPPS) (EUPOL COPPS/1/2021) (OJ L 244, 9.7.2021, p. 3).

⁽⁵⁾ Council Decision (CFSP) 2022/1018 of 27 June 2022 amending Decision 2013/354/CFSP on the European Union Police Mission for the Palestinian Territories (EUPOL COPPS) (OJ L 170, 28.6.2022, p. 76).

Article 2

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

It shall apply from 1 July 2022.

Done at Brussels, 28 June 2022.

For the Political and Security Committee

The Chairperson

D. PRONK

POLITICAL AND SECURITY COMMITTEE DECISION (CFSP) 2022/1045**of 28 June 2022****extending the mandate of the Head of Mission of the European Union Border Assistance Mission for the Rafah Crossing Point (EU BAM Rafah) (EU BAM Rafah/1/2022)**

THE POLITICAL AND SECURITY COMMITTEE,

Having regard to the Treaty on European Union, and in particular the third paragraph of Article 38 thereof,

Having regard to Council Joint Action 2005/889/CFSP of 25 November 2005 on establishing a European Union Border Assistance Mission for the Rafah Crossing Point (EU BAM Rafah) ⁽¹⁾, and in particular Article 10(1) thereof,

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

Whereas:

- (1) Pursuant to Article 10(1) of Joint Action 2005/889/CFSP, the Political and Security Committee (PSC) is authorised, in accordance with Article 38 of the Treaty, to take the relevant decisions for the purpose of exercising political control and strategic direction of the European Union Border Assistance Mission for the Rafah Crossing Point (EU BAM Rafah), including the decision to appoint a Head of Mission.
- (2) On 13 October 2020, the PSC adopted Decision (CFSP) 2020/1548 ⁽²⁾, appointing Mr Mihai-Florin BULGARIU as Head of Mission of EU BAM Rafah from 1 November 2020 to 30 June 2021.
- (3) On 28 June 2021, the Council adopted Decision (CFSP) 2021/1065 ⁽³⁾, extending the mandate of EU BAM Rafah until 30 June 2022.
- (4) On 1 July 2021, the PSC adopted Decision (CFSP) 2021/1127 ⁽⁴⁾, extending the mandate of Mr Mihai-Florin BULGARIU as the Head of Mission EUBAM Rafah from 1 July 2021 to 30 June 2022.
- (5) On 27 June 2022, the Council adopted Decision (CFSP) 2022/1017 ⁽⁵⁾, extending the mandate of EU BAM Rafah until 30 June 2023.
- (6) The High Representative of the Union for Foreign Affairs and Security Policy has proposed to extend the mandate of Mr Mihai-Florin BULGARIU as Head of Mission of EU BAM Rafah until 30 June 2023,

HAS ADOPTED THIS DECISION:

Article 1

The mandate of Mr Mihai-Florin BULGARIU as Head of Mission of EU BAM Rafah is hereby extended from 1 July 2022 to 30 June 2023.

⁽¹⁾ OJ L 327, 14.12.2005, p. 28.

⁽²⁾ Political and Security Committee Decision (CFSP) 2020/1548 of 13 October 2020 on the appointment of the Head of Mission of the European Union Border Assistance Mission for the Rafah Crossing Point (EU BAM Rafah) (EU BAM Rafah/2/2020) (OJ L 354, 26.10.2020, p. 5).

⁽³⁾ Council Decision (CFSP) 2021/1065 of 28 June 2021 amending Joint Action 2005/889/CFSP on establishing a European Union Border Assistance Mission for the Rafah Crossing Point (EU BAM Rafah) (OJ L 229, 29.6.2021, p. 11).

⁽⁴⁾ Political and Security Committee Decision (CFSP) 2021/1127 of 1 July 2021, extending the mandate of the Head of Mission of the European Union Border Assistance Mission for the Rafah Crossing Point (EU BAM Rafah) (EU BAM Rafah/1/2021) (OJ L 244, 9.7.2021, p. 1).

⁽⁵⁾ Council Decision (CFSP) 2022/1017 of 27 June 2022 amending Joint Action 2005/889/CFSP on establishing a European Union Border Assistance Mission for the Rafah Crossing Point (EU BAM Rafah) (OJ L 170, 28.6.2022, p. 74).

Article 2

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

It shall apply from 1 July 2022.

Done at Brussels, 28 June 2022.

For the Political and Security Committee

The Chairperson

D. PRONK

**DECISION (EU) 2022/1046 OF THE REPRESENTATIVES OF THE GOVERNMENTS OF THE
MEMBER STATES**

of 29 June 2022

appointing Judges to the General Court

THE REPRESENTATIVES OF THE GOVERNMENTS OF THE MEMBER STATES OF THE EUROPEAN UNION,

Having regard to the Treaty on European Union, and in particular Article 19 thereof,

Having regard to the Treaty on the Functioning of the European Union, and in particular Articles 254 and 255 thereof,

Whereas:

- (1) The terms of office of 26 Judges of the General Court are due to expire on 31 August 2022. Appointments to those posts should therefore be made for the period from 1 September 2022 to 31 August 2028.
- (2) It has been proposed that the terms of office of Mr Ion GÂLEA, Mr Marc JAEGER, Mr Dean SPIELMANN and Ms Mirela STANCU as Judges of the General Court be renewed.
- (3) Mr Steven VERSCHUUR has been nominated for a first term of office as Judge of the General Court.
- (4) In addition, Article 48 of Protocol No 3 on the Statute of the Court of Justice of the European Union, as amended by Regulation (EU, Euratom) 2015/2422 of the European Parliament and of the Council ⁽¹⁾, provides that the General Court is to be increased in three stages so as to consist of two Judges per Member State as from 1 September 2019. Pursuant to Article 2(a) of that Regulation, the first stage of the increase in the number of Judges at the General Court entailed the appointment of 12 additional Judges, six of whom were to have a term of office ending on 31 August 2016. Those six Judges were to be chosen in such a way that the governments of six Member States nominated two Judges for the partial renewal of the General Court in 2016, whose term of office runs from 1 September 2016 to 31 August 2022. The post of the additional Judge to be appointed on a proposal from the Government of the Slovak Republic is one of the six additional Judge posts involved in the partial renewal of the General Court in 2016. Ms Beatrix RICZIOVÁ has been nominated for the post of additional Judge of the General Court.
- (5) Under Article 7 of Protocol No 3 and following the death of Mr Barna BERKE, a Judge should be appointed to the General Court for the remainder of Mr Barna BERKE's term of office, which runs until 31 August 2022.
- (6) Mr Tihamér TÓTH has been nominated for the vacant post.
- (7) The panel set up under Article 255 of the Treaty on the Functioning of the European Union has given a favourable opinion on the suitability of those candidates to perform the duties of Judge of the General Court,

⁽¹⁾ Regulation (EU, Euratom) 2015/2422 of the European Parliament and of the Council of 16 December 2015 amending Protocol No 3 on the Statute of the Court of Justice of the European Union (OJ L 341, 24.12.2015, p. 14).

HAVE ADOPTED THIS DECISION:

Article 1

The following are hereby appointed Judges of the General Court for the period from 1 September 2022 to 31 August 2028:

- Mr Ion GÂLEA,
- Mr Marc JAEGER,
- Mr Dean SPIELMANN,
- Ms Mirela STANCU,
- Mr Steven VERSCHUUR.

Article 2

The following are hereby appointed Judges of the General Court for the period from the date of entry into force of this Decision to 31 August 2022:

- Ms Beatrix RICZIOVÁ,
- Mr Tihamér TÓTH.

Article 3

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

Done at Brussels, 29 June 2022.

The President
P. LÉGLISE-COSTA

III

(Other acts)

EUROPEAN ECONOMIC AREA

EFTA SURVEILLANCE AUTHORITY DECISION No 269/21/COL**of 1 December 2021****introducing revised Guidelines on Regional State Aid for 2022-2027 [2022/1047]**

THE EFTA SURVEILLANCE AUTHORITY ('ESA'),

Having regard to the Agreement on the European Economic Area ('the EEA Agreement'), in particular to Articles 61 to 63 and Protocol 26,

Having regard to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ('the Surveillance and Court Agreement'), in particular to Article 24 and Article 5(2)(b),

Having regard to Protocol 3 to the Surveillance and Court Agreement ('Protocol 3'), in particular to Article 1(1) of Part I,

Whereas:

Under Article 24 of the Surveillance and Court Agreement, ESA shall give effect to the provisions of the EEA Agreement concerning state aid,

Under Article 5(2)(b) of the Surveillance and Court Agreement, ESA shall issue notices or guidelines on matters dealt with in the EEA Agreement, if that Agreement or the Surveillance and Court Agreement expressly so provides or if ESA considers it necessary,

Under Article 1(1) of Part I of Protocol 3 to the Surveillance and Court Agreement, ESA shall keep under constant review all systems of aid existing in the EFTA States and propose any appropriate measures required by the progressive development or by the functioning of the EEA Agreement,

On 19 April 2021, the European Commission ('the Commission') adopted revised EU guidelines on regional state aid ⁽¹⁾,

These guidelines are also of relevance for the European Economic Area,

Uniform application of the EEA state aid rules is to be ensured throughout the European Economic Area in line with the objective of homogeneity established in Article 1 of the EEA Agreement,

According to point II under the heading 'GENERAL' on page 11 of Annex XV to the EEA Agreement, ESA, after consultation with the Commission, is to adopt acts corresponding to those adopted by the European Commission,

Having consulted the European Commission,

⁽¹⁾ Published in OJ C 153, 29.4.2021, p. 1.

Having consulted the EFTA States,

HAS ADOPTED THIS DECISION:

Article 1

The substantive rules in the field of state aid shall be amended by introducing revised Guidelines on regional state aid with effect from the date of the present Decision. The revised Guidelines are annexed to this Decision and form an integral part of it.

Article 2

The existing Guidelines on Regional State Aid for 2014–2021 shall be replaced with effect from 1 January 2022.

Article 3

Only the English language version of this decision is authentic.

Done in Brussels, 1 December 2021.

For the EFTA Surveillance Authority,

Bente ANGELL-HANSEN
President
Responsible College Member

Högni S. KRISTJÁNSSON
College Member

Stefan BARRIGA
College Member

Melpo-Menie JOSÉPHIDÈS
Countersigning as Director,
Legal and Executive Affairs

Guidelines on regional state aid *

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(*) These Guidelines correspond to the European Commission Guidelines on regional State aid (OJ C 153, 29.4.2021, p. 1). The Commission Guidelines do not qualify as legislative instruments and therefore do not have to be incorporated into the EEA Agreement by the EEA Joint Committee.

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1. INTRODUCTION

1. The EFTA Surveillance Authority ('ESA') may consider the following types of state aid compatible with the functioning of the EEA Agreement, on the basis of Article 61(3)(a) and (c) of the EEA Agreement:

- a) State aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment; and
- b) State aid to facilitate the development of certain economic areas within the European Economic Area ('EEA') ⁽¹⁾.

These types of state aid are known as regional aid.

2. These Guidelines set out the conditions under which regional aid may be considered to be compatible with the functioning of the EEA Agreement. They also set out the criteria for identifying the areas that fulfil the conditions of compatibility under Article 61(3)(a) and Article 61(3)(c) of the EEA Agreement.

3. The primary objective of state aid control in the field of regional aid is to ensure that aid for regional development and territorial cohesion ⁽²⁾ does not to an undue extent adversely affect trading conditions between EEA States ⁽³⁾. In particular, it aims at preventing subsidy races that may occur when EEA States seek to attract or retain businesses in assisted areas of the EEA, and to limit the effects of regional aid on trade and competition to the minimum necessary.

4. The objective of regional development and territorial cohesion distinguishes regional aid from other forms of aid, such as aid for research, development and innovation, employment, training, energy or for environmental protection, which pursue other objectives of economic development under Article 61(3) of the EEA Agreement. In some circumstances, higher aid intensities may be allowed for those other types of aid when granted to undertakings established in assisted areas, in recognition of the specific difficulties they face in these areas ⁽⁴⁾.

5. Regional aid can only play an effective role if it is used sparingly and proportionately and is focused on assisted areas in the EEA ⁽⁵⁾. In particular, the permissible aid ceilings should reflect the extent of the problems affecting the development of the areas concerned. The advantages of the aid in terms of the development of an assisted area must outweigh the distortion of competition and trade that it may result in ⁽⁶⁾. The weight given to the positive effects of the aid is likely to vary according to the derogation under Article 61(3) of the EEA Agreement, which means that a greater distortion of competition can be accepted in the most disadvantaged areas covered by Article 61(3)(a) than in areas covered by Article 61(3)(c) ⁽⁷⁾.

⁽¹⁾ Areas eligible for regional aid under Article 61(3)(a) of the EEA Agreement, commonly referred to as 'a' areas, tend to be the most disadvantaged within the EEA in terms of economic development. Areas eligible under Article 61(3)(c) of the EEA Agreement, referred to as 'c' areas, also tend to be disadvantaged, but to a lesser extent. Due to the relatively high GDP per capita in the EEA EFTA States, no region in these States currently qualifies for the derogation under Article 61(3)(a) of the EEA Agreement.

⁽²⁾ [...]

⁽³⁾ These Guidelines concern aid granted within the EEA by the EEA EFTA States, namely Iceland, Liechtenstein and Norway. When mentioning 'Member States', ESA includes the territory of Northern Ireland as agreed within the 'Protocol on Ireland/Northern Ireland' annexed to the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community.

⁽⁴⁾ Regional top-ups for aid granted for such purposes are therefore not considered as regional aid.

⁽⁵⁾ EEA EFTA States can identify these areas in a regional aid map, following the conditions laid down in Section 7.

⁽⁶⁾ See judgment of 17 September 1980, *Philip Morris Holland BV v Commission of the European Communities*, Case 730/79, ECLI:EU:C:1980:209, paragraph 17, and judgment of 14 January 1997, *Spain v Commission*, C-169/95, ECLI:EU:C:1997:10, paragraph 20.

⁽⁷⁾ See judgment of 12 December 1996, *AIUFFASS and AKT v Commission*, T-380/94, ECLI:EU:T:1996:195, paragraph 54.

6. Furthermore, regional aid can only be effective in promoting or facilitating the economic development of assisted areas provided that it is awarded to stimulate additional investment or economic activity in those areas. In certain very limited, well-identified cases, the obstacles faced by these areas in attracting or maintaining economic activity may be so severe or permanent that investment aid may not be sufficient to enable the area to develop. In this situation may regional investment aid be supplemented by regional operating aid.

7. In 2019, the European Commission ('the Commission') launched an evaluation of the regional aid framework to assess whether its regional aid guidelines were still fit for purpose. The results ⁽⁸⁾ showed that, in principle, the rules work well, but they require some improvements to reflect economic developments. In addition, the 'European Green Deal' ⁽⁹⁾, 'A new industrial strategy for Europe' ⁽¹⁰⁾ and 'Shaping Europe's digital future' ⁽¹¹⁾, may be taken into account by the Commission when assessing the impact of regional aid, which require making some amendments to the rules. In this context, other state aid rules are also undergoing a revision process and the Commission is paying particular attention to the scope of each of the thematic guidelines and also to the possibilities to potentially combine different kinds of aid for the same investment. As such, support for initial investments for new environmentally friendly technologies that contribute to the decarbonisation of production processes in industry, including energy-intensive industries such as steel, can be assessed, depending on their exact features, in particular under the state aid rules for research, development and innovation or for environmental protection and energy. Regional aid can also be combined with other types of aid. It is possible, for example, for the same investment project, to combine regional aid with support under the state aid rules for environmental protection and energy if that investment project facilitates the development of an assisted area and at the same time increases the level of environmental protection to an extent that the investment or part of it qualifies for support under both thematic rules and the provisions of both sets of rules are complied with. In this way, EEA States can incentivise reaching both objectives in an optimal way, while avoiding overcompensation. [...] ⁽¹²⁾.

7a. ESA notes that certain policy instruments and legislative provisions referred to by the Commission may not be incorporated into the EEA Agreement. While taking into account the particular legislative situation of the EEA EFTA States, ESA will nonetheless, with a view to ensuring uniform application of state aid provisions, and equal conditions of competition throughout the EEA, generally apply the same points of reference as the Commission Guidelines when assessing the compatibility of regional aid with the functioning of the EEA Agreement *. The present Guidelines consequently include references to European Union legislation and policy documents found in the Commission Guidelines **. This does not imply that the EEA EFTA States are obliged to comply with legislation which has not been implemented into the EEA Agreement.

⁽⁸⁾ See the Commission staff working document on the results of the Fitness Check of 30 October 2020 – SWD(2020) 257 final.

⁽⁹⁾ Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions of 11 December 2019 – COM(2019) 640 final.

⁽¹⁰⁾ Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions of 10 March 2020 – COM(2020) 102 final.

⁽¹¹⁾ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 19 February 2020 – COM(2020) 67 final.

⁽¹²⁾ [...].

^(*) Based on the Proposal for a Regulation of the European Parliament and of the Council establishing the Just Transition Fund – COM(2020) 22 final, the Commission also included in its Guidelines specific provisions to facilitate support in the context of the Just Transition Fund (JTF) in line with cohesion principles. These provisions are not included in the present Guidelines as, at the time of their adoption, it was not sufficiently clear how the JTF would be dealt with in the context of the EEA Agreement to stipulate conditions. Depending on the future development, ESA may consider revising the present Guidelines on these and other points.

^(**) Some text has nevertheless been deleted compared with the Commission Guidelines. These deletions include text referring to legal instruments and provisions which are not part of, or have no equivalent in, the EEA Agreement, and text where, as mentioned in the preceding footnote, it is too unclear at this point what the implications of the legal instrument referred to will be in the context of the EEA Agreement. Where text has been deleted, it has been replaced with [...] as placeholder.

8. In response to the economic disturbance created by the COVID-19 pandemic, the Commission has put in place targeted instruments, such as the Temporary Framework for State aid measures ⁽¹³⁾. The pandemic may have more long-lasting effects in certain areas than in others. At this point in time, it is too early to predict the impact of the pandemic over the mid- to long- term and to identify which areas will be particularly affected. ESA therefore plans a mid-term review of the regional aid maps in 2023, which will take into account the latest available statistics.

