



EUROPEAN
COMMISSION

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COMMISSION DELEGATED REGULATION (EU) .../...

of 22.2.2024

supplementing Regulation (EU) 2022/2554 of the European Parliament and of the Council by specifying the criteria for the designation of ICT third-party service providers as critical for financial entities

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE DELEGATED ACT

Regulation (EU) 2022/2554 of the European Parliament and of the Council of 14 December 2022 on digital operational resilience for the financial sector and amending Regulations (EC) No 1060/2009, (EU) No 648/2012, (EU) No 600/2014, (EU) No 909/2014 and (EU) 2016/1011 (the Digital Operational Resilience Act ‘DORA’) was published on 27 December 2022 and entered into force on 17 January 2023¹. This Regulation provides a comprehensive legal framework addressing various, core components of the digital operational resilience of financial entities. The Digital Operational Resilience Act enhances the overall conduct of information and communication technologies (ICT) risk management, establishes testing rules for ICT systems and increases financial supervisors’ awareness of cyber risks through an EU harmonized incident reporting scheme.

To address potential systemic and concentration risks posed by the financial sectors’ reliance on a small number of ICT third-party service providers, the Regulation establishes an EU oversight framework for ICT third-party service providers deemed critical (CTPPs). As Lead Overseers (LOs), each of the three European Supervisory Authorities (‘ESAs’) will have the power to monitor on pan-European scale the activity of CTPPs in the context of their ICT services to the financial sector. In particular, DORA entrusts the ESAs with exclusive competence to designate ICT third-party service providers as critical. The Regulation also gives the LOs a set of tasks and power to oversee the activity of CTPPs.

Article 31(6) of DORA empowers the Commission to adopt a delegated act to further specify the criteria for the designation of ICT third-party service providers as critical. More specifically, the designation criteria have to be further specified in relation to the following:

- (i) the systemic impact that a failure or operational outage of an ICT third-party service provider could have on the financial entities to which it provides ICT services;
- (ii) the systemic character or importance by taking into account the number of global systemically important institutions (G-SIIs) or other systemically important institutions (O-SIIs) that rely on the ICT third-party service provider;
- (iii) the criticality or importance of the functions supported by the ICT services provided by the ICT third-party service provider; and
- (iv) the degree of substitutability of the ICT third party provider by taking into account the number of ICT third-party service providers active on a given market, as well as the costs of migrating data and ICT workloads to other ICT third-party service providers.

2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT

Procedural aspects

On 21 December 2022, the Commission asked the ESAs for a ‘technical advice’ on a Commission delegated act specifying further the criteria to be considered by the ESAs when assessing the critical nature of ICT third-party service providers, and on determining the amount of the fees and the way in which they are to be paid by CTPPs.

¹ OJ L 333, 27.12.2022, p. 1–79

The ESAs conducted a public consultation on its draft technical advice from 26 May to 23 June 2023². In total, the ESAs received 41 responses to the consultation paper. The ESAs sent their technical advice to the Commission on 29 September 2023.

On 29 September 2023, the Commission consulted the Expert Group on Banking, Payments and Insurance (EGBPI) on the content of this delegated act. The Group supported the Commission's approach regarding the delegated act on the criteria for the designation of ICT third-party service providers as critical; only experts from a few Member States have provided comments on the content of the delegated act. Representatives in the group advised in particular to remain loyal, to the extent possible, to the wording used by the ESAs in their technical advice.

Stakeholder views

As a result of the abovementioned consultations, and also ad hoc contributions, the Commission received a wide range of views on the content of the delegated act. Those views mainly relate to the two-steps approach proposed by the ESAs and to the various sub-criteria under each criticality criteria: the impact on the provision of financial services, the importance of financial entities, the critical or important functions and the degree of substitutability.

The two-steps approach and some general remarks

Several stakeholders expressed general support on the proposed two-steps approach by the ESAs. Some respondents suggested the criteria should apply cumulatively for the designation, while others proposed the criteria to apply sequentially with the orderly application of each criterion during the assessment process. In the public consultation, stakeholders also called for further clarification or guidance on the definition of 'ICT services' and suggested the development of a taxonomy in this regard.

There was broad support from stakeholders to put more emphasis on ICT services supporting critical or important functions of financial entities for the various sub-criteria, and to keep the sub-criteria simple with no overlaps.

In terms of the minimum turnover time (lifecycle duration) in the CTPP list, stakeholders expressed support for the aim to ensure that the list of designated CTPPs is stable over time to manage threshold effects.

Impact on provision of financial services

In their responses to the public consultation by the ESAs, several respondents considered the proposed thresholds to be rather low (e.g. 10%), which would result in a large number of CTPPs. Other respondents proposed a gradual approach for the application of the indicative thresholds, where initially they could be placed at a higher level to allow the oversight of the largest CTPPs, and subsequently, to consider the use of lower thresholds.