2. SCOPE AND DEFINITIONS

2.1. Scope of regional aid

9. The compatibility conditions set out in these Guidelines are applicable both to notifiable regional aid schemes and notifiable individual aid.

10. These Guidelines do not cover state aid granted to the steel ⁽¹⁴⁾, lignite ⁽¹⁵⁾ and coal ⁽¹⁶⁾ sectors.

11. ESA will apply the principles set out in these Guidelines to regional aid in all other sectors of economic activity falling within the scope of the EEA Agreement, apart from sectors that are subject to specific state aid rules, in particular, in[...] ⁽¹⁷⁾ ⁽¹⁸⁾ transport ⁽¹⁹⁾, broadband ⁽²⁰⁾, and energy ⁽²¹⁾, save where state aid is granted in those sectors as part of a horizontal regional operating aid scheme.

12. ESA will apply the principles set out in these Guidelines in respect of processing and marketing of agricultural products into non-agricultural products ⁽²²⁾.

13. Large enterprises tend to be less affected than small and medium sized enterprises (SMEs) by regional constraints to investing or maintaining economic activity in an assisted area. Firstly, large enterprises can more easily obtain capital and credit on global markets and are less constrained by the more limited offer of financial services in assisted areas. Secondly, investments by large enterprises can produce economies of scale that reduce location-specific initial costs and, in many respects, are not tied to the area in which the investment takes place. Thirdly, large enterprises that plan investments usually have considerable bargaining power vis-à-vis the authorities, which may lead to aid being awarded without need or due justification. Lastly, large enterprises are more likely to be significant players on the market concerned and, as a result, the investment for which the aid is awarded may distort competition and trade on the internal market.

⁽¹³⁾ OJ C 91 I, 20.3.2020, p. 1.

⁽¹⁴⁾ As defined in Annex VI.

⁽¹⁵⁾ 'Lignite' means low-rank C or Ortho-lignite and low-rank B or Meta lignite as defined by the international codification system for coal established by the United Nations Economic Commission for Europe.

⁽¹⁶⁾ 'Coal' means high-grade, medium grade and low grade category A and B coal as defined by the international codification system for coal established by the United Nations Economic Commission for Europe and clarified in the Council decision of 10 December 2010 on State aid to facilitate the closure of uncompetitive coal mines (OJ L 336, 21.12.2010, p. 24).

⁽¹⁷⁾ [...].

⁽¹⁸⁾ [...].

⁽¹⁹⁾ Transport means the transport of passengers by aircraft, maritime transport, road, railway and by inland waterway or freight transport services for hire or reward. Transport infrastructure covered by specific guidelines, such as airports, is also excluded from these Guidelines (see the Guidelines on state aid to airports and airlines (OJ L 318, 24.11.2016, p. 17, and EEA Supplement No 66, 24.11.2016, p. 1)).

⁽²⁰⁾ Guidelines for the application of state aid rules in relation to the rapid deployment of broadband networks (OJ L 135, 8.5.2014, p. 49, and EEA Supplement No 27, 8.5.2014, p. 1).

⁽²¹⁾ ESA will assess the compatibility of state aid to the energy sector on the basis of the Guidelines on state aid for environmental protection and energy 2014-2020 (OJ L 131, 28.5.2015, p. 1, and EEA Supplement No 30, 28.5.2015, p. 1).

⁽²²⁾ [...].

14. Since regional aid to large enterprises for their investments is unlikely to have an incentive effect, as a rule it cannot be considered as compatible with the functioning of the EEA Agreement under Article 61(3)(c) of the EEA Agreement, unless it is granted for initial investments that create new economic activities in these 'c' areas in line with the criteria laid down in these Guidelines. [...] ⁽²³⁾ ⁽²⁴⁾.

15. Regional aid aimed at reducing the current expenses of an undertaking constitutes operating aid. Operating aid may be considered compatible only if it can be shown that it is necessary for the development of the area, for instance if it aims to reduce certain specific difficulties faced by SMEs in the most disadvantaged areas (under Article 61(3)(a) of the EEA Agreement), if it compensates for additional costs incurred in pursuing an economic activity in outermost regions, or if it prevents or reduces depopulation in sparsely and very sparsely populated areas.

16. These Guidelines do not cover operating aid awarded to undertakings whose principal activity falls under Section K 'Financial and insurance activities' of the NACE Rev. 2 statistical classification of economic activities ⁽²⁵⁾ or to undertakings that perform intra-group activities and whose principal activity falls under classes 70.10 'Activities of head offices' or 70.22 'Business and other management consultancy activities' of NACE Rev. 2.

17. Regional aid may not be awarded to undertakings in difficulty, as defined for the purpose of these Guidelines by the Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty ⁽²⁶⁾.

18. When assessing regional aid awarded to an undertaking that is subject to an outstanding recovery order following a previous ESA decision declaring an aid illegal and incompatible with the the functioning of the EEA Agreement, ESA will take account of any aid still to be recovered ⁽²⁷⁾.

2.2. Definitions

19. For the purposes of these Guidelines, the following definitions apply:

- (1) 'a' areas' mean areas designated in a regional aid map in accordance with Article 61(3)(a) of the EEA Agreement and 'c' areas' mean areas designated in a regional aid map in accordance with Article 61(3)(c) of the EEA Agreement;
- (2) 'ad hoc aid' means aid that is not awarded on the basis of a scheme;
- (3) 'adjusted aid amount' means the maximum permissible aid amount for a large investment project, calculated according to the following formula:

$$3.1. \text{ adjusted aid amount} = R \times (A + 0,50 \times B + 0,34 \times C)$$

3.2. where: R is the maximum aid intensity applicable in the area concerned, excluding the increased aid intensity for SMEs. A is the part of eligible costs equal to EUR 50 million, B is the part of eligible costs between EUR 50 million and EUR 100 million, and C is the part of eligible costs above EUR 100 million;

⁽²³⁾ [...].

⁽²⁴⁾ [...].

⁽²⁵⁾ NACE is an acronym derived from the French title 'Nomenclature générale des Activités économiques dans les Communautés Européennes' (Statistical classification of economic activities in the European Communities) used to designate the various statistical classifications of economic activities in the EU. See Regulation (EC) No 1893/2006 of the European Parliament and of the Council of 20 December 2006 establishing the statistical classification of economic activities NACE Revision 2 and amending Council Regulation (EEC) No 3037/90 as well as certain EC Regulations on specific statistical domains (OJ L 393, 30.12.2006, p. 1). The Regulation is incorporated into Annex XXI of the EEA Agreement by EEA Joint Committee Decision No 61/2007 (OJ L 266, 11.10.2007, p. 25, and EEA Supplement No 48, 11.10.2007, p. 18).

⁽²⁶⁾ Guidelines on state aid for rescuing and restructuring non-financial undertakings in difficulty (OJ L 271, 16.10.2015, p. 35, and EEA Supplement No 62, 15.10.2015, p. 1). As explained in point 23 of those guidelines, given that its very existence is in danger, an undertaking in difficulty cannot be considered an appropriate vehicle for promoting other public policy objectives until such time as its viability is assured.

⁽²⁷⁾ See judgment of 13 September 1995, TWD Textilwerke Deggendorf GmbH v Commission of the European Communities, Joined cases T-244/93 and T-486/93, ECLI:EU:T:1995:160, paragraph 56, and ESA's communication on recovery of unlawful and incompatible state aid (OJ L 105, 21.4.2011, p. 32, and EEA Supplement No 23, 21.4.2011, p. 1).

- (4) 'aid intensity' means the gross grant equivalent expressed as a percentage of the eligible costs;
- (5) 'assisted area' means either an 'a' area' or a 'c' area';
- (6) 'completion of the investment' means the moment when the investment is considered by the national authorities as completed or three years after the start of works, whichever is earlier;
- (7) 'date of award of the aid' means the date when the legal right to receive the aid is conferred on the aid beneficiary under the applicable national legal regime;
- (8) 'EU27' means all 27 Member States (excluding Northern Ireland) *;
- (8a) 'EEA States' means the EU27 and the EEA EFTA States;
- (8b) 'EEA EFTA States' means Iceland, Liechtenstein and Norway;
- (9) 'evaluation plan' means a document covering one or more aid schemes and containing at least the following minimum aspects: the objectives to be evaluated, the evaluation questions, the result indicators, the envisaged method to conduct the evaluation, the data collection requirements, the proposed timing of the evaluation including the date of submission of the interim and the final evaluation reports, the description of the independent body that will carry out the evaluation or the criteria that will be used for its selection and the modalities for making the evaluation publicly available;
- (10) 'gross grant equivalent' means the discounted amount of the aid equivalent to what it would amount to if provided in the form of a grant to the aid beneficiary, before taxes or other charges, as calculated at the date of award of the aid or at the time the aid is notified to ESA, whichever is earlier, on the basis of the reference rate applicable on that date;
- (11) 'horizontal regional operating aid scheme' means an act on the basis of which, without further implementing measures, individual operating aid may be granted to undertakings defined in the act in a general and abstract manner. For the purpose of this definition, a sectoral aid scheme cannot be considered as a horizontal regional operating aid scheme;
- (12) 'individual aid' means *ad hoc* aid or notifiable awards of aid to individual beneficiaries on the basis of an aid scheme;
- (13) 'initial investment' means:
- a) an investment in tangible and intangible assets related to one or more of the following:
 - the setting-up of a new establishment;
 - the extension of the capacity of an existing establishment;
 - the diversification of the output of an establishment into products ⁽²⁸⁾ not previously produced in the establishment; or
 - a fundamental change in the overall production process of the product(s) concerned by the investment in the establishment; or
 - b) an acquisition of assets belonging to an establishment that has closed or would have closed had it not been purchased. Sole acquisition of the shares of an undertaking does not qualify as initial investment.
- Replacement investment thus does not constitute initial investment.
- (14) 'initial investment that creates a new economic activity' means:
- a) an investment in tangible and intangible assets related to one or more of the following:
 - the setting up of a new establishment; or
 - the diversification of the activity of an establishment, under the condition that the new activity is not the same or a similar activity to the activity previously performed in the establishment; or

(*) See in this context also footnote 3.

⁽²⁸⁾ The concept of product also covers services in the context of these Guidelines.

- b) an acquisition of assets belonging to an establishment that has closed or would have closed had it not been purchased, provided that the new activity to be carried out using the acquired assets is not the same or a similar activity than the one carried out in the establishment before the acquisition. Sole acquisition of the shares of an undertaking does not qualify as initial investment that creates a new economic activity.
- (15) 'intangible assets' means assets that do not have a physical or financial embodiment such as patent rights, licences, know-how or other intellectual property;
- (16) 'job creation' means a net increase in the number of employees in the establishment concerned compared with the average over the previous 12 months, after deducting from the number of jobs created, any job losses that occurred during that period, expressed in annual labour units;
- (17) 'large enterprises' means undertakings that do not fulfill the conditions to qualify as SMEs in accordance with point (28);
- (18) 'large investment project' means an initial investment with eligible costs exceeding EUR 50 million;
- (19) 'maximum aid intensity' means the aid intensity reflected in the regional aid maps set out in subsection 7.4, including the increased aid intensity for SMEs;
- (20) 'number of employees' means the number of annual labour units, namely the numbers of persons employed full-time in one year; persons working part-time or employed in seasonal work are counted in annual labour unit fractions;
- (21) [...]⁽²⁹⁾;
- (22) 'operating aid' means aid aimed to reduce an undertaking's current expenditure, including categories such as personnel costs, materials, contracted services, communications, energy, maintenance, rent and administration, but excluding depreciation charges and the costs of financing if these have been included in the eligible costs when granting regional investment aid;
- (23) 'regional aid map' means the list of areas designated by an EEA EFTA State in line with the conditions laid down in these Guidelines and approved by ESA;
- (24) 'relocation' means a transfer of the same or a similar activity or part thereof from an establishment in one contracting party to the EEA Agreement (initial establishment) to the establishment in which the aided investment takes place in another contracting party to the EEA Agreement (aided establishment). There is a transfer if the product in the initial and in the aided establishments serves at least partly the same purposes and meets the demands or needs of the same type of customers and jobs are lost in the same or similar activity in one of the initial establishments of the aid beneficiary in the EEA;
- (25) 'same or a similar activity' means an activity in the same class (four-digit numerical code) of the NACE Rev. 2 statistical classification of economic activities;
- (26) 'sectoral aid scheme' means a scheme that covers activities falling within the scope of fewer than five classes (four-digit numerical code) of the NACE Rev.2 statistical classification;
- (27) 'single investment project' means any initial investment related to the same or a similar activity started by the aid beneficiary at group level within three years of the date of start of works on another aided investment in the same statistical region at level 3⁽³⁰⁾;
- (28) 'SMEs' means undertakings that fulfil the conditions laid down in ESA's guidelines of 19 April 2006 on aid to micro, small and medium-sized enterprises⁽³¹⁾;

⁽²⁹⁾ [...].

⁽³⁰⁾ In these Guidelines the term 'statistical region' will be used instead of the acronym 'NUTS' in the Commission Guidelines. NUTS is derived from the title 'Nomenclature of Territorial Units for Statistics' according to Regulation (EC) No 1059/2003 of the European Parliament and of the Council of 26 May 2003 on the establishment of a common classification of territorial units for statistics (NUTS) (OJ L 154, 21.6.2003, p. 1) as amended by the Commission Delegated Regulation (EU) 2019/1755 (OJ L 270, 24.10.2019, p. 1). This regulation has not been incorporated into the EEA Agreement. However, in order to achieve common definitions in an ever-increasing demand for statistical information at a regional level, the Statistical Office of the European Union, Eurostat, and the National Institutes of the Candidate countries and EFTA have agreed that statistical regions be established similar to the NUTS classification. The data used in these Guidelines are based on this 2021 nomenclature.

⁽³¹⁾ EFTA Surveillance Authority Decision No 94/06/COL of 19 April 2006 amending for the fifty-seventh time the procedural and substantive rules in the field of state aid (OJ L 36, 5.2.2009, p. 62, and EEA Supplement No 6, 5.2.2009, p. 1).

- (29) 'start of works' means either the start of construction works relating to the investment, or the first legally binding commitment to order equipment or any other commitment that makes the investment irreversible, whichever is earlier. Buying land and preparatory works such as obtaining permits and conducting preliminary feasibility studies are not considered as start of works. For takeovers, 'start of works' means the date when the assets directly linked to the acquired establishment were acquired;
- (30) 'sparsely populated areas' mean the areas designated by the EEA EFTA State concerned in line with paragraph 169;
- (31) 'tangible assets' means assets such as land, buildings, and plant, machinery and equipment;
- (32) 'very sparsely populated areas' mean statistical regions at level 2 with fewer than eight inhabitants per km² or parts of such statistical regions designated by the EEA EFTA State concerned in line with paragraph 169;
- (33) 'wage costs' means the total amount actually payable by the aid beneficiary in respect of the employment concerned, comprising gross wages before tax and compulsory contributions such as social security, child care and parent care costs over a defined period of time.

3. NOTIFIABLE REGIONAL AID

20. In principle, EEA EFTA States must notify regional aid pursuant to Article 1(3) of Part I of Protocol 3 to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ('Protocol 3'), with the exception of measures that fulfil the conditions laid down in a Block Exemption Regulation incorporated in the EEA Agreement through Annex XV ⁽³²⁾.

21. ESA will apply these Guidelines to notifiable regional aid schemes and notifiable individual regional aid.

22. Individual aid granted under a notified scheme remains subject to the notification obligation under Article 1(3) of Part I of Protocol 3 if the aid from all sources exceeds the individual notification threshold laid down in the General Block Exemption Regulation ⁽³³⁾ ('GBER') for regional investment aid.

23. Individual aid granted under a notified scheme also remains subject to the notification obligation under Article 1(3) of Part I of Protocol 3 unless the beneficiary:

- a) has confirmed that in the 2 years preceding the application for aid, it has not carried out a relocation to the establishment in which the aided initial investment is to take place, and
- b) has committed not to carry out such relocation up to a period of two years after completion of the initial investment.

4. ELIGIBLE COSTS

4.1. Investment aid

24. The eligible costs are as follows:

- 1. investment costs in tangible and intangible assets; or
- 2. the estimated wage costs arising from job creation as a result of an initial investment, calculated over two years; or
- 3. a combination of part of the costs referred to in point (1) and 2) but not exceeding the amount of 1) or 2), whichever is higher.

⁽³²⁾ [...].

⁽³³⁾ Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty (OJ L 187 26.6.2014, p. 1). The Regulation was incorporated into the EEA Agreement at point 1j of Annex XV by EEA Joint Committee Decision No 152/2014 (OJ L 342, 27.11.2014, p. 63, and EEA Supplement No 71, 27.11.2014, p. 61).

25. If the eligible costs are drawn up on the basis of investment costs in tangible and intangible assets, only the costs of assets that form part of the initial investment in the establishment of the aid beneficiary located in the targeted assisted area are eligible.

26. By way of derogation from the condition in paragraph 25, vendor tooling ⁽³⁴⁾ assets can be included in the eligible costs of the undertaking that acquired (or produced) them if they are used over the full minimum maintenance period of five years for large enterprises, and three years for SMEs, for a processing or assembly operation of the aid beneficiary directly linked to a production process based on the aided initial investment of the aid beneficiary. This derogation is applicable provided the supplier's establishment is located in an assisted area, the supplier itself does not receive regional investment aid or investment aid for SMEs pursuant to Article 17 GBER for the assets concerned, and the aid intensity does not exceed the relevant maximum aid intensity applicable to the location of the supplier's establishment. Any adjustment of the aid intensity for large investment projects also applies to the aid calculated for the costs of the vendor tooling assets, which are considered to form part of the overall investment costs of the initial investment.

4.1.1. *Eligible costs calculated on the basis of investment costs*

27. The assets acquired must be new, except for SMEs or for the acquisition of an establishment ⁽³⁵⁾.

28. For SMEs, up to 50 % of the costs of preparatory studies or consultancy costs linked to the investment may also be considered as eligible costs.

29. For aid granted to large enterprises for a fundamental change in the production process, the eligible costs must exceed the depreciation of the assets linked to the activity to be modernised over the preceding three fiscal years.

30. For aid awarded for a diversification of an existing establishment, the eligible costs must exceed by at least 200 % the book value of the reused assets, as registered in the fiscal year preceding the start of works.

31. Costs related to the lease of tangible assets may be taken into account under the following conditions:

1. for land and buildings, the lease must continue for at least five years after the expected date of completion of the investment for large enterprises, and three years for SMEs;
2. for plant or machinery, the lease must take the form of financial leasing and must contain an obligation for the aid beneficiary to purchase the asset at the expiry of the term of the lease.

32. In case of an initial investment as referred to in paragraph 19(13)(b) or 19(14)(b), in principle only the costs of buying the assets from third parties unrelated to the buyer should be taken into consideration. However, if a member of the family of the original owner, or an employee, takes over a small enterprise, the condition that the assets must be bought from third parties unrelated to the buyer does not apply. The transaction must take place under market conditions. If the acquisition of the assets of an establishment is accompanied by an additional investment eligible for regional aid, the eligible costs of that additional investment should be added to the costs of acquisition of the assets of the establishment.

⁽³⁴⁾ Vendor tooling is the acquisition (or auto-production) of machines, tools or equipment and related software by an undertaking (at group level), which are acquired (or produced) not for use on one of its premises (at group level), but made available to selected suppliers for the production of products to be manufactured on the supplier's premises, which will serve as intermediary products for the production process of the undertaking. Vendor tooling assets remain the property of the acquiring undertaking, but are made available to the supplier for the tasks and under the conditions defined in a supply contract or similar agreement. They are linked to well-defined processing or assembly operations in one or several of the undertaking's (at group level) premises, and may have to be returned to the owner after completion of the order, or expiry or termination of a framework contract.

⁽³⁵⁾ Defined in paragraph 19 (13) and (14).

33. For large enterprises, the costs of intangible assets are eligible only up to 50 % of the total eligible investment costs for the initial investment. For SMEs, 100 % of the costs of intangible assets are eligible.

34. Intangible assets that can be taken into account for the calculation of the investment costs must remain associated with the area concerned and must not be transferred to other areas. To this end, the intangible assets must fulfil the following conditions:

1. they must be used exclusively in the establishment receiving the aid;
2. they must be amortisable;
3. they must be purchased under market conditions from third parties unrelated to the buyer;
4. they must be included in the assets of the undertaking that receives the aid and must remain associated with the project for which the aid is awarded for at least five years (three years for SMEs).

4.1.2. *Eligible costs calculated on the basis of wage costs*

35. Regional aid may also be calculated by reference to the estimated wage costs arising from job creation as a result of an initial investment. The aid may compensate only the wage costs related to job creation, calculated over two years, and the resulting aid intensity must not exceed the maximum applicable aid intensity in the area concerned.

36. Where eligible costs are calculated by reference to the estimated wage costs as referred to in paragraph 35, the following conditions must be fulfilled:

1. the investment project must lead to job creation;
2. each post must be filled within three years of the completion of the investment;
3. each job created through the investment must be maintained in the area concerned for at least five years from the date the post was first filled, or three years for SMEs.

4.2. **Operating aid**

37. Eligible costs for operating aid schemes must be predefined and fully attributable to the problems that the aid is intended to address, as demonstrated by the EEA EFTA State.

38. [...].

5. **COMPATIBILITY ASSESSMENT OF REGIONAL AID**

39. ESA will consider a regional aid measure compatible with Article 61(3) of the EEA Agreement only if the aid contributes to regional development and cohesion. The aim must be either to promote the economic development of 'a' areas or to facilitate the development of 'c' areas (Section 5.1) and in addition it must meet each of the following criteria:

1. incentive effect: the aid must change the behaviour of the undertakings concerned in such a way that they carry out an additional activity which they would not carry out without the aid or would carry out in a restricted or different manner or location; (Section 5.2)
2. need for State intervention: a state aid measure must be targeted towards a situation where aid can bring about a material improvement that the market cannot deliver itself, for example by remedying a market failure or addressing an equity or cohesion concern; (Section 5.3)
3. appropriateness of the aid measure: the proposed aid measure must be an appropriate policy instrument to meet its objective; (Section 5.4)
4. proportionality of the aid (aid to the minimum): the aid amount must be limited to the minimum needed to stimulate the additional investment or activity in the area concerned; (Section 5.5)

5. avoidance of undue negative effects on competition and trade between EEA States: the negative effects of the aid on competition and trade must be outweighed by the positive effects; (Section 5.6)
6. transparency of the aid: EEA States, ESA, economic operators, and the public, must have easy access to all relevant acts and information on the aid awarded (Section 5.7).

40. The overall balance of certain categories of schemes may also be made subject to the requirement to carry out an *ex post* evaluation, as described in Section 6. In such cases, ESA may limit the duration of the schemes (typically to four years or less), with the option to re-notify their prolongation afterwards.

41. If a state aid measure, the conditions attached to it (including its financing method when the financing method forms an integral part of the state aid measure), or the activity it finances entail a violation of a relevant provision of EEA law, the aid cannot be declared compatible with the functioning of the EEA Agreement ⁽³⁶⁾.

5.1. Contribution to regional development and cohesion

42. The primary objective of regional aid is the economic development of the disadvantaged areas within the EEA. By promoting and facilitating the sustainable development of assisted areas, the aid improves economic and social cohesion by reducing disparities in the level of development between areas.

5.1.1. Investment aid schemes

43. Regional aid schemes should form an integral part of a regional development strategy with clearly defined objectives.

44. EEA EFTA States must demonstrate that the scheme is consistent with and contributes to the development strategy of the area concerned. For this purpose, EEA EFTA States can refer to evaluations of past state aid schemes, impact assessments made by the granting authorities, or expert opinions. To ensure that the aid scheme contributes to the development strategy, it must include a method that enables the granting authorities to prioritise and select the investment projects that meet the objectives of the scheme (for example, by using a formal scoring method).

45. Regional aid schemes may be put in place in 'a' areas to support initial investments made by SMEs or large enterprises. In 'c' areas, schemes may be put in place to support initial investments made by SMEs and initial investments that create a new economic activity made by large enterprises.

46. When awarding aid to individual investment projects on the basis of a scheme, the granting authority must verify that the selected project will contribute towards the scheme's objective and thus towards the development strategy in the area concerned. For this purpose, EEA EFTA States should refer to the information provided by the aid applicant in the aid application form describing the positive effects of the investment on the development of the area concerned ⁽³⁷⁾.

47. To ensure that the investment makes a real and sustained contribution to the development of the area concerned, the investment must be maintained in that area for at least five years, or three years for SMEs, after the completion of the investment ⁽³⁸⁾.

⁽³⁶⁾ See the judgments of 19 September 2000, *Germany v Commission*, C-156/98, ECLI:EU:C:2000:467, paragraph 78, and of 22 December 2008, *Régie Networks v Rhone Alpes Bourgogne*, C-333/07, ECLI:EU:C:2008:764, paragraphs 94 to 116.

⁽³⁷⁾ See Annex VII.

⁽³⁸⁾ The obligation to maintain the investment in the area concerned for a minimum period of five years (three years for SMEs) should not prevent the replacement of plant or equipment that has become outdated or broken within this period, provided that the economic activity is retained in the area concerned for the minimum period. However, regional aid may not be awarded to replace that plant or equipment.

48. To ensure that the investment is viable, the EEA EFTA State must ensure that the aid beneficiary provides a financial contribution of at least 25 % ⁽³⁹⁾ of the eligible costs, through its own resources or by external financing, in a form that is free of any public support ⁽⁴⁰⁾.

49. To avoid state aid measures leading to environmental harm, EEA EFTA States must also ensure compliance with EEA environmental legislation, including in particular the need to carry out an environmental impact assessment when required by law and to obtain all relevant permits.

5.1.2. Notifiable individual investment aid

50. To demonstrate the contribution of notifiable individual investment aid to regional development, EEA EFTA States may use a variety of indicators such as the ones mentioned below that can be both direct (for example, direct jobs created) and indirect (for example, local innovation):

1. The number of direct jobs created by the investment is an important indicator of the contribution to regional development and cohesion. The quality and durability of the jobs created and the required skill level should also be considered.
2. An even higher number of new jobs might be created in the local (sub-) supplier network, helping to better integrate the investment in the area concerned and ensuring more widespread spillover effects. The number of indirect jobs created is therefore also an indicator to be taken into account.
3. A commitment by the aid beneficiary to enter into widespread training activities to improve the skills (general and specific) of its workforce will be considered as a factor that contributes to regional development and cohesion. Emphasis will also be put on providing traineeships or apprenticeships, especially for young people and on training that improves the knowledge and employability of workers outside the undertaking.
4. External economies of scale or other benefits from a regional development viewpoint may arise as a result of proximity (clustering effect). Clustering of undertakings in the same industry allows individual plants to specialise more, which leads to increased efficiency. However, the importance of this indicator in determining the contribution to regional development and cohesion depends on the state of development of the cluster.
5. Investments embody technical knowledge and can be the source of a significant transfer of technology (knowledge spillovers). Investments taking place in technology intensive industries are more likely to involve technology transfer to the area concerned. The level and the specificity of the knowledge dissemination are also important in this regard.
6. The projects' contribution to the area's ability to create new technology through local innovation can also be considered. Cooperation with local research and knowledge-dissemination organisations, such as universities or research institutes can be considered positively in this respect.
7. The duration of the investment and possible future follow-on investments are an indication of a durable engagement of an undertaking in the area concerned.

51. EEA EFTA States can refer to the business plan of the aid beneficiary which could provide information on the number of jobs to be created, salaries to be paid (increase in household wealth as spill-over effect), volume of acquisition from local producers, turnover generated by the investment and benefiting the area possibly through additional tax revenues.

52. For notifiable individual investment aid, the requirements laid down in paragraphs 47 to 49 apply.

⁽³⁹⁾ [...].

⁽⁴⁰⁾ This is not the case for example for subsidised loans, public equity-capital loans or public participations which do not meet the market investor principle, State guarantees containing elements of aid, or public support granted within the scope of the de minimis rule.

53. For *ad hoc* aid ⁽⁴¹⁾, EEA EFTA States must demonstrate, in addition to the requirements laid down in paragraphs 50 to 52, that the project is coherent with and contributes to the development strategy of the area concerned.

5.1.3. *Operating aid schemes*

54. Operating aid schemes promote the development of assisted areas only if the challenges that those areas face are clearly identified in advance. The obstacles to attracting or maintaining economic activity may be so severe or permanent that investment aid alone is not sufficient for these areas to develop.

55. For aid to reduce certain specific difficulties faced by SMEs in 'a' areas, EEA EFTA States must demonstrate the existence and scale of those specific difficulties and must demonstrate that an operating aid scheme is needed as those specific difficulties cannot be overcome with investment aid.

56. [...].

57. As regards operating aid to prevent or reduce depopulation in sparsely and very sparsely populated areas, EEA EFTA States must demonstrate the risk of depopulation in the event that operating aid is not granted.

5.2. **Incentive effect**

5.2.1. *Investment aid*

58. Regional aid can only be found compatible with the functioning of the EEA Agreement if it has an incentive effect. State aid is considered to have an incentive effect when it changes the behaviour of an undertaking in a way that it carries out additional activity contributing to the development of an area that it would not have carried out, or would only have done in a limited or different manner or in another location, if the aid was not granted. The aid must not subsidise the costs of an activity that an undertaking would carry out in any event and must not compensate for the normal business risk of an economic activity.

59. The incentive effect can be proven in two ways:

1. the aid gives an incentive to take a positive decision to invest in the area concerned because otherwise the investment would not be sufficiently profitable for the aid beneficiary anywhere in the EEA ⁽⁴²⁾ (*scenario 1, investment decision*),
2. the aid gives an incentive to locate a planned investment in the area concerned rather than elsewhere because it offsets the net disadvantages and costs of investing in a location in the area concerned (*scenario 2, location decision*).

60. If the aid does not change the behaviour of the aid beneficiary by stimulating (additional) initial investment in the area concerned, it can be considered that the same investment would be made in the area even without the aid. The aid therefore lacks an incentive effect to achieve the regional development and cohesion objective and cannot be approved as compatible with the functioning of the EEA Agreement under these Guidelines.

61. However, for regional aid awarded through cohesion policy funds in 'a' areas to investments necessary to achieve standards set by EEA law, the aid may be considered to have incentive effect, if in absence of the aid, it would not have been sufficiently profitable for the aid beneficiary to make the investment in the area concerned, leading to the closure of an existing establishment in that area.

⁽⁴¹⁾ *Ad hoc* aid is subject to the same requirements as individual aid granted on the basis of a scheme, unless otherwise mentioned.

⁽⁴²⁾ Such investments may create the conditions for further investments that are viable without additional aid.

5.2.1.1. Investment aid schemes

62. Works on an individual investment can start only after the application form for aid is submitted.

63. If works start before the application form for aid is submitted, any aid awarded for that individual investment will not be considered compatible with the functioning of the EEA Agreement.

64. EEA EFTA States must submit a standard aid application form that contains, as a minimum, all the information listed in Annex VII. In the application form, SMEs and large enterprises must explain counterfactually what would happen if they were not granted aid, indicating the applicable scenario described in paragraph 59.

65. In addition, large enterprises must submit documentary evidence to underpin the counterfactual described in the application form. SMEs are not subject to such obligation in respect of non-notifiable aid granted under a scheme.

66. The granting authority must carry out a credibility check of the counterfactual and verify that regional aid has the required incentive effect corresponding to one of the scenarios described in paragraph 59. A counterfactual is credible if it is genuine and relates to the decision-making factors prevalent at the time of the decision by the aid beneficiary regarding the investment.

5.2.1.2. Notifiable individual investment aid

67. In addition to the requirements of paragraphs 62 to 66, for notifiable individual aid, EEA EFTA States must provide clear evidence that the aid has an impact on the investment decision or on the choice of location ⁽⁴³⁾. They must specify which scenario described in paragraph 59 applies. To enable a comprehensive assessment to be made, EEA EFTA States must provide not only information on the project but also a comprehensive description of the counterfactual scenario, in which the applicant receives no aid from any public authority in the EEA.

68. In *scenario 1*, EEA EFTA States could prove that the aid has an incentive effect by providing the undertaking's documents that show that the investment would not be sufficiently profitable without the aid.

69. In *scenario 2*, EEA EFTA States could prove that the aid has an incentive effect by providing the undertaking's documents showing that a comparison has been made between the costs and benefits of locating in the area concerned and those in alternative area(s). ESA verifies whether these comparisons are realistic.

70. EEA EFTA States are invited to draw on genuine and official board documents, risk assessments (including the assessment of location-specific risks), financial reports, internal business plans, expert opinions and other studies related to the investment project under assessment. Those documents need to be contemporary to the decision making process concerning the investment or its location. Documents containing information on demand forecasts, cost forecasts, financial forecasts, documents submitted to an investment committee and that elaborate on investment scenarios, or documents provided to the financial institutions could help EEA EFTA States to demonstrate the incentive effect.

⁽⁴³⁾ The counterfactual scenarios are described in paragraph 64.

71. In this context, and in particular in *scenario 1*, the level of profitability can be evaluated by using methods that are standard practice in the given industry, which may include methods to evaluate the net present value of the project (NPV) ⁽⁴⁴⁾, the internal rate of return (IRR) ⁽⁴⁵⁾ or the average return on capital employed (ROCE). The profitability of the project is to be compared with normal rates of return applied by the beneficiary in other investment projects of a similar kind. Where these rates are not available, the profitability of the project must be compared with the cost of capital of the beneficiary as a whole or with the rates of return commonly observed in the industry concerned.

72. If the aid does not change the behaviour of the aid beneficiary by stimulating (additional) investment in the area, there is no positive effect for the area. Therefore, aid will not be considered compatible with the functioning of the EEA Agreement if it appears that the same investment would be made in the area even without aid being granted.

5.2.2. *Operating aid schemes*

73. For operating aid schemes, the aid is considered to have an incentive effect if it is likely that, in the absence of aid, the level of economic activity in the area concerned would be significantly reduced due to the problems that the aid aims to tackle.

74. ESA will therefore consider that the operating aid provides an incentive to additional economic activity in the area, if the EEA EFTA State has demonstrated the existence and substantial nature of those problems in that area (see paragraphs 54 to 57).

5.3. **Need for State intervention**

75. To assess whether state aid is necessary to achieve the objective of regional development and cohesion, it is necessary first to diagnose the problem. State aid should be targeted to situations where aid can bring about a material improvement that the market cannot deliver. This is especially important in a context of scarce public resources.

76. State aid measures can, under certain conditions, correct market failures and thereby contribute to the efficient functioning of markets and boost competitiveness. Where markets do provide efficient outcomes but such outcomes are deemed unsatisfactory in terms of equity or cohesion, state aid may be used to obtain a more desirable, equitable market outcome.

77. As regards aid granted for the development of areas included in the regional aid map in line with the rules in section 7 of these Guidelines, ESA considers that in those areas, the market does not deliver outcomes resulting in a sufficient level of economic development and cohesion without State intervention. Therefore, aid granted in those areas is considered necessary.

5.4. **Appropriateness of regional aid**

78. The aid measure must be an appropriate policy instrument to address the policy objective concerned. An aid measure will not be considered compatible if other less distortive policy instruments or other less distortive types of aid instrument make it possible to achieve the same positive contribution to regional development and cohesion.

⁽⁴⁴⁾ The NPV of a project is the difference between the positive and negative cash flows over the lifetime of the investment, discounted to their current value (typically using the cost of capital).

⁽⁴⁵⁾ The IRR is not based on accounting earnings in a given year, but takes into account the stream of future cash flows that the investor expects to receive over the entire lifetime of the investment. It is defined as the discount rate for which the NPV of a stream of cash flows equals zero.

5.4.1. Appropriateness among alternative policy instruments

5.4.1.1. Investment aid

79. Regional investment aid is not the only policy instrument available to EEA EFTA States to boost investment and job creation in assisted areas. EEA EFTA States can use other measures such as infrastructure development, enhancing the quality of education and training, or improving the business environment.

80. When notifying an investment aid scheme, EEA EFTA States must indicate why regional aid is an appropriate instrument to help develop the area.

81. If an EEA EFTA State decides to put in place a sectoral aid scheme, it must demonstrate the advantages of doing so instead of using a multi-sectoral scheme or other policy options.