Stakeholders also noted that the metric on the total number of financial entities should not be considered in isolation and more aspects could be considered such as balance sheet totals, market penetration, customer volume or similar business criteria. In addition, some respondents raised concerns on the application of the 'total assets' as a uniformed EU metric for assessment, suggesting to us other alternative metrics, such as assets under management, gross written premiums, etc.

² https://www.esma.europa.eu/sites/default/files/2023-09/Joint-ESAs_response_to_the_Call_for_advice_on_the_designation_criteria_and_fees_for_the_DORA_oversight_framework_final.pdf.

Importance of financial entities

Respondents to the public consultation by the ESAs suggested that while the proposed sub-criteria refer to financial entities actively using ICT services provided by the ICT TPP, it is not very clear how the usage is defined or measured.

Stakeholders also highlighted that the lists of G-SIIs and O-SIIs refer to credit institutions, and therefore other types of financial entities are excluded. Several respondents called for clearer rules around the designation of a financial entity as “systemic” by competent authorities, as this leaves too much discretion in the hands of the competent authorities and may create an uneven playing field within the EU market.

With regards to the sub-criteria on the degree of technological interdependence, several stakeholders noted that it is highly challenging and complicated to obtain concrete and representative data to measure this sub-criterion in the EU financial sector.

Critical or important functions

There was broad agreement with the proposed approach to focus on ICT services supporting critical or important functions of financial entities, with stakeholders agreeing to put more emphasises on this under step 1 assessment. Many respondents suggested to define the term ‘taxonomy of ICT services’ and the term ‘level of criticality’ by leveraging on existing or ongoing work by different regulators/standard setting bodies. Other respondents were more cautious on establishing a “taxonomy of ICT services”, as a service may be critical, or a region may be critical for a particular financial entity, depending on how the use of that service or region is implemented, but non-critical for other financial entities.

Stakeholders also found that the proposed thresholds (e.g. 10%) are considered too low and requested more clarity on what constitutes ‘critical or important functions’. Some even recommended to use a predetermined list of critical functions or to perform the assessment of critical functions following a business impact analysis and a risk-based approach.

Degree of substitutability

Several respondents to the public consultation by the ESAs agreed with the proposed sub-criteria but noted their high level of complexity. Some respondents proposed that the degree of substitutability can be measured by market concentration and data portability. They suggested concentration could be assessed by taking into account the market share of an ICT TPP in a market, while portability could be deemed critical if migration is either impossible or requires substantial time (e.g. more than 12 months) and significant costs to switch to an alternative ICT TPP (e.g. 5% or more of the total IT budget of a financial entity).

Several respondents supported the sub-criterion on the market share of ICT TPPs directly or indirectly providing ICT services to financial entities. However, some stakeholders expressed their objection, as they consider it highly complex and cumbersome to gather comparable and representative data for this sub-criterion (e.g. providers offer a broad range of services and therefore could have a significant market share in one area, while other providers may offer only one specific service and are very dominant in this specific area).

The delegated act was also subject to a four-weeks feedback period on the ‘Have Your Say’ portal from 16 November 2023 to 14 December 2023, in line with the Commission’s Better Regulation guidelines. Twenty contributions were received. In particular, some businesses and their associations suggested the criticality criteria may be too low and not very targeted to the size and nature of the ICT service provider and proposed to apply them in a narrower manner, other businesses expressed the concern that step two approach was broader in terms of assessment than step one approach, and many businesses overall asked for the explicit

insertion of procedural requirements in the act, such as requirements to motivate decisions, to keep confidential data received from third party providers, etc.

The Commission has fully considered all feedback received, including the technical advice provided by the ESAs, the responses to the public consultation undertaken by the ESAs, the feedback received from the EGBPI, as well as all input provided to the Commission by stakeholders. On this basis, the Commission is adopting under Article 31(6) of DORA this delegated act further specifying the criteria for the designation of ICT third-party service providers as critical. The delegated act is in line with the technical advice received from the ESAs.

3. LEGAL ELEMENTS OF THE DELEGATED ACT

Article 1 specifies the assessment approach to be used by ESAs when applying the various sub-criteria.

Article 2 specifies the sub-criteria and their respective formulas and thresholds for the criterion assessing the systemic impact of ICT third-party service provider, in relation to the two steps identified.

Article 3 specifies the sub-criteria and their respective formulas and thresholds for the criterion assessing the systemic character and importance of the ICT services provided to financial entities, in relation to the two steps identified.

Article 4 specifies the sub-criteria and their respective formulas and thresholds for the criterion assessing criticality or importance of the functions, in relation to the step two identified.

Article 5 specifies the sub-criteria and their respective formulas and thresholds for criterion assessing the degree of substitutability, in relation to the two steps identified.