82. In particular, ESA will take account of impact assessments of the proposed aid scheme that EEA EFTA States make available. Likewise, it may take into account the results of *ex post* evaluations described in Section 6 to assess the appropriateness of the proposed scheme.

83. In the case of *ad hoc* investment aid, EEA EFTA States must demonstrate how the aid can better contribute to the development of the area than aid under a scheme or other types of measures.

5.4.1.2. Operating aid schemes

84. EEA EFTA States must demonstrate that the aid is appropriate to achieve the objective of the scheme for the problems that the aid aims to address. To demonstrate that the aid is appropriate, EEA EFTA States may calculate the aid amount *ex ante* as a fixed sum covering the expected additional costs over a given period, to encourage undertakings to contain costs and develop their business in a more efficient manner over time ⁽⁴⁶⁾.

5.4.2. Appropriateness among different aid instruments

85. Regional aid can be awarded in several forms. EEA EFTA States must however, ensure that the aid is awarded in the form likely to have the lowest impact in distorting trade and competition. If the aid is awarded in forms that provide a direct pecuniary advantage (for example, direct grants, exemptions or reductions in taxes, social security or other compulsory charges, or the supply of land, goods or services at favourable prices), EEA EFTA States must demonstrate why other potentially less distortive forms of aid such as repayable advances or aid based on debt or equity instruments (for example, low-interest loans or interest rebates, State guarantees, the purchase of a share-holding or an alternative injection of capital on favourable terms) are not appropriate.

86. The results of *ex post* evaluations as described in Section 6 may be taken into account to assess the appropriateness of the proposed aid instrument.

5.5. Proportionality of the aid amount (limiting aid to the minimum needed)

5.5.1. Investment aid

87. The amount of regional aid must be limited to the minimum needed to stimulate additional investment or activity in the area concerned.

88. To ensure predictability and a level playing field, ESA applies maximum aid intensities ⁽⁴⁷⁾ for investment aid.

⁽⁴⁶⁾ However, where future costs and revenue developments are surrounded by a high degree of uncertainty and there is a strong asymmetry of information, the public authority may also wish to adopt compensation models that are not entirely *ex ante*, but a mix of *ex ante* and *ex post* (for example, using claw backs such as to allow sharing of unanticipated gains).

⁽⁴⁷⁾ See Section 7.4. on regional aid maps.

89. For an initial investment project, the maximum aid intensity and maximum aid amount ⁽⁴⁸⁾ (adjusted aid amount ⁽⁴⁹⁾ and the related reduced aid intensity for a large investment project) must be calculated by the granting authority when awarding the aid or notifying the aid to ESA, whichever is earlier.

90. Since large investment projects are likely to give rise to greater distortions of competition and trade, the aid amount for these projects must not exceed the adjusted aid amount.

91. Where the initial investment is part of a single investment project and that single investment project is a large investment project, the aid amount for the single investment project must not exceed the adjusted aid amount. The exchange rate and discount rate to be applied for the purpose of this rule are those applicable at the date of award of the aid for the first project in the single investment project.

92. The maximum aid intensities serve a dual purpose.

93. First, for notifiable schemes, these maximum aid intensities serve as safe harbours for SMEs: provided that the aid intensity remains below the maximum permissible, the aid is deemed proportionate.

94. Second, for all other cases, the maximum aid intensities are used as a cap to the net-extra costs approach described in paragraphs 95 to 97.

95. As a general rule, ESA will consider notifiable individual aid to be limited to the minimum, if the aid amount corresponds to the net-extra costs of investing in the area concerned, compared to the counterfactual in the absence of aid ⁽⁵⁰⁾, with maximum aid intensities as a cap. Likewise, for investment aid granted to large enterprises under notifiable schemes, EEA EFTA States must ensure that the aid amount is limited to the minimum on the basis of a 'net-extra costs approach', with maximum aid intensities as a cap.

96. For *scenario 1* situations (investment decisions), the aid amount should therefore not exceed the minimum necessary to render the project sufficiently profitable, for example to increase its IRR above the normal rate applied by the undertaking in other investment projects of a similar kind or, when available, to increase its IRR above the cost of capital of the beneficiary as a whole or above the rates of return commonly achieved in that industry.

97. For *scenario 2* situations (location incentives), the aid amount should not exceed the difference between the NPV of the investment in the target area with the NPV in the alternative location. All relevant costs and benefits must be taken into account, including for example administrative costs, transport costs, training costs not covered by training aid and wage differences. However, if the alternative location is in the EEA, subsidies in that location cannot be taken into account.

98. Calculations used to analyse the incentive effect can also be used to assess whether the aid is proportionate. EEA EFTA States must demonstrate proportionality with documentation, such as that referred to in paragraph 70.

99. Investment aid may be awarded concurrently under several regional aid schemes or cumulated with *ad hoc* regional aid, provided that the total aid from all sources does not exceed the maximum aid intensity per project, which must be calculated in advance by the first granting authority. Any other state aid in relation to the same eligible costs, partly or fully overlapping, may be cumulated only if it does not result in exceeding the highest aid intensity or aid amount applicable to this aid under the applicable thematic rules. Cumulation checks must be carried out both when the aid is granted and when the aid is paid ⁽⁵¹⁾. If the EEA EFTA State allows state aid under one scheme to be cumulated with state aid under other schemes, it must specify, for each scheme, the method to ensure compliance with the conditions in this paragraph.

⁽⁴⁸⁾ Expressed as gross grant equivalent.

⁽⁴⁹⁾ *Idem*.

⁽⁵⁰⁾ When comparing counterfactual scenarios, the aid is to be discounted by the same factor as the corresponding investment and counterfactual scenarios.

⁽⁵¹⁾ The requirement that the maximum permissible aid intensity per project must be calculated in advance by the first granting authority does not apply when the aid is granted via automatic aid scheme(s) in the form of a tax advantage. In this situation, cumulation checks are in principle not possible when the aid is granted and should be carried out when the aid is paid out.

100. For an initial investment linked to European Territorial Cooperation (ETC) projects meeting the criteria of the Regulation laying down the specific provisions for the European Territorial Cooperation goal (Interreg) ⁽³²⁾, the aid intensity applicable to the area in which the initial investment is located applies to all beneficiaries participating in the project. If the initial investment is located in two or more assisted areas, the maximum aid intensity for the initial investment is the one applicable in the assisted area where the highest amount of the eligible costs is incurred. Initial investments carried out by large enterprises in 'c' areas may only receive regional aid in the context of ETC projects if they are initial investments that create a new economic activity.

5.5.2. *Operating aid schemes*

101. EEA EFTA States must demonstrate that the level of the aid is proportionate to the problems that the aid aims to address.

102. In particular, EEA EFTA States must meet the following conditions:

1. the aid must be calculated in relation to a predefined set of eligible costs that are fully attributable to the problems that the aid aims to address, as demonstrated by the EEA EFTA State;
2. the aid must be limited to a certain proportion of that predefined set of eligible costs and must not exceed these costs;
3. the aid amount per aid beneficiary must be proportional to the level of the problems actually experienced by each aid beneficiary.

103. As regards aid to reduce certain specific difficulties faced by SMEs in 'a' areas, the level of the aid must be progressively reduced over the duration of the scheme ⁽³³⁾. This does not apply to schemes to prevent depopulation in sparsely and very sparsely populated areas.

5.6. **Avoiding undue negative effects on competition and trade**

104. For the aid to be compatible, the negative effects of the aid measure in terms of distortions of competition and impact on trade between EEA States must be limited and must not outweigh the positive effects of the aid to an extent that would be contrary to the common interest.

5.6.1. *General considerations*

105. In the overall balancing of the positive effects of the aid (section 5.1) against its negative effects on competition and trade, ESA may take into account, where relevant, the circumstance that on top of its contribution to regional development and cohesion, the aid produces other positive effects. Such may be the case for instance where it is established that the initial investment, in addition to creating local jobs, introducing new activities and/or generating local revenues, contributes substantially in particular to the digital transition or transition towards environmentally sustainable activities, including low carbon, climate neutral or climate-resilient activities. ESA will pay particular attention to Article 3 of the EU Taxonomy Regulation (EU) 2020/852 of the European Parliament and of the Council ⁽³⁴⁾, including the 'Do no significant harm' principle, or other comparable methodologies. Furthermore, as part of the assessment of negative effects on competition and trade, ESA may take into account, where relevant, negative externalities of the aided activity where such externalities adversely affect competition and trade between EEA States to an extent contrary to the common interest by creating or aggravating market inefficiencies ⁽³⁵⁾.

⁽³²⁾ Regulation (EU) No 1299/2013 of the European Parliament and of the Council of 17 December 2013 on specific provisions for the support from the European Regional Development Fund to the European territorial cooperation goal (OJ L 347, 20.12.2013, p. 259) or a Regulation containing specific provisions for the European territorial cooperation goal (Interreg) applicable to the 2021-2027 programming period, whichever applies to a given initial investment.

⁽³³⁾ Including when operating aid schemes are notified to prolong existing aid measures.

⁽³⁴⁾ Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088 (OJ L 198, 22.6.2020, p. 13).

⁽³⁵⁾ This could also be the case where the aid distorts the operation of economic instruments put in place to internalise such negative externalities (e.g. by affecting price signals given by the EU Emissions Trading System or a similar instrument).

106. In terms of negative effects, regional aid can give rise to two main types of potential distortion of competition and trade. These are product market distortions and location effects. Both types of distortion can lead to allocative inefficiencies (undermining the economic performance of the internal market) and to distributional concerns (distribution of economic activity across areas).

107. One potentially harmful effect of state aid is that it prevents the market from delivering efficient outcomes by rewarding the most efficient producers and putting pressure on the least efficient to improve, restructure or exit the market. State aid that gives rise to a substantial capacity expansion in an underperforming market can unduly distort competition, as the creation or maintenance of overcapacity can squeeze profit margins, reduce competitors' investments or even result in competitors exiting the market. This can lead to a situation where competitors that would otherwise be able to compete on the market are forced out of the market. It may also prevent undertakings from entering or expanding in the market and it may weaken the incentives for competitors to innovate. This may result in inefficient market structures that are also detrimental to consumers in the long term. Making aid available may also encourage complacent or unduly risky behaviour on the part of potential beneficiaries. It is likely to have a negative long-term effect on the overall performance of the sector.

108. Aid may also have distortive effects in terms of increasing or maintaining substantial market power for the aid beneficiary. Even where aid does not strengthen substantial market power directly, it may do so indirectly by discouraging existing competitors from expanding, resulting in their exit from the market or discouraging the entry of new competitors.

109. Apart from distortions on the product markets, by its very nature, regional aid also affects the location of economic activity. If one area attracts investment due to the aid, another area loses out on that opportunity. These negative effects in the areas adversely affected by aid may be felt through lost economic activity and lost jobs, including jobs for subcontractors. Negative effects may also be felt in a loss of positive externalities (for example, the cluster effect, knowledge spillovers, education and training).

110. The geographical specificity of regional aid distinguishes it from other forms of horizontal aid. A specific characteristic of regional aid is that it aims to influence the choice made by investors about where to locate investment projects. When regional aid offsets the additional costs stemming from regional constraints and supports additional investment in assisted areas without attracting it away from other equally or less developed assisted areas, it contributes not only to the development of the area, but also to cohesion and ultimately benefits the whole EEA. The potential negative location effects of regional aid are already limited to a certain degree by regional aid maps, which define the areas where regional aid may be granted, in line with the regional economic development and cohesion policy objectives, and the maximum permissible aid intensities. However, it remains important to understand what would happen in the absence of the aid to assess the impact of the aid on the development of the area and on cohesion.

5.6.2. *Manifest negative effects on competition and trade*

111. ESA identifies a number of situations where the negative effects of regional investment aid on competition and trade between EEA States manifestly outweigh any positive effects, meaning that the aid is unlikely to be declared compatible with the functioning of the EEA Agreement.

5.6.2.1. *Creating overcapacity in a market in absolute decline*

112. As pointed out in paragraph 107, to assess the negative effects of aid, ESA takes account of the additional production capacity created by the project when the market underperforms.

113. Where investments adding production capacity in a market are made possible because of state aid, there is a risk that production or investment in other areas of the EEA may be negatively affected. This is particularly likely if the capacity increase exceeds market growth or takes place in a market with overcapacity.

114. Therefore, where the investment leads to the creation or increase of overcapacity in a market that is structurally in absolute decline (i.e. the market is contracting) ⁽⁵⁶⁾, ESA considers the aid to have a negative effect, which is unlikely to be compensated by any positive effect. This applies in particular to scenario 1 situations (investment decisions).

115. For scenario 2 situations (location decisions), where the investment would be made in any event in the same geographical market or, exceptionally, in a different geographical market, but where sales target the same geographical market, the aid – provided it is limited to the minimum necessary to compensate for the locational disadvantage and does not give additional liquidity to the aid beneficiary – only influences the location decision. In this situation, the investment would add additional capacity on the given geographical market independently of the aid. Therefore, possible outcomes in terms of overcapacity would, in principle, be the same regardless of the aid. However, if the alternative investment location is in a different geographical market, and the aid leads to the creation of overcapacity on a market structurally in absolute decline, the conclusions of paragraph 114 apply.

5.6.2.2. Counter-cohesion effects

116. As stated in paragraphs 109 and 110, to assess the negative effects of the aid, ESA must take account of the effects on the location of the economic activity.

117. In scenario 2 situations (location decisions), where without aid the investment would have been located in an area with a regional aid intensity ⁽⁵⁷⁾ that is higher or the same as in the target area, this constitutes a negative effect that is unlikely to be compensated by any positive effect because it runs counter to the very rationale of regional aid.

5.6.2.3. Relocation

118. When evaluating the notifiable measures, ESA will request all necessary information to consider whether the state aid is likely to result in a substantial loss of jobs in existing locations within the EEA. In this situation, and if the investment enables the aid beneficiary to relocate an activity to the target area, if there is a causal link between the aid and the relocation, this constitutes a negative effect that is unlikely to be compensated by any positive effects.

5.6.3. Investment aid schemes

119. Investment aid schemes must not lead to significant distortions of competition and trade. In particular, even where distortions may be considered limited at an individual level (provided all conditions for investment aid are fulfilled), on a cumulative basis schemes might still lead to high levels of distortions. Such distortions could affect output markets by creating or aggravating a situation of overcapacity or creating, increasing or maintaining the substantial market power of some recipients in a way that negatively affects dynamic incentives. Aid available under schemes could also lead to a significant loss of economic activity in other areas of the EEA. If a scheme focuses on certain sectors, the risk of such distortions is even more pronounced.

120. Therefore, EEA EFTA States must demonstrate that these negative effects will be limited to the minimum, taking into account, for example, the size of the projects, the individual and cumulative aid amounts, the expected beneficiaries and the characteristics of the targeted sectors. For ESA to assess the likely negative effects, EEA EFTA States can submit all available impact assessment and *ex post* evaluations carried out for similar predecessor schemes.

⁽⁵⁶⁾ ESA will assess this both in terms of volume and value and will take into account the business cycle.

⁽⁵⁷⁾ To verify this, the standard applicable aid ceiling in 'c' areas bordering 'a' areas should be used regardless of the increased aid intensities, in accordance with paragraph 184.

121. When awarding aid under a scheme to individual projects, the granting authority must verify and confirm that the aid does not result in manifest negative effects, as described in paragraphs 111 to 118. This verification can be based on the information received from the aid beneficiary when applying for aid and on the declaration made in the standard application form for aid, which should indicate the alternative location in the scenario that aid is not granted.

5.6.4. *Notifiable individual investment aid*

122. When evaluating the negative effects of individual aid, ESA distinguishes between the two counterfactual scenarios described in paragraphs 96 and 97.

5.6.4.1. Scenario 1 situations (investment decision)

123. Under scenario 1 situations, ESA places particular emphasis on the negative effects linked with the build-up of overcapacity in declining markets, the prevention of exit, and the concept of substantial market power. These negative effects are described in paragraphs 124 to 133 and must be counterbalanced with the positive effects of the aid. However, if it is established that the aid would result in the manifest negative effects described in paragraph 114, the aid is unlikely to be compensated by any positive effect and thus to be found compatible with the functioning of the EEA Agreement.

124. To identify and assess potential distortion of competition and trade, EEA EFTA States should provide evidence permitting ESA to identify the product markets concerned (products affected by the change in behaviour of the aid beneficiary) and identify the competitors and customers/consumers affected. The product concerned is typically the product covered by the investment project ⁽⁵⁸⁾. When the project concerns an intermediate product and a significant part of the output is not sold on the market, the product concerned may be the downstream product. The relevant product market includes the product concerned and its substitutes considered to be such, either by the consumer (by reason of the product's characteristics, prices, or intended use) or by the producer (by reason of flexibility of production installations).

125. ESA will use multiple criteria to assess these potential distortions, such as market structure of the product concerned, performance of the market (declining or growing market), the process for selecting the aid beneficiary, entry and exit barriers and product differentiation.

126. A systematic reliance on state aid by an undertaking could indicate that the undertaking is unable to withstand competition on its own or that it derives undue advantages compared to its competitors.

127. ESA distinguishes two main sources of potential negative effects on product markets:

1. cases of capacity expansion which leads to or deteriorates an existing situation of overcapacity, especially in a declining market;
2. cases where the aid beneficiary holds substantial market power.

128. To evaluate whether the aid serves to create or maintain inefficient market structures, ESA will take into account the additional production capacity created by the project and whether the market is underperforming.

129. If the market in question is growing, there is typically less cause for concern that the aid will negatively affect dynamic incentives or will unduly impede market exit or entry.

⁽⁵⁸⁾ For investment projects that involve the production of several different products, each product must be assessed.

130. More concern is warranted when markets are in decline. ESA distinguishes between cases for which, with a long-term outlook, the market is structurally in decline (i.e. it is contracting), and cases for which the market is in relative decline (i.e. it is still growing, but does not exceed a benchmark growth rate).

131. Underperformance of the market is typically measured against the EEA gross domestic product (GDP) over the three years before the start of the project (benchmark rate). It can also be measured on the basis of projected growth rates for the next three to five years. Indicators may include the expected future growth of the market concerned, the resulting expected capacity utilisation rates, and the likely impact of the capacity increase on competitors in terms of prices and profit margins.