Article 6 specifies the information sources to be used by ESAs to enable the criticality assessment.

Article 7 specifies the entry into force and application of this act.

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supplementing Regulation (EU) 2022/2554 of the European Parliament and of the Council by specifying the criteria for the designation of ICT third-party service providers as critical for financial entities

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

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

Having regard to Regulation (EU) 2022/2554 of the European Parliament and of the Council of 14 December 2022 on digital operational resilience for the financial sector and amending Regulations (EC) No 1060/2009, (EU) No 648/2012, (EU) No 600/2014, (EU) No 909/2014 and (EU) 2016/1011³, and in particular Article 31(6) thereof,

Whereas:

- (1) To assess whether an ICT third-party service provider is critical for financial entities, and taking into account the criteria set out in Article 31(2) of Regulation (EU) 2022/2554, the European Supervisory Authorities (ESAs) should use sub-criteria in a two-step approach assessment. Considering the important number of ICT services and the diversity and number of financial institutions using those services, such a two-step approach should be undertaken to filter the population of ICT third-party service providers and identify the most critical ICT third-party service providers. The quantitative sub-criteria that are to be considered as part of the first step of the assessment are necessary to carry out a first selection of the population of ICT third-party service providers for which it is relevant to carry out a further in-depth analysis in light of the qualitative sub-criteria that are to be considered as part of the second step of the assessment.
- (2) The extent to which an ICT service provided by an ICT third-party service provider supports critical or important functions of the financial entity is considered a crucial element of the criticality assessment in general. Therefore, the importance of the activities of the financial entities that are supported by ICT services should be integrated in all sub-criteria considered as part of the first step. Consequently, there should not be a distinct quantitative assessment related to the criticality of the functions of the financial entities as part of the first step of the assessment. Instead, it is appropriate that the ESAs consider the criticality and importance of the functions of the financial entities supported by ICT services as part of the qualitative second step of the assessment.
- (3) The assessment should be carried out per individual ICT third-party service provider or, where applicable, per group of ICT third-party services providers in case the ICT third-party service provider belongs to a group as per Article 31(3) of Regulation (EU)

³ OJ L 333, 27.12.2022, p. 1, ELI: <http://data.europa.eu/eli/reg/2022/2554/oj>.

2022/2554. In order to enable a comprehensive assessment of the potential systemic impact on the Union financial sector, ICT subcontractors of ICT third-party service providers should also be subject to the assessment by the ESAs, and where applicable, designated as critical ICT third-party service providers.

- (4) To determine the systemic impact of the ICT third-party service provider on the stability, continuity or quality of the provision of financial services it is of paramount importance to develop a clear view on the extent and nature of systemic impact which a large-scale operational failure of an ICT third-party service provider would have on financial entities, which rely on services provided by an ICT third-party service provider, and on the financial system. Therefore, it is appropriate to consider the number of financial entities of a specific category of financial entities using the same ICT services, as well as the value of their assets to assess whether it is relevant to consider the ICT third-party service provider offering those ICT services as critical. Furthermore, a qualitative assessment of the systemic importance and interconnectedness of ICT third-party service providers, as well as the importance of the services provided by an ICT third-party provider on financial entities' provision of financial services taking into account the stability and the continuity of the services should be carried out to determine the systemic impact of the ICT third-party service provider on the activities of financial entities.
- (5) To determine the systemic character and importance of the financial entities relying on the ICT services, it is necessary to take into account the nature of those financial entities. Where financial entities that are classified as G-SIIs and O-SIIs or that are identified as 'systemic' rely on the same ICT services to support their critical or important functions, it is appropriate to assess whether the ICT third-party service provider providing those services should be considered as critical for the Union financial sector. The interconnectedness between financial entities within the Union financial sector that rely on ICT services provided by the same ICT third-party service provider should also be assessed to determine the reliance of financial entities on that ICT third-party service provider.
- (6) The ICT services supporting critical or important functions of the financial entities should be assessed in respect of their type and critical nature that are necessary for the financial entities to run their activities without any disruptions.
- (7) To determine the degree of substitutability of the ICT third party service provider, it is necessary to take into account the number of ICT third-party service providers active on a given market, the existence of alternative solutions for the same ICT service, as well as at the costs of migrating data and ICT workloads to other ICT third-party service providers as part of the assessment to be carried out by the ESAs.
- (8) In order to ensure the soundness of the assessment process, it is important that the ESAs rely on the data from the registers of information referred to in Article 28(3) of Regulation (EU) 2022/2554, and any other readily available information, when assessing whether the ICT third-party service providers should be designated as critical.

HAS ADOPTED THIS REGULATION:

Article 1
Assessment approach

1. When considering the criteria set out in Article 31(2) of Regulation (EU) 2022/2554 to designate an ICT third-party service provider