132. In certain cases, assessing the growth of the product market in the EEA may not be appropriate to assess all the effects of aid, in particular if the geographic market is global. In such cases, ESA will consider the effect of the aid on the market structures concerned, in particular, its potential to crowd out producers in the EEA.

133. To evaluate the existence of substantial market power, ESA will take into account the position of the aid beneficiary over a period of time before receiving the aid and the expected market position after finalising the investment. ESA will take account of market shares of the aid beneficiary, as well as of market shares of its competitors and other relevant factors. For example, it will assess the market structure by looking at market concentration, potential barriers to entry ⁽⁵⁹⁾, buyer power ⁽⁶⁰⁾ and barriers to expansion or exit.

5.6.4.2. Scenario 2 situations (location decision)

134. If the counterfactual analysis suggests that without the aid the investment would have gone ahead in another location (scenario 2) in the same geographical market for the product concerned, and if the aid is proportional, the outcome in terms of overcapacity or substantial market power is in principle likely to be the same regardless of the aid. In such cases, the positive effects of the aid are likely to outweigh the limited negative effects on competition. However, if the alternative location is in the EEA, ESA is particularly concerned with negative effects linked with the alternative location. Therefore, if the aid results in a manifest negative effect as described in paragraphs 117 and 118, it is unlikely to be compensated by any positive effects and thus is unlikely to be found compatible with the functioning of the EEA Agreement.

5.6.5. Operating aid schemes

135. If the aid is necessary and proportional to achieve the contribution to regional development and cohesion described in subsection 5.1.3, the negative effects of the aid on competition and trade between EEA States are likely to be compensated by positive effects. However, in some cases, the aid may result in changes to the structure of the market or to the characteristics of a sector or industry which could significantly distort competition through barriers to market entry or exit, substitution effects, or displacement of trade flows. In those cases, the negative effects are unlikely to be compensated by any positive effects.

5.7. Transparency

136. EEA EFTA States must publish the following information in the European Commission's transparency award module ⁽⁶¹⁾ or on a comprehensive state aid website, at national or regional level:

1. the full text of the individual aid granting decision or the approved aid scheme and its implementing provisions, or a link to it;
2. information on each individual aid award exceeding EUR 100 000, using the structure in Annex VIII.

⁽⁵⁹⁾ These entry barriers include legal barriers (in particular intellectual property rights), economies of scale and scope, and access barriers to networks and infrastructure. If the aid concerns a market where the aid beneficiary is an incumbent, potential barriers to entry may exacerbate the potential substantial market power wielded by the aid beneficiary and thus the possible negative effects of that market power.

⁽⁶⁰⁾ Where there are strong buyers in the market, it is less likely that an aid beneficiary can increase prices vis-à-vis these strong buyers.

⁽⁶¹⁾ 'State Aid Transparency Public Search', available at the following website: <https://webgate.ec.europa.eu/competition/transparency/public?lang=en>

137. As regards aid granted to ETC projects, the information referred to in paragraph 136 must be placed on the website of the EEA State in which the Managing Authority ⁽⁶²⁾ concerned is located. Alternatively, the participating EEA States may decide that each of them is to provide the information relating to the aid measures within their territory on the respective websites.

138. EEA EFTA States must organise their comprehensive state aid websites, as referred to in paragraph 136, in such a way as to allow easy access to the information. Information must be published in a non-proprietary spreadsheet data format, which allows data to be effectively searched, extracted, downloaded and easily published on the internet, for instance in CSV or XML format. The general public must be allowed to access the website without any restrictions, including prior user registration.

139. For schemes in the form of tax advantages, the conditions set out in paragraph 136.2 will be considered to be fulfilled if EEA EFTA States publish the required information on individual aid amounts in the following ranges (in EUR million):

0,1-0,5;

0,5-1;

1-2;

2-5;

5-10;

10-30;

30-60;

60-100;

100-250; and

250 and over.

140. The information referred to in paragraph 136.2 must be published within six months from the date of award of the aid, or, for aid in the form of tax advantages, within one year from the date the tax declaration is due ⁽⁶³⁾. For aid that is unlawful but subsequently found to be compatible, EEA EFTA States must publish this information within six months from the date of ESA's decision declaring the aid compatible. To enable the enforcement of state aid rules under the EEA Agreement, the information must be available for at least 10 years from the date on which the aid was granted.

141. ESA will publish on its website the link to the state aid website referred to in paragraph 136.

6. EVALUATION

142. To further ensure that distortion of competition and trade is limited, ESA may require that aid schemes, as referred to in paragraph 143, are subject to an *ex post* evaluation. Evaluations will be carried out for schemes where the potential distortion of competition and trade is particularly high, i.e. that may risk significantly restricting or distorting competition if implementation is not reviewed in due time.

143. *Ex post* evaluation may be required for schemes with large aid budgets, or containing novel characteristics, or when significant market, technology or regulatory changes are foreseen. In any case, evaluation will be required for schemes with a state aid budget or accounted expenditure over EUR 150 million in any given year or EUR 750 million over their total duration, i.e. the combined duration of the scheme and any predecessor scheme covering a similar objective and geographical area, starting from 1 January 2022. Given the objectives of the evaluation, and to avoid putting a disproportionate burden on EEA EFTA States, *ex post* evaluations are only required for aid schemes the total duration of which exceeds three years, starting from 1 January 2022.

⁽⁶²⁾ As defined in Article 21 of Regulation (EC) No 1299/2013.

⁽⁶³⁾ If there is no formal requirement for an annual declaration, 31 December of the year for which the aid was granted will be considered as the granting date for encoding purposes.

144. The *ex post* evaluation requirement may be waived for aid schemes that are an immediate successor of a scheme covering a similar objective and geographical area that has been subject to an evaluation, delivered a final evaluation report in compliance with the evaluation plan approved by ESA and has not generated any negative findings. Where the final evaluation report of a scheme is not in compliance with the approved evaluation plan, that scheme must be suspended with immediate effect.

145. The aim of the evaluation should be to verify whether the assumptions and conditions underlying the compatibility of the scheme have been achieved, in particular the necessity and the effectiveness of the aid measure in the light of its general and specific objectives. It should also assess the impact of the scheme on competition and trade.

146. For aid schemes subject to the evaluation requirement according to paragraph 143, EEA EFTA States must notify a draft evaluation plan, which will form an integral part of ESA's assessment of the scheme, as follows:

1. together with the aid scheme, if the state aid budget of the scheme exceeds EUR 150 million in any given year or EUR 750 million over its total duration;
2. within 30 working days following a significant change that increases the budget of the scheme to over EUR 150 million in any given year or EUR 750 million over the total duration of the scheme;
3. within 30 working days following the recording in official accounts of expenditure under the scheme in excess of EUR 150 million in any year.

147. The draft evaluation plan must be in line with the common methodological principles provided by ESA ⁽⁶⁴⁾. EEA EFTA States must publish the evaluation plan approved by ESA.

148. The *ex post* evaluation must be carried out by an expert independent from the aid granting authority on the basis of the evaluation plan. Each evaluation must include at least one interim and one final evaluation report. EEA EFTA States must publish both reports.

149. The final evaluation report must be submitted to ESA in due time to assess any prolongation of the aid scheme and at the latest nine months before its expiry. That period may be reduced for schemes triggering the evaluation requirement in their last two years of implementation. The precise scope and arrangements for each evaluation will be set out in the decision approving the aid scheme. The notification of any subsequent aid measure with a similar objective must describe how the results of the evaluation have been taken into account.

7. REGIONAL AID MAPS

150. In this section, ESA lays down criteria for identifying the areas that fulfil the conditions of Article 61(3)(a) and (c) of the EEA Agreement. The areas that fulfil those conditions and which EEA EFTA States wish to designate as 'a' or 'c' areas ⁽⁶⁵⁾ must be identified in a regional aid map, which must be notified to and approved by ESA before regional aid can be awarded to undertakings located in the designated areas.

151. The maps must also specify the maximum aid intensities that apply in those areas during the period of validity of the approved map.

152. To maintain the incentive effect of the aid, where aid applications for discretionary aid measures were introduced already before the start of the period of validity of the map, the 'aid amount deemed necessary' identified in the original aid application must not be amended retroactively after the start of works on the project to justify a higher aid intensity that might be available under these Guidelines.

⁽⁶⁴⁾ Based on the Commission staff working document, Common methodology for State aid evaluation, Brussels, 28.5.2014, SWD(2014) 179 final, or any of its successors.

⁽⁶⁵⁾ Sparsely populated and very sparsely populated areas should also be identified on the regional aid map.

153. For automatic aid schemes in the form of a tax advantage, the maximum aid intensities available under these Guidelines may only be applied to projects started on or after the date on which the increase of the relevant maximum aid intensity became applicable under the relevant national rules. For projects started before that date, the maximum aid intensity approved under the previous regional aid map will continue to apply.

7.1. Population coverage eligible for regional aid

154. Given that the award of regional state aid derogates from the general prohibition of state aid laid down in Article 107(1) of the Treaty on the Functioning of the European Union, the Commission considers that the combined population of 'a' and 'c' areas in the EU27 must be lower than that in non-designated areas. The total coverage of the designated areas in the EU27 should therefore be less than 50 % of the EU27's population.

155. In its Guidelines on regional State aid for 2014-2020 ⁽⁶⁶⁾ the Commission set the overall coverage of 'a' and 'c' areas at 47 % of the EU28 population. Given the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the EU, the Commission considers that an increase to 48 % of the overall EU27 population coverage is appropriate.

156. Accordingly, for the Member States, the overall maximum coverage of 'a' and 'c' areas is set at 48 % of the EU27 population in the current Commission Guidelines on regional State aid ⁽⁶⁷⁾.

156a. ESA shares the Commission's view. Consequently, a corresponding overall coverage ceiling for the whole of the EEA, which includes the EEA EFTA States, should be set in the present Guidelines. This EEA-wide ceiling is found by adding the population of the EEA EFTA States to the calculation of the coverage ceiling established in the Commission Guidelines. Accordingly, for the purpose of the present Guidelines, the overall maximum coverage of 'a' and 'c' areas is set at 48 % of the total EEA population, using Eurostat data for 2018.

7.2. The derogation in Article 61(3)(a)

157. Article 61(3)(a) of the EEA Agreement provides that 'aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, may be considered to be compatible with the functioning of the EEA Agreement. According to the Court of Justice, 'the use of the words 'abnormally' and 'serious' in Article (107)(3)(a) [of the Treaty on the Functioning of the European Union] shows that the exemption concerns only areas where the economic situation is extremely unfavourable in relation to the [Union] as a whole' ⁽⁶⁸⁾.

158. ESA considers that the conditions of Article 61(3)(a) of the EEA Agreement are fulfilled in statistical regions at level 2 that have a gross domestic product (GDP) per capita below or equal to 75 % of the EEA average ⁽⁶⁹⁾.

159. Therefore EEA EFTA States may designate the following areas as 'a' areas:

1. statistical regions at level 2 whose GDP per capita in purchasing power standard ⁽⁷⁰⁾ is below or equal to 75 % of the EEA average (based on the average of the last three years for which Eurostat data are available ⁽⁷¹⁾);
2. [...].

⁽⁶⁶⁾ OJ C 209, 23.7.2013, p. 1.

⁽⁶⁷⁾ This ceiling is set using Eurostat population data for 2018. The ceiling will correspond to 48,00 % of the EU27_2020 – (European Union – 27 countries (from 2020)).

⁽⁶⁸⁾ Judgment of 14 October 1987, *Germany v Commission*, Case 248/84, ECLI:EU:C:1987:437, paragraph 19; judgment of 14 January 1997, *Spain v Commission*, C-169/95, ECLI:EU:C:1997:10, paragraph 15; and judgment of 7 March 2002, *Italy v Commission*, C-310/99, ECLI:EU:C:2002:143, paragraph 77.

⁽⁶⁹⁾ [...].

⁽⁷⁰⁾ In all subsequent references to GDP per capita, GDP is measured in PPS.

⁽⁷¹⁾ The data cover the period 2016-2018. In all subsequent references to GDP per capita in relation to the EEA average, data are based on the average of Eurostat regional data for 2016-2018 (as updated on 23.3.2020).

160. Annex I sets out the eligible 'a' areas by EEA EFTA State. At the time of the adoption of these Guidelines, no region in the EEA EFTA States qualified for the derogation under Article 61(3)(a) of the EEA Agreement.

7.3. The derogation in Article 61(3)(c)

161. Article 61(3)(c) of the EEA Agreement provides that 'aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest' may be considered to be compatible with the functioning of the EEA Agreement. According to the Court of Justice, '[t]he exemption in Article (107)(3)(c) [of the Treaty on the Functioning of the European Union] [...] permits the development of certain areas without being restricted by the economic conditions laid down in Article [107] (3)(a), provided such aid 'does not adversely affect trading conditions to an extent contrary to the common interest'. That provision gives the Commission power to authorise aid intended to further the economic development of areas of a Member State which are disadvantaged in relation to the national average' ⁽⁷²⁾. In ESA's view, the same applies under Article 61(3)(c) of the EEA Agreement.

162. The maximum coverage for 'c' areas in the EEA ('c' coverage') is obtained by subtracting the population of the eligible 'a' areas in the EEA from the overall EEA-wide maximum coverage laid down in paragraph 156a.

163. There are two categories of 'c' areas:

1. areas that fulfil certain set conditions and that an EEA EFTA State may therefore designate as 'c' areas without any further justification ('predefined 'c' areas');
2. areas that an EEA EFTA State may, at its own discretion, designate as 'c' areas provided that the EEA EFTA State demonstrates that such areas fulfil certain socioeconomic criteria ('non-predefined 'c' areas').

7.3.1. *Predefined 'c' areas*

7.3.1.1. Specific allocation of 'c' coverage for predefined 'c' areas

164. [...] ⁽⁷³⁾.

165. ESA considers that EEA EFTA States must have sufficient 'c' coverage to be able to designate as 'c' areas the areas with low population density.

166. The following areas are considered as predefined 'c' areas:

1. [...];
2. sparsely populated areas: statistical regions at level 2 with fewer than 8 inhabitants per km² or statistical regions at level 3 with fewer than 12,5 inhabitants per km² (based on Eurostat data on population density for 2018).

167. Annex I sets out the specific allocation of predefined 'c' coverage by EEA EFTA State. This population allocation may only be used to designate predefined 'c' areas.

7.3.1.2. Designation of predefined 'c' areas

168. EEA EFTA States may designate as 'c' areas the predefined 'c' areas referred to in paragraph 166.

169. For sparsely populated areas, EEA EFTA States should in principle designate statistical regions at level 2 with fewer than 8 inhabitants per km² or statistical regions at level 3 with fewer than 12,5 inhabitants per km². However, EEA EFTA States may designate parts of statistical regions at level 3 with fewer than 12,5 inhabitants per km² or other contiguous areas adjacent to those statistical regions at level 3, provided that these areas have fewer than 12,5 inhabitants per km². For very sparsely populated areas, EEA EFTA States may designate statistical regions at level 2 with fewer than 8 inhabitants per km² or other smaller contiguous areas adjacent to those statistical regions at level 2, provided that these areas have fewer than 8 inhabitants per km² and that the population of the very sparsely populated areas taken together with the sparsely populated areas does not exceed the specific allocation of 'c' coverage referred to in paragraph 167.

⁽⁷²⁾ *Germany v Commission*, Case 248/84, *op. cit.*, paragraph 19.

⁽⁷³⁾ [...].

7.3.2. *Non-predefined 'c' areas*

7.3.2.1. Method for allocating non-predefined 'c' coverage among EEA EFTA States

170. The maximum coverage for non-predefined 'c' areas in the EEA is obtained by subtracting the population of the eligible 'a' areas and of the predefined 'c' areas for the EU27 and the EEA EFTA States from the EEA-wide overall maximum coverage laid down in paragraph 156a. The non-predefined 'c' coverage is allocated among the EEA EFTA States by applying the method set out in Annex III.

7.3.2.2. Safety net and minimum population coverage

171. To ensure continuity in the regional aid maps and a minimum scope of action for all Member States, the Commission considers that no Member State should lose more than 30 % of its total coverage compared to the period 2017-2020 and that all Member States should have a minimum population coverage.

172. Therefore, by way of derogation from the overall maximum coverage laid down in paragraph 156 of the Commission Guidelines, the Commission increased the 'c' coverage for each Member State so that:

1. the total 'a' and 'c' coverage of each Member State concerned is not reduced by more than 30 % compared to the period 2017-2020 ⁽⁷⁴⁾;
2. all Member States have a population coverage of at least 7,5 % of the national population ⁽⁷⁵⁾.

172a. ESA shares the Commission's views. Consequently, the 'c' coverage is increased so that Liechtenstein receives the minimum population coverage of 7,5 % of the national population.

173. Annex I sets out the non-predefined 'c' coverage, including the safety net and the minimum population coverage, by EEA EFTA State.

7.3.2.3. Designation of non-predefined 'c' areas

174. ESA considers that the criteria used by EEA EFTA States for designating 'c' areas should reflect the range of situations in which granting regional aid may be justified. The criteria should therefore address the socioeconomic, geographical or structural problems likely to be encountered in 'c' areas and should provide sufficient safeguards that granting regional state aid will not affect trading conditions to an extent contrary to the common interest.

175. Therefore, EEA EFTA States may designate as 'c' areas the non-predefined 'c' areas defined on the basis of the following criteria:

1. Criterion 1: contiguous areas of at least 100 000 inhabitants ⁽⁷⁶⁾. These are to be located in statistical regions at level 2 or level 3 that have:
 - (i) a GDP per capita below or equal to the EEA average, or;
 - (ii) an unemployment rate above or equal to 115 % of the national average ⁽⁷⁷⁾.
2. Criterion 2: statistical regions at level 3 of fewer than 100 000 inhabitants that have:
 - (i) a GDP per capita below or equal to the EEA average, or;
 - (ii) an unemployment rate above or equal to 115 % of the national average.

⁽⁷⁴⁾ This aspect of the safety net applies to Germany, Ireland, Malta, and Slovenia.

⁽⁷⁵⁾ This minimum population coverage applies to Denmark and Luxembourg.

⁽⁷⁶⁾ This population threshold will be reduced to 50 000 inhabitants for EEA EFTA States that have a non-predefined 'c' coverage of less than 1 million inhabitants or to 10 000 inhabitants for EEA EFTA States whose national population is below 1 million inhabitants.

⁽⁷⁷⁾ For unemployment, calculations should be based on regional data published by the national statistical office, using the average of the last three years for which such data are available (at the moment of the notification of the regional aid map). Except as otherwise indicated in these Guidelines, the unemployment rate in relation to the national average is calculated on this basis.

3. Criterion 3: islands or contiguous areas characterised by similar geographical isolation (for example, peninsulas or mountain areas) that have:
 - (i) a GDP per capita below or equal to the EEA average ⁽⁷⁸⁾, or;
 - (ii) an unemployment rate above or equal to 115 % of the national average ⁽⁷⁹⁾, or;
 - (iii) fewer than 5 000 inhabitants.
4. Criterion 4: statistical regions at level 3, or parts of statistical regions at level 3 that form contiguous areas, that are adjacent to an 'a' area or that share a land border with a country outside the EEA or the European Free Trade Association (EFTA).
5. Criterion 5: contiguous areas of at least 50 000 inhabitants ⁽⁸⁰⁾ that are undergoing major structural change or are in serious relative decline, provided that such areas are not located in statistical regions at level 3 or contiguous areas that fulfil the conditions to be designated as predefined areas or under Criteria 1 to 4 ⁽⁸¹⁾.

176. For the purpose of applying the criteria set out in paragraph 175, the concept of contiguous areas refers to whole local administrative units (LAU) ⁽⁸²⁾ or to a group of LAU ⁽⁸³⁾. A group of LAU will be considered to form a contiguous area if each area in the group shares an administrative border with another area in the group ⁽⁸⁴⁾.

177. Compliance with the population coverage allowed for each EEA EFTA State will be assessed on the basis of the most recent data on the total resident population of the areas concerned, as published by the national statistical office.

7.4. Maximum aid intensities applicable to regional investment aid

178. ESA considers that the maximum aid intensities applicable to regional investment aid must take into account the nature and scope of the disparities between the levels of development of the different areas in the EEA. The aid intensities should therefore be higher in 'a' areas than in 'c' areas.

7.4.1. Maximum aid intensities in 'a' areas

179. The aid intensity for large enterprises in 'a' areas must not exceed:

1. 50 % in statistical regions at level 2 whose GDP per capita is below or equal to 55 % of the EEA average;

⁽⁷⁸⁾ To calculate whether such islands or contiguous areas have a GDP per capita below or equal to the EEA average, the EEA EFTA State may use data provided by their national statistical office or other recognised sources.

⁽⁷⁹⁾ To calculate whether such islands or contiguous areas have an unemployment rate above or equal to 115 % of the national average, EEA EFTA States may use data provided by their national statistical office or other recognised sources.

⁽⁸⁰⁾ This population threshold will be reduced to 25 000 inhabitants for EEA EFTA States that have a non-predefined 'c' coverage of fewer than 1 million inhabitants, to 10 000 inhabitants for EEA EFTA States whose total population is below 1 million inhabitants, or to 5 000 inhabitants for islands or contiguous areas characterised by similar geographical isolation.

⁽⁸¹⁾ For the purpose of applying Criterion 5, EEA EFTA States must demonstrate that the area is undergoing major structural change or is in serious relative decline by comparing the areas concerned with the situation of other areas in the same EEA EFTA State or in other EEA States on the basis of socioeconomic indicators concerning structural business statistics, labour markets, household accounts, education, or other similar indicators. For this purpose, EEA EFTA States may use data provided by their national statistical office or other recognised sources. [...].

⁽⁸²⁾ The Local Administrative Units (LAU) are defined in Annex III of Regulation (EC) No 1059/2003 of the European Parliament and of the Council on the establishment of a common classification of territorial units for statistics (NUTS) as amended by the Commission Delegated Regulation (EU) 2019/1755. As identified in footnote 30, this regulation has not been incorporated into the EEA Agreement. However, in order to achieve common definitions in an ever-increasing demand for statistical information at a regional level, the Statistical Office of the European Union, Eurostat, and the National Institutes of the Candidate countries and EFTA have agreed that statistical regions be established similar to the NUTS classification.

⁽⁸³⁾ The EEA EFTA State may nevertheless designate parts of a LAU, provided that the population of the LAU concerned exceeds the minimum population required for contiguous areas under Criteria 1 or 5 (including the reduced population thresholds for those criteria) and that the population of the parts of that LAU is at least 50 % of the minimum population required under the applicable criterion.

⁽⁸⁴⁾ For islands, administrative borders include maritime borders with other administrative units of the EEA EFTA State concerned.

2. 40 % in statistical regions at level 2 whose GDP per capita is above 55 % and below or equal to 65 % of the EEA average;
3. 30 % in statistical regions at level 2 with a GDP per capita above 65 % of the EEA average.

180. [...].

181. The aid intensities set in paragraph 179 may be increased in the areas referred to in sections 7.4.4 and 7.4.5 to the extent that the aid intensity for large enterprises in the area concerned does not exceed 70 %.

7.4.2. *Maximum aid intensities in 'c' areas*

182. The aid intensity for large enterprises must not exceed:

1. 20 % in sparsely populated areas and in areas (statistical regions at level 3 or parts of statistical regions at level 3) that share a land border with a country outside the EEA or the EFTA;
2. 15 % in former 'a' areas;
3. 10 % in non-predefined 'c' areas that have a GDP per capita above 100 % of the EEA average and an unemployment rate below 100 % of the EEA average.
4. 15 % in other non-predefined 'c' areas;

183. In former 'a' areas, the aid intensity of 15 % set in paragraph 182.2) may be increased by up to 5 percentage points until 31 December 2024.

184. If a 'c' area is adjacent to an 'a' area, the aid intensities set in paragraph 182 in the statistical regions at level 3 or parts of statistical regions at level 3 within that 'c' area which are adjacent to the 'a' area may be increased as necessary so that the difference in aid intensity between the two areas does not exceed 15 percentage points.

185. The aid intensities set in paragraph 182 may also be increased in the areas referred to in section 7.4.5.

7.4.3. *Increased aid intensities for SMEs*

186. The aid intensities laid down in subsections 7.4.1 and 7.4.2 may be increased by up to 20 percentage points for small enterprises or by up to 10 percentage points for medium-sized enterprises ⁽⁸⁵⁾.

7.4.4. *Increased aid intensities for territories identified for support from the JTF ⁽⁸⁶⁾*

187. [...] ⁽⁸⁷⁾.

7.4.5. *Increased aid intensities for regions experiencing population loss*

188. The maximum aid intensities laid down in subsection 7.4.1 may be increased by 10 percentage points and the maximum aid intensities laid down in subsection 7.4.2 may be increased by 5 percentage points for statistical regions at level 3 experiencing population loss of more than 10 % over the period 2009-2018 ⁽⁸⁸⁾.

7.5. **Notification of regional aid maps and their assessment**

189. Following the adoption of these Guidelines, each EEA EFTA State should notify to ESA a single regional aid map applicable from 1 January 2022 to 31 December 2027. Each notification should include the information specified in Annex V.

⁽⁸⁵⁾ The increased aid intensities for SMEs will not apply to aid awarded for large investment projects.

⁽⁸⁶⁾ [...].

⁽⁸⁷⁾ [...].

⁽⁸⁸⁾ See Annex IV.

190. ESA will examine for each EEA EFTA State its notified regional aid map and, if the map meets the conditions laid down in these Guidelines, it will adopt a decision approving it. All regional aid maps will be published in the *Official Journal of the European Union*, and in the EEA Supplement thereto, and will constitute an integral part of these Guidelines.

7.6. Amendments

7.6.1. Population reserve

191. On its own initiative, an EEA EFTA State may decide to establish a reserve of national population coverage consisting of the difference between the maximum population coverage for that EEA EFTA State, as allocated by ESA ⁽⁸⁹⁾, and the coverage used for the 'a' and 'c' areas designated in its regional aid map.

192. If an EEA EFTA State decides to create this reserve, it may, at any time, use the reserve to add new 'c' areas in its map until it reaches the national maximum coverage. For this purpose, the EEA EFTA State may use the most recent socioeconomic data provided by Eurostat or by its national statistical office or other recognised sources. The population of the 'c' areas concerned should be calculated on the basis of the population data used to draw up the initial map.

193. The EEA EFTA State must notify ESA each time it intends to use its population reserve to add new 'c' areas before making such amendments.

7.6.2. Mid-term review

194. A mid-term review of the regional aid maps, taking into account updated statistics, will be carried out in 2023. By June 2023, ESA will communicate the details on that mid-term review.

8. AMENDMENT OF THE GUIDELINES ON REGIONAL STATE AID FOR 2014-2020

195. In its notification under paragraph 189, an EEA EFTA State may also include an amendment to its regional aid map for 2014-2021 ⁽⁹⁰⁾ to replace the areas eligible for aid under the Guidelines on regional state aid for 2014-2020 with the areas eligible for aid in the map to be approved by ESA under paragraph 190 of these Guidelines. The reviewed regional aid map will be valid from the date of adoption of the ESA decision on the notified amendment of the regional aid map for 2014-2021 until 31 December 2021. That decision will also indicate the maximum aid intensities applicable in the areas eligible for aid under the amended regional aid map for 2014-2021, corresponding to the maximum aid intensities set out in the Guidelines on regional state aid for 2014-2020. The amended map will constitute an integral part of the Guidelines on regional state aid for 2014-2020, in line with paragraph 157 of those Guidelines.

196. The Guidelines on regional state aid for 2014-2020 are amended as follows:

1. Paragraph 20(q) is replaced with the following:

“regional aid map’ means the list of areas designated by an EEA EFTA State in line with the conditions laid down in these Guidelines, or the Guidelines on regional state aid applicable as from 1 January 2022, and approved by ESA;”

2. The following paragraph 161a is inserted after paragraph 161:

‘5.6.3. Amendment following the Guidelines on regional state aid applicable as from 1 January 2022

161a. An EEA EFTA State may request an amendment to its regional aid map in line with Section 7.6 of the Guidelines on regional state aid applicable as from 1 January 2022.’

⁽⁸⁹⁾ See Annex I.

⁽⁹⁰⁾ The regional aid map approved by ESA under the Guidelines on regional state aid for 2014-2020 that is applicable for the period 1 July 2014 to 31 December 2021.

9. APPLICABILITY OF REGIONAL AID RULES

197. ESA will apply the principles set out in these Guidelines to assess the compatibility of all notifiable regional aid awarded or intended to be awarded after 31 December 2021.

198. Notifications of regional aid schemes or of aid measures to be awarded after 31 December 2021 cannot be considered complete until ESA has adopted a decision approving the regional aid map for the EEA EFTA State concerned, in line with the arrangements described in subsection 7.5.

199. The implementation of these Guidelines will lead to some changes in the rules applicable to regional aid. Therefore, it is necessary to review the continuing justification for and effectiveness of all existing ⁽⁹¹⁾ regional aid schemes, including investment aid and operating aid schemes, that are due to extend beyond 2021.

200. For these reasons, ESA proposes the following appropriate measures to EEA EFTA States pursuant to Article 1(1) in Part I of Protocol 3:

1. EEA EFTA States must limit the application of all existing regional aid schemes to aid intended to be awarded by 31 December 2021 at the latest;
2. EEA EFTA States must amend other existing horizontal aid schemes that give specific treatment for aid to projects in assisted areas in order to ensure that aid to be awarded after 31 December 2021 is in line with the regional aid map applicable on the date the aid is awarded;
3. EEA EFTA States should confirm acceptance of the measures proposed in points 1) and 2) by 31 December 2021.

10. REPORTING AND MONITORING

201. In accordance with Protocol 3 and ESA's Decision No 195/04/COL ⁽⁹²⁾ ⁽⁹³⁾, EEA EFTA States must submit annual reports to ESA.

202. EEA EFTA States must maintain detailed records regarding all aid measures. These records must contain all information necessary to establish that the conditions regarding eligible costs and maximum aid intensities have been fulfilled. EEA EFTA States must maintain those records for 10 years from the date of award of the aid and must provide them to ESA upon request.

11. REVISION

203. ESA may decide to modify these Guidelines at any time if necessary for reasons associated with competition policy or to take account of other EU policies and international commitments or for any other justified reason.

⁽⁹¹⁾ Aid measures put into effect under the GBER do not qualify as existing aid schemes. Aid schemes put into effect in breach of Article 1(3) of Part I of Protocol 3 do not qualify as existing aid schemes except when they are deemed to be existing aid under Article 15(3) of Part II to that Protocol.

⁽⁹²⁾ ESA's Decision No 195/04/COL of 14 July 2004 on the implementing provisions referred to under Article 27 in Part II of Protocol 3. The consolidated version of the decision is available at: <https://www.eftasurv.int/cms/sites/default/files/documents/2017-Consolidated-version-of-Dec-195-054-COL-002-.pdf>.

⁽⁹³⁾ [...].

ANNEX I

Regional aid coverage by EEA EFTA State for 2022–2027

Norway	Statistical region	GDP per capita	Percentage of national population
Predefined 'c' areas (sparsely populated areas)	NO021, NO022 Innlandet	—	7,30 %
	NO061, NO062 Trøndelag	—	8,66 %
	NO071 Nordland	—	4,60 %
	NO072, NO073 Troms og Finnmark	—	4,58 %
Non-predefined 'c' areas	—	—	6,87 %
Total population coverage 2022–2027	—	—	32,02 %

Iceland	Statistical region	GDP per capita	Percentage of national population
Predefined 'c' areas (sparsely populated areas)	IS00 Iceland	—	100 %
Total population coverage 2022–2027	—	—	100 %

Liechtenstein	Statistical region	GDP per capita	Percentage of national population
Non-predefined 'c' areas	—	—	7,50 %
Total population coverage 2022–2027	—	—	7,50 %

ANNEX II

[...]

[...].

ANNEX III

Method to be used for allocating non-predefined 'c' coverage among EEA EFTA States

ESA will calculate the non-predefined 'c' coverage for each EEA EFTA State by applying the following method:

(1) ESA will identify any statistical regions at level 3 in the EEA EFTA States that are not in any of the following areas:

- eligible 'a' areas set out in Annex I;
- former 'a' areas set out in Annex I;
- sparsely populated areas set out in Annex I.

(2) Among the statistical regions at level 3 identified under Step 1, ESA will identify those that have either:

- a GDP per capita ⁽¹⁾ below or equal to the national GDP per capita disparity threshold ⁽²⁾ or;
- an unemployment ⁽³⁾ rate above or equal to the national unemployment disparity threshold ⁽⁴⁾, or above or equal to 150 % of the national average or;
- a GDP per capita below or equal to 90 % of the EEA average or;
- an unemployment rate above or equal to 125 % of the EEA average.

(3) The allocation of non-predefined 'c' coverage for EEA EFTA State *i* (A_i) is calculated by using the following formula (expressed as a percentage of the EEA population):

$$A_i = p_i/P \times 100$$

where:

p_i is the population ⁽⁵⁾ of the statistical regions at level 3 in EEA EFTA State *i* identified under Step 2.

P is the sum of the population of the statistical regions at level 3, and of the NUTS 3 regions, identified under Step 2 in respectively the present and the Commission Guidelines.

⁽¹⁾ All GDP per capita referred to in this Annex are based on the average over the last three years for which Eurostat data are available, i.e. 2016–2018.

⁽²⁾ The national GDP per capita disparity threshold for EEA EFTA State *i* (TG_i) is calculated using the following formula (expressed as a percentage of national GDP per capita):

$$(TG)_i = 85 \times ((1 + 100/g_i)/2)$$

where: g_i is the GDP per capita of EEA EFTA State *i*, expressed as a percentage of the EEA average.

⁽³⁾ All unemployment data referred to in this Annex are based on the average of the last three years for which Eurostat data are available, i.e. 2017–2019. However, these data do not contain information at level 3 and therefore unemployment data for the level 2 region in which those level 3 regions are located are used.

⁽⁴⁾ The national unemployment rate disparity threshold for EEA EFTA State *i* (TU_i) is calculated using the following formula (expressed as a percentage of the national unemployment rate):

$$(TU)_i = 115 \times ((1 + 100/u_i)/2)$$

where: u_i is the national unemployment rate of EEA EFTA State *i*, expressed as a percentage of the EEA average.

⁽⁵⁾ Population figures for level 3 regions are calculated on the basis of the population data used by Eurostat to calculate the regional GDP per capita for 2018.

ANNEX IV

Method to define assisted areas experiencing population loss as referred to in section 7.4.5

In accordance with paragraph 188, EEA EFTA States may identify the areas experiencing a population loss as follows:

- EEA EFTA States must identify assisted areas at the level of statistical regions at level 3 under Article 61(3)(a) and (c) of the EEA Agreement;
- Eurostat data on population density for the period 2009–2018 must be used, based on the most recent statistical regions classification available;
- EEA EFTA States must demonstrate a population loss of more than 10 % over the period 2009–2018.
- Where the statistical regions classification was changed during the previous 10 years, then EEA EFTA States must use the data on population density for the longest available time period.

EEA EFTA States must include the areas thus identified when issuing a notification under paragraph 189.

ANNEX V

Information to be provided when notifying a regional aid map

- (1) EEA EFTA States must provide information for each of the following categories of areas proposed for designation, if applicable:
 - 'a' areas;
 - former 'a' areas;
 - sparsely populated areas;
 - very sparsely populated areas;
 - [...];
 - assisted areas experiencing population loss as referred to in section 7.4.5;
 - non-predefined areas 'c' areas designated on the basis of Criterion 1;
 - non-predefined areas 'c' areas designated on the basis of Criterion 2;
 - non-predefined areas 'c' areas designated on the basis of Criterion 3;
 - non-predefined areas 'c' areas designated on the basis of Criterion 4;
 - non-predefined areas 'c' areas designated on the basis of Criterion 5;
 - (2) Under each category, EEA EFTA States must provide the following information for each proposed area:
 - identification of the area (using the statistical regions level 2 or 3 region code of the area, the LAU code of the areas that form the contiguous area or other official denominations of the administrative units concerned);
 - the proposed aid intensity in the area for the period 2022–2027 or, for former 'a' areas, for the periods 2022–2024 and 2025–2027 (indicating any increase of aid intensity as under paragraphs 180, 181, 183 or 184, 185 and 186, if applicable);
 - the total resident population of the area, as stated in paragraph 177.
 - (3) For the designation of sparsely and very sparsely populated areas, EEA EFTA States must provide sufficient proof that the applicable conditions in paragraph 169 are met.
 - (4) For non-predefined areas designated on the basis of Criteria 1–5, EEA EFTA States must provide sufficient proof that all applicable conditions laid down in paragraphs 175, 176 and 177 are met.
-

ANNEX VI

Definition of the steel sector

For the purpose of these Guidelines, 'steel sector' means the production of one or more of the following:

- (a) pig iron and ferro-alloys: pig iron for steelmaking, foundry and other pig iron, spiegeleisen and high-carbon ferro-manganese, not including other ferro-alloys;
 - (b) crude and semi-finished products of iron, ordinary steel or special steel: liquid steel cast or not cast into ingots, including ingots for forging semi-finished products: blooms, billets and slabs; sheet bars and tinplate bars; hot-rolled wide coils, with the exception of the production of liquid steel for castings from small and medium-sized foundries;
 - (c) hot finished products of iron, ordinary steel or special steel: rails, sleepers, fishplates, soleplates, joists, heavy sections of 80 mm and over, sheet piling, bars and sections of less than 80 mm and flats of less than 150 mm, wire rod, tube rounds and squares, hot-rolled hoop and strip (including tube strip), hot-rolled sheet (coated or uncoated), plates and sheets of 3 mm thickness and over, universal plates of 150 mm and over, with the exception of wire and wire products, bright bars and iron castings;
 - (d) cold finished products: tinplate, terneplate, blackplate, galvanised sheets, other coated sheets, cold-rolled sheets, electrical sheets and strip for tinplate, cold-rolled plate, in coil and in strip;
 - (e) tubes: all seamless steel tubes, welded steel tubes with a diameter of over 406,4 mm.
-

ANNEX VII

Information to be included in the application form for regional investment aid

1. Information about the aid beneficiary:
 - Name, registered address of main seat, main sector of activity (NACE code).
 - Declaration that the firm is not in difficulty, as defined under the rescue and restructuring guidelines.
 - Declaration detailing the aid (both de minimis and State aid) already received for other investments over the last three years in the same statistical region at level 3 where the new investment will be located. Declaration specifying regional aid received or to be received for the same project by other granting authorities.
 - Declaration specifying whether the beneficiary has closed a same or similar activity in the EEA two years preceding the date of this application.
 - Declaration specifying whether the beneficiary has the intention to close down such an activity at the moment of aid application within a period of two years after the investment to be subsidised is completed.
 - For aid granted under a scheme: non-relocation declaration and commitment.
2. Information about the investment to be supported:
 - Short description of the investment.
 - Short description of expected positive effects for the area concerned (for example, number of jobs created or safeguarded, R & D&I activities, training, creation of a cluster and project's possible contribution to the green ⁽¹⁾ and digital transition of the regional economy).
 - Applicable legal basis (national, EEA or both).
 - Planned start of works and completion of the investment.
 - Location(s) of the investment.
3. Information about the financing of the investment:
 - Investment costs and other associated costs, cost benefit analysis for the notified aid measure.
 - Total eligible costs.
 - Aid amount needed to carry out the investment.
 - Aid intensity.
4. Information on the need for aid and its expected impact:
 - Short explanation of the need for aid and its impact on the investment decision or location decision. This must include an explanation of the alternative investment or location decision if aid is not granted.
 - Declaration of absence of an irreversible agreement between the aid beneficiary and contractors to carry out the investment.

⁽¹⁾ Including, where relevant, information on whether the investment is environmentally sustainable within the meaning of the EU Taxonomy Regulation 2020/852, OJ L 198, 22.6.2020, p. 13–43 or other comparable methodologies.

ANNEX VIII

Information referred to in paragraph 136

The information on individual awards referred to in paragraph 136.2 of the Guidelines must include the following:

- Identity of the individual aid beneficiary ⁽¹⁾
 - name
 - aid beneficiary's identifier
- Type of aid beneficiary at the time of application:
 - SME
 - large enterprise
- Statistical region in which the aid beneficiary is located, at level II or below
- The main sector or activity of the aid beneficiary for the given aid, identified by the, NACE group (three-digit numerical code) ⁽²⁾
- Aid element expressed in full in the national currency
- Where different from the aid element, the nominal aid amount, expressed in full in the national currency ⁽³⁾
- Aid instrument ⁽⁴⁾:
 - grant/interest rate subsidy/debt write-off
 - loan/repayable advances/reimbursable grant
 - guarantee
 - tax advantage or tax exemption
 - risk finance
 - other (please specify)
- Date of award and date of publication
- Objective of the aid
- Identity of the granting authority or authorities
- Where applicable, name of the entrusted entity, and the names of the selected financial intermediaries
- Reference of the aid measure ⁽⁵⁾

⁽¹⁾ With the exception of business secrets and other confidential information in duly justified cases and subject to ESA's agreement (ESA's Guidelines on Professional Secrecy in State Aid Decisions, OJ L 154, 8.6.2006, p. 27, and EEA Supplement No 29, 8.6.2006, p. 1).

⁽²⁾ Regulation (EC) No 1893/2006 of the European Parliament and of the Council of 20 December 2006 establishing the statistical classification of economic activities NACE Revision 2 and amending Council Regulation (EEC) No 3037/90 as well as certain regulations governing specific statistical domains (OJ L 393, 30.12.2006, p. 1). The Regulation is incorporated into Annex XXI of the EEA Agreement by EEA Joint Committee Decision No 61/2007 (OJ L 266, 11.10.2007, p. 25, and EEA Supplement No 48, 11.10.2007, p. 18).

⁽³⁾ Gross grant equivalent, or where applicable, the amount of the investment. For operating aid, the annual aid amount per aid beneficiary can be provided. For fiscal schemes, this amount can be provided by the ranges set out in paragraph 139. The amount to be published is the maximum allowed tax benefit and not the amount deducted each year (e.g. in the context of a tax credit, the maximum allowed tax credit must be published rather than the actual amount, which might depend on the taxable revenue and vary each year).

⁽⁴⁾ If the aid is granted through multiple aid instruments, the aid amount must be specified by instrument.

⁽⁵⁾ As provided by ESA under the notification procedure referred to in Section 3.

EFTA SURVEILLANCE AUTHORITY DECISION No 293/21/COL
of 16 December 2021
amending the procedural and substantive rules in the field of State aid by introducing revised
Guidelines on short-term export credit insurance [2022/1048]

THE EFTA SURVEILLANCE AUTHORITY ('ESA'),

Having regard to the Agreement on the European Economic Area ('the EEA Agreement'), in particular to Articles 61 to 63 and Protocol 26,

Having regard to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ('the Surveillance and Court Agreement'), in particular to Article 24 and Article 5(2)(b),

Whereas:

Under Article 24 of the Surveillance and Court Agreement, ESA is to give effect to the provisions of the EEA Agreement concerning State aid.

Under Article 5(2)(b) of the Surveillance and Court Agreement, ESA is to issue notices or guidelines on matters dealt with in the EEA Agreement, if that Agreement or the Surveillance and Court Agreement expressly so provides or if ESA considers it necessary.

On 6 December 2021, the European Commission adopted a Communication on the application of Article 107 and 108 of the Treaty on the Functioning of the European Union to short-term export credit insurance ('the Guidelines') ⁽¹⁾.

The Guidelines are also of relevance for the European Economic Area ('EEA').

Uniform application of the EEA State aid rules is to be ensured throughout the EEA in line with the objective of homogeneity established in Article 1 of the EEA Agreement.

According to Section General Paragraph II of Annex XV to the EEA Agreement, ESA, after consultation with the European Commission, is to adopt acts corresponding to those adopted by the European Commission.

The Guidelines may refer to certain European Union policy instruments and to certain European Union legal acts that have not been incorporated into the EEA Agreement. With a view to ensuring uniform application of State aid provisions and equal conditions of competition throughout the EEA, ESA will generally apply the same points of reference as the European Commission when assessing the compatibility of aid with the functioning of the EEA Agreement.

Having consulted the European Commission,

Having consulted the EFTA States,

HAS ADOPTED THIS DECISION:

Article 1

1. The substantive rules in the field of State aid are amended by introducing revised Guidelines for Short-term export credit insurance. The Guidelines are annexed to this Decision and form an integral part of it.

⁽¹⁾ C(2021) 8705 final (OJ C 497, 10.12.2021, p. 5).

2. The Guidelines replace the existing guidelines on Short-term export-credit insurance ⁽²⁾ with effect from 1 January 2022.

Article 2

ESA applies the Guidelines with the following adaptations where applicable, including, but not limited to, the following:

- (a) if there is a reference to 'Member State(s)', ESA reads it as a reference to 'EFTA State(s)' ⁽³⁾, or where appropriate 'EEA State(s)';
- (b) if there is a reference to the 'European Commission', ESA reads it as a reference to the 'EFTA Surveillance Authority';
- (c) if there is a reference to 'the Treaty' or 'TFEU', ESA reads it as a reference to 'the EEA Agreement';
- (d) if there is a reference to Article 49 TFEU or sections of that Article, ESA reads it as a reference to Article 31 of the EEA Agreement and the corresponding sections of that Article;
- (e) if there is a reference to Article 63 TFEU or sections of that Article, ESA reads it as a reference to Article 40 of the EEA Agreement and the corresponding sections of that Article;
- (f) if there is a reference to Article 107 TFEU or sections of that Article, ESA reads it as a reference to Article 61 of the EEA Agreement and the corresponding sections of that Article;
- (g) if there is a reference to Article 108 TFEU or sections of that Article, ESA reads it as a reference to Article 1 of Part I of Protocol 3 of the Surveillance and Court Agreement and the corresponding sections of that Article;
- (h) if there is a reference to Council Regulation (EU) 2015/1589 ⁽⁴⁾, ESA reads it as a reference to Part II of Protocol 3 of the Surveillance and Court Agreement;
- (i) if there is a reference to Commission Regulation (EC) No 794/2004 ⁽⁵⁾, ESA reads it as a reference to EFTA Surveillance Authority Decision 195/04/COL;
- (j) if there is a reference to the wording '(in-)compatible with the internal market', ESA reads it as '(in-)compatible with the functioning of the EEA Agreement';
- (k) if there is a reference to the wording 'within (or outside) the Union', ESA reads it as 'within (or outside) the EEA';
- (l) if there is a reference to 'intra-Union trade', ESA reads it as a reference to 'intra-EEA trade';
- (m) if the Guidelines set out that they will be applied to 'all sectors of economic activity', ESA applies them to 'all sectors of economic activity or parts of sectors of economic activity falling within the scope of the EEA Agreement';
- (n) if there is a reference to Commission Communications, Notices or Guidelines, ESA reads it as a reference to the corresponding ESA Guidelines.

⁽²⁾ OJ L 343, 19.12.2013, p. 54, and EEA Supplement No 71, 19.12.2013, p. 1, re-adopted by EFTA Surveillance Authority Decision No 4/19/COL of 6 February 2019 amending, for the one hundred and fourth time, the procedural and substantive rules in the field of state aid [2019/1008] (OJ L 163, 20.6.2019, p. 110), and EEA Supplement No 48, 20.6.2019, p. 1, amended by Decision No 30/20/COL of 1 April 2020 amending, for the one hundred and sixth time, the procedural and substantive rules in the field of state aid by replacing the Annex to the Guidelines on short-term export-credit insurance [2020/982] (OJ L 220, 9.7.2020, p. 8), and EEA Supplement No 46, 9.7.2020, p. 1, Decision No 90/20/COL of 15 July 2020 amending, for the one hundred and seventh time, the procedural and substantive rules in the field of State aid, by amending and prolonging certain State aid guidelines [2020/1576] (OJ L 359, 29.10.2020, p. 16), and EEA Supplement No 68, 29.10.2020, p. 4, and Decision No 12/21/COL of 24 February 2021 replacing the Annex to the Guidelines on short-term export-credit insurance [2021/1238] (OJ L 271, 29.7.2021, p. 1), and EEA Supplement No 50, 29.7.2021, p. 1.

⁽³⁾ The 'EFTA States' refers to Iceland, Liechtenstein and Norway.

⁽⁴⁾ Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 248, 24.9.2015, p. 9).

⁽⁵⁾ Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EU) 2015/1589 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 140, 30.4.2004, p. 1).

Article 3

ESA applies the list of marketable risk countries in the Annex to the Guidelines with the addition of Liechtenstein.

Done in Brussels, 16 December 2021.

For the EFTA Surveillance Authority

Bente ANGELL-HANSEN
President
Responsible College Member

Stefan BARRIGA
College Member

Högni KRISTJÁNSSON
College Member

Melpo-Menie JOSÉPHIDÈS
Countersigning as Director,
Legal and Executive Affairs

Communication from the Commission on the application of Article 107 and 108 of the Treaty on the Functioning of the European Union to short-term export credit insurance

1. Introduction

1. Export subsidies can adversely affect competition in the marketplace among potential rival suppliers of goods and services. That is why the Commission, as the guardian of competition under the Treaty, has always strongly condemned export aid for intra-Union trade and for exports outside the Union. The aim of this Communication is to clarify the Commission's assessment of Member State support for export credit insurance under Union State aid rules.
2. The Commission has used its power to issue guidance on State aid in the area of short-term export credit insurance. The aim has been to address actual or potential distortions of competition in the internal market, not only among exporters in different Member States (in trade within and outside the Union), but also among export credit insurers operating in the Union. In 1997, the Commission set out the principles for State intervention in its *Communication to the Member States pursuant to Article 93(1) of the EC Treaty applying Articles 92 and 93 of the Treaty to short-term export-credit insurance* ⁽¹⁾ ('the 1997 Communication'). The principles of the 1997 Communication were to be applied for a period of 5 years from 1 January 1998. The 1997 Communication was subsequently adapted and its period of application was prolonged in 2001 ⁽²⁾, 2004 ⁽³⁾, 2005 ⁽⁴⁾ and 2010 ⁽⁵⁾. Its principles applied until 31 December 2012.
3. Experience gained in applying the principles of the 1997 Communication, in particular during the financial crisis between 2009 and 2011, suggested that the Commission's policy in this area should be reviewed. Therefore, the Commission adopted a new *Communication to the Member States on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to short-term export-credit insurance* ⁽⁶⁾ ('the 2012 Communication'). The principles of the 2012 Communication were, in principle, to be applied from 1 January 2013 until 31 December 2018 ⁽⁷⁾. The Annex to the 2012 Communication was subsequently adapted several times ⁽⁸⁾ and the 2012 Communication's period of application was extended in 2018 ⁽⁹⁾ and 2020 ⁽¹⁰⁾. It now applies until 31 December 2021.
4. In 2019, the Commission launched an evaluation of the 2012 Communication as part of the *Fitness check of the State aid modernisation package, railways guidelines and short-term export credit insurance* ⁽¹¹⁾. The results of the evaluation showed that, in principle, the rules work well, but that they require some minor improvements to reflect market developments. Therefore, this Communication only contains a few technical adjustments while retaining the principles set out in the 2012 Communication.
5. The rules set out in this Communication will help to ensure that State aid does not distort competition among private and public – or publicly supported – export credit insurers. Those rules will also help to create a level playing field among exporters.

⁽¹⁾ OJ C 281, 17.9.1997, p. 4.

⁽²⁾ OJ C 217, 2.8.2001, p. 2.

⁽³⁾ OJ C 307, 11.12.2004, p. 12.

⁽⁴⁾ OJ C 325, 22.12.2005, p. 22.

⁽⁵⁾ OJ C 329, 7.12.2010, p. 6.

⁽⁶⁾ OJ C 392, 19.12.2012, p. 1.

⁽⁷⁾ Point 18(a) and Section 5.2 of the 2012 Communication were to be applied from the date of adoption of the 2012 Communication.

⁽⁸⁾ OJ C 398, 22.12.2012, p. 6; OJ C 372, 19.12.2013, p. 1; OJ C 28, 28.1.2015, p. 1; OJ C 215, 1.7.2015, p. 1; OJ C 244, 5.7.2016, p. 1; OJ C 206, 30.6.2017, p. 1; OJ C 225, 28.6.2018, p. 1; OJ C 457, 19.12.2018, p. 9; OJ C 401, 27.11.2019, p. 3; OJ C 101I, 28.3.2020, p. 1; OJ C 340I, 13.10.2020, p. 1; OJ C 34, 1.2.2021, p. 6.

⁽⁹⁾ OJ C 457, 19.12.2018, p. 9.

⁽¹⁰⁾ OJ C 224, 8.7.2020, p. 2.

⁽¹¹⁾ Commission staff working document – *Fitness check of the 2012 State aid modernisation package, railways guidelines and short-term export credit insurance*, 30.10.2020, SWD(2020) 257 final.

6. This Communication gives Member States more detailed guidance about the principles on which the Commission intends to base its interpretation of Articles 107 and 108 of the Treaty and their application to short-term export credit insurance. It should make the Commission's policy in this area as transparent as possible and ensure predictability and equal treatment. To that end, it sets out a series of conditions that must be fulfilled when State insurers wish to enter the short-term export-credit insurance market for marketable risks.
7. Risks that are in principle non-marketable are outside the scope of this Communication.
8. Section 2 describes the scope of this Communication and sets out the definitions used in it. Section 3 deals with the applicability of Article 107(1) of the Treaty and the general prohibition of State aid for export credit insurance of marketable risks. Finally, Section 4 provides for some exceptions from the scope of marketable risks and specifies the conditions under which State support for the insurance of temporarily non-marketable risks may be compatible with the internal market.

2. **Scope of the communication and definitions**

2.1. *Scope*

9. The Commission will apply the principles set out in this Communication only to export credit insurance with a risk period of less than two years. All other export finance instruments are excluded from the scope of this Communication.

2.2. *Definitions*

10. For the purposes of this Communication, the following definitions apply:
 - (1) 'export credit insurance' means an insurance product whereby the insurer provides insurance against a commercial or political risk, or both, related to payment obligations in an export transaction;
 - (2) 'private credit insurer' means a company or organisation other than a State insurer that provides export credit insurance;
 - (3) 'State insurer' means a company or other organisation that provides export credit insurance with the support of, or on behalf of, a Member State, or a Member State that provides export credit insurance;
 - (4) 'marketable risks' means commercial or political risks, or both, with a maximum risk period of less than two years, on public and non-public buyers in the countries listed in the Annex; all other risks are considered non-marketable for the purposes of this Communication;
 - (5) 'commercial risks' include in particular the following risks:
 - (a) arbitrary repudiation of a contract by a buyer, that is to say any arbitrary decision made by a non-public buyer to interrupt or terminate the contract without a legitimate reason;
 - (b) arbitrary refusal of a non-public buyer to accept the goods covered by the contract without a legitimate reason;
 - (c) insolvency of a non-public buyer and its guarantor;
 - (d) protracted default, that is to say non-payment by a non-public buyer and by its guarantor of a debt resulting from the contract;
 - (6) 'political risks' include in particular the following risks:
 - (a) the risk that a public buyer or country prevents the completion of a transaction or does not pay on time;
 - (b) a risk that is beyond the scope of an individual buyer or falls outside the individual buyer's responsibility;

- (c) the risk that a country fails to transfer to the country of the insured the moneys paid by buyers domiciled in that country;
- (d) the risk that a case of force majeure occurs outside the country of the insurer, which could include warlike events, in so far as its effects are not otherwise insured;
- (7) 'risk period' means the manufacturing period plus the credit period;
- (8) 'manufacturing period' means the period between the date of an order and the delivery of the goods or services;
- (9) 'credit period' means the period of time given to the buyer to pay for the delivered goods and services under an export credit transaction;
- (10) 'single-risk cover' means cover for all sales to one buyer or for a single contract with one buyer;
- (11) 'reinsurance' means insurance that is purchased by an insurer from another insurer to manage risk by lowering its own risk;
- (12) 'co-insurance' means the percentage of each insured loss that is not indemnified by the insurer but is borne by another insurer;
- (13) 'quota share' means reinsurance that requires the insurer to transfer, and the reinsurer to accept, a given percentage of every risk within a defined category of business written by the insurer;
- (14) 'top-up cover' means additional cover over a credit limit established by another insurer;
- (15) 'whole turnover policy' means a credit insurance policy other than single-risk cover; that is to say, a credit insurance policy that covers all or most of the credit sales of the insured as well as payment receivables from sales to multiple buyers.

3. **Applicability of Article 107(1) of the Treaty**

3.1. *General principles*

- 11. Article 107(1) of the Treaty states that 'any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market'.
- 12. If State insurers provide export credit insurance, such insurance involves State resources. The involvement of the State may give the insurers or the exporters a selective advantage and could thereby distort or threaten to distort competition and affect trade between Member States. The principles set out in Sections 3.2, 3.3 and Section 4 are designed to provide guidance on how such measures will be assessed under State aid rules.

3.2. *Aid for insurers*

- 13. If State insurers have certain advantages compared with private credit insurers, State aid may be involved. The advantages can take different forms and might include, for example:
 - (a) State guarantees of borrowing and losses;
 - (b) exemption from the requirement to constitute adequate reserves and the other requirements stemming from the exclusion of export credit insurance operations for the account of or guaranteed by the State from Directive 2009/138/EC of the European Parliament and of the Council ⁽¹²⁾;

⁽¹²⁾ Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (OJ L 335, 17.12.2009, p. 1).

- (c) relief or exemption from taxes normally payable (such as company taxes and taxes levied on insurance policies);
- (d) awards of aid or provision of capital by the State or other forms of financing that are not in accordance with the market economy investor principle;
- (e) provision by the State of services in kind, such as access to and use of State infrastructure, facilities or privileged information, on terms that do not reflect their market value;
- (f) direct reinsurance by the State or a direct State reinsurance guarantee on terms more favourable than those available on the private reinsurance market, leading to underpricing of the reinsurance cover or to the artificial creation of capacity that would not be forthcoming from the private market.

3.3. *Prohibition of State aid for export credits*

- 14. The advantages for State insurers listed in point 13 with regard to marketable risks affect intra-Union trade in credit insurance services. They lead to variations in the insurance cover available for marketable risks in different Member States. This distorts competition among insurers in different Member States and has secondary effects on intra-Union trade regardless of whether intra-Union exports or exports outside the Union are concerned ⁽¹³⁾. For those reasons, if State insurers have such advantages compared to private credit insurers, they should not be able to insure marketable risks. It is therefore necessary to determine the conditions under which State insurers can operate, in order to ensure that they do not benefit from State aid.
- 15. Advantages for State insurers are also sometimes passed on to exporters, at least in part. Such advantages may distort competition and trade and constitute State aid within the meaning of Article 107(1) of the Treaty. However, if the conditions for the provision of export credit insurance for marketable risks, as set out in Section 4.3 of this Communication, are fulfilled, the Commission will consider that no undue advantage has been passed on to exporters.

4. **Conditions for providing export credit insurance for temporarily non-marketable risks**

4.1. *General principles*

- 16. As stated in point 14, if State insurers have any advantages compared with private credit insurers, as described in point 13, they must not insure marketable risks. If State insurers or their subsidiaries wish to insure marketable risks, it must be ensured that in so doing, they do not directly or indirectly benefit from State aid. To that end, they must have a certain amount of own funds (a solvency margin, including a guarantee fund) and technical provisions (an equalisation reserve) and must have obtained the required authorisation in accordance with Directive 2009/138/EC. They must also at least keep a separate administration account and separate accounts for their insurance of marketable risks and non-marketable risks with the support of, or on behalf of, the State, to show that they do not receive State aid for their insurance of marketable risks. The accounts for businesses insured on the insurer's own account should comply with Council Directive 91/674/EEC ⁽¹⁴⁾.
- 17. Member States providing reinsurance cover to an export credit insurer by way of participation or involvement in private sector reinsurance contracts covering marketable and non-marketable risks must be able to demonstrate that the arrangements do not involve State aid as referred to in point 13(f).
- 18. State insurers may provide export credit insurance for temporarily non-marketable risks, subject to the conditions set out in the Section 4 of this Communication.

⁽¹³⁾ In its judgment in Case C-142/87 *Kingdom of Belgium v Commission of the European Communities*, the Court held that not only aid for intra-Union exports, but also aid for exports outside the Union, can influence intra-Union competition and trade. Both types of operation are insured by export credit insurers and aid for both can therefore affect intra-Union competition and trade.

⁽¹⁴⁾ Council Directive 91/674/EEC of 19 December 1991 on the annual accounts and consolidated accounts of insurance undertakings (OJ L 374, 31.12.1991, p. 7).

4.2. *Exceptions to the scope of marketable risks: temporarily non-marketable risks*

19. Notwithstanding the definition of marketable risks, certain commercial or political risks, or both, on buyers established in the countries listed in the Annex are considered temporarily non-marketable in the following cases:
- (a) where the Commission decides to temporarily remove one or more countries from the list of marketable risk countries in the Annex, as described in Section 5.2, because the capacity of the private insurance market is insufficient to cover all economically justifiable risks in the country or countries concerned;
 - (b) where the Commission, after having received a notification from a Member State as referred to in Section 5.3 of this Communication, decides that the risks incurred by small and medium-sized enterprises as defined by the Commission Recommendation 2003/361/EC ⁽¹⁵⁾, with a total annual export turnover not exceeding EUR 2,5 million, are temporarily non-marketable for exporters in the notifying Member State;
 - (c) where the Commission, after having received a notification from a Member State as referred to in Section 5.3 of this Communication, decides that single-risk cover with a risk period of at least 181 days and less than two years is temporarily non-marketable for exporters in the notifying Member State;
 - (d) where the Commission, after having received a notification from a Member State as referred to in Section 5.4 of this Communication, decides that, due to a shortage of export credit insurance, certain risks are temporarily non-marketable for exporters in the notifying Member State.
20. To minimise distortions of competition in the internal market, risks that are considered temporarily non-marketable in accordance with point 19 can be covered by State insurers, provided they fulfil the conditions set out in Section 4.3.

4.3. *Conditions for providing cover for temporarily non-marketable risks*

4.3.1. *Quality of cover*

21. The quality of cover offered by State insurers must be consistent with market standards. In particular, only economically justified risks, that is to say risks that are acceptable on the basis of sound underwriting principles, can be covered. The maximum percentage of cover must be 95 % for commercial risks and political risks and the claims waiting period must be a minimum of 90 days.

4.3.2. *Underwriting principles*

22. Sound underwriting principles must always be applied to the assessment of risks. Accordingly, the risk of financially unsound transactions must not be eligible for cover under publicly supported schemes. With regard to such principles, risk acceptance criteria must be explicit. If a business relationship already exists, exporters must have a positive trading or payment experience, or both. Buyers must have a clean claims record, the probability of the buyers' default must be acceptable and their internal or external financial ratings must also be acceptable.

4.3.3. *Adequate pricing*

23. Risk carrying in the export credit insurance contract must be remunerated by an adequate premium. To minimise the crowding out of private credit insurers, average premiums under publicly supported schemes must be higher than the average premiums charged by private credit insurers for similar risks. This requirement ensures the phasing out of State intervention, because the higher premium will ensure that exporters return to private credit insurers as soon as market conditions allow them to do so and the risk becomes marketable again.

⁽¹⁵⁾ Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (OJ L 124, 20.5.2003, p. 36).

24. Pricing is considered adequate if the minimum annual risk premium ⁽¹⁶⁾ ('safe harbour premium') for the relevant buyers' risk category ⁽¹⁷⁾, as set out in the following table, is charged. The safe harbour premium applies unless Member States provide evidence that those rates are inadequate for the risk in question. For a whole turnover policy, the risk category must correspond to the average risk of buyers covered by the policy.

Risk category	Minimum annual risk premium ⁽¹⁾ (% of insured volume)
Excellent ⁽²⁾	0,2–0,4
Good ⁽³⁾	0,41–0,9
Satisfactory ⁽⁴⁾	0,91–2,3
Weak ⁽⁵⁾	2,31–4,5

⁽¹⁾ Safe harbour for a 30-day insurance contract can be obtained by dividing the annual risk premium by 12.

⁽²⁾ The excellent risk category includes risks equivalent to AAA, AA+, AA, AA-, A+, A, A- in Standard & Poor's credit ratings.

⁽³⁾ The good risk category includes risks equivalent to BBB+, BBB or BBB- in Standard & Poor's credit ratings.

⁽⁴⁾ The satisfactory risk category includes risks equivalent to BB+, BB or BB- in Standard & Poor's credit ratings.

⁽⁵⁾ The weak risk category includes risks equivalent to B+, B or B- in Standard & Poor's credit ratings.

25. For co-insurance, quota share and top-up cover, pricing is considered adequate only if the premium charged is at least 30 % higher than the premium for the (original) cover provided by a private credit insurer.
26. An administration fee must be added to the risk premium regardless of the term of the contract in order for pricing to be considered adequate.

4.3.4. Transparency and reporting

27. Member States must publish the schemes put in place for risks that are considered temporarily non-marketable in accordance with point 19 on the websites of State insurers, specifying all applicable conditions.
28. They must submit annual reports to the Commission on risks that are considered temporarily non-marketable in accordance with point 19 and are covered by State insurers. They must do so at the latest on 31 July of the year following the intervention.
29. The report must contain the following information for each scheme:
- (a) the total amount of credit limits granted;
 - (b) the turnover insured;
 - (c) premiums charged;
 - (d) claims registered and paid;
 - (e) amounts recovered;
 - (f) the administrative costs of the scheme.

⁽¹⁶⁾ For each relevant risk category, the safe harbour risk premium range was established on the basis of one-year credit default swap (CDS) spreads, based on a composite rating including ratings of all three main credit rating agencies (Standard & Poor's, Moody's and Fitch), for the years 2007–11, assuming that average recovery ratios for short-term export credit insurance are 40 %. The ranges were subsequently made continuous to better cater for the fact that risk premiums do not remain constant over time.

⁽¹⁷⁾ The buyers' risk categories are based on credit ratings. Ratings do not need to be obtained from specific rating agencies. National rating systems or rating systems used by banks are equally acceptable. For firms without a public rating, a rating based on verifiable information could be applied.

30. Information is to be provided in a spreadsheet data format, which allows data to be searched, extracted, downloaded and easily published on the internet, for instance in CSV or XML format. The Member States must publish the reports on the websites of the State insurers.

5. **Procedural Rules**

5.1. *General principles*

31. The risks specified in point 19(a) can be covered by State insurers, subject to the conditions set out in Section 4.3. The Commission does not have to be notified in such cases.
32. The risks specified in points 19(b), (c) and (d) can be covered by State insurers, subject to the conditions set out in Section 4.3 and following notification to and approval by the Commission.
33. Failure to fulfil any one of the conditions set out in Section 4.3 does not mean that the export credit insurance or insurance scheme is automatically prohibited. If a Member State wishes to deviate from any of the conditions set out in Section 4.3 or if there is any doubt about whether a planned export credit insurance scheme fulfils the conditions set out in this Communication, in particular Section 4, the Member State must notify the scheme to the Commission.
34. Analysis under State aid rules does not prejudice the compatibility of a given measure with other Treaty provisions.

5.2. *Modification of the list of marketable risk countries*

35. When determining whether the lack of sufficient private capacity justifies the temporary removal of a country from the list of marketable risk countries, as referred to in point 19(a), the Commission will take the following factors into account, in order of priority:
- (a) contraction of private credit insurance capacity: in particular, the decision of a major credit insurer not to cover risks on buyers in the country concerned, a significant decrease in total insured amounts or a significant decrease in acceptance ratios for the country concerned within a six-month period;
 - (b) deterioration of sovereign sector ratings: in particular, sudden changes in credit ratings within a six-month period, for example multiple downgrading by independent rating agencies, or a big increase in credit default swap spreads;
 - (c) deterioration of corporate sector performance: in particular, a sharp increase in insolvencies in the country concerned within a six-month period.
36. Where market capacity becomes insufficient to cover all economically justifiable risks, the Commission may revise the list of marketable risk countries in the Annex at the written request of at least three Member States or on its own initiative.
37. If the Commission intends to modify the list of marketable risk countries it will consult and seek information from Member States, private credit insurers and interested parties. The consultation and the type of information sought will be announced on the Commission's website. The consultation period will usually not be longer than 20 working days. Where, based on the information gathered, the Commission decides to modify the list of marketable risk countries, it will announce that decision on its website.
38. The temporary removal of a country from the list of marketable risk countries will be valid for, in principle, at least 12 months. Insurance policies relating to the temporarily removed country that are signed during that period may be valid for a maximum of 180 days after the date on which the temporary removal ceases. New insurance policies may not be signed after that date. Three months before the temporary removal ceases, the Commission will consider whether to extend the removal of the country concerned from the list. If the Commission determines that market capacity is still insufficient to cover all economically justifiable risks, taking into account the factors set out in point 35, it may extend the temporary removal of the country from the list, in accordance with point 37.

5.3. *Notification obligation for temporarily non marketable risks referred to in points 19(b) and (c)*

39. The evidence currently available to the Commission suggests that there is a market gap as regards the risks specified in points 19(b) and (c) and that those risks are therefore non-marketable. It must be borne in mind, however, that the lack of cover does not exist in every Member State and that the situation could change over time, as the private sector might become interested in this segment of the market. State intervention should only be allowed for risks that the market would otherwise not cover.
40. For those reasons, if a Member State wants to cover the risks specified in points 19(b) or (c) of this Communication, it must notify the Commission pursuant to Article 108(3) of the Treaty and demonstrate in its notification that it has contacted the main credit insurers and brokers in that Member State ⁽¹⁸⁾ and given them an opportunity to provide evidence that cover for the risks concerned is available there. If the credit insurers and brokers concerned do not provide the Member State or the Commission with information concerning the conditions of cover and insured volumes for the type of risks the Member State wants to cover within 30 days following receipt of a request from the Member State to do so, or if the information provided does not demonstrate that cover for the risks concerned is available in that Member State, the Commission will consider the risks temporarily non-marketable.

5.4. *Notification obligation in other cases*

41. As regards the risks specified in point 19(d), the Member State concerned must, in its notification to the Commission pursuant to Article 108(3) of the Treaty, demonstrate that cover is unavailable for exporters in that particular Member State due to a supply shock in the private insurance market, in particular the withdrawal of a major credit insurer from the Member State concerned, reduced capacity or a limited range of products compared with other Member States.

6. **Date of application and duration**

42. The Commission will apply the principles set out in this Communication from 1 January 2022, except for the list of the countries in the Annex which will be applied from 1 April 2022. Until 31 March 2022, the Commission will consider all commercial and political risks associated with exports to all countries temporarily non-marketable in accordance with the temporary exemption specified in point 33 of the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak ⁽¹⁹⁾ and in point 62 of Commission Communication C(2021) 8442 on the 6th Amendment to the Temporary Framework. The Commission may decide to adapt this Communication at any time if necessary for reasons associated with competition policy or to take account of other Union policies and international commitments.

⁽¹⁸⁾ The contacted credit insurers and brokers should be representative in terms of the products offered (for example, specialised providers for single risks) and the size of the market they cover (for example, representing jointly a minimum share of 50 % of the market).

⁽¹⁹⁾ Communication from the Commission 'Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak', C(2020)1863, 19.3.2020 (OJ C 91 I, 20.3.2020, p. 1), as amended by Commission Communications C(2020) 2215 (OJ C 112I, 4.4.2020, p. 1), C(2020) 3156 (OJ C 164, 13.5.2020, p. 3), C(2020) 4509 (OJ C 218, 2.7.2020, p. 3), C(2020) 7127 (OJ C 340I, 13.10.2020, p. 1), C(2021) 564 (OJ C 34, 1.2.2021, p. 6) and C(2021) 8442 (OJ C 473, 24.11.2021, p. 1). Points 24 to 27 and 62 of Commission Communication C(2021) 8442 on the 6th Amendment to the Temporary Framework provide further information on the temporary exemption.

ANNEX

List of Marketable Risk Countries

Belgium	Cyprus	Slovakia
Bulgaria	Latvia	Finland
Czechia	Lithuania	Sweden
Denmark	Luxembourg	Australia
Germany	Hungary	Canada
Estonia	Malta	Iceland
Ireland	Netherlands	Japan
Greece	Austria	New Zealand
Spain	Poland	Norway
France	Portugal	Switzerland
Croatia	Romania	United Kingdom
Italy	Slovenia	United States of America

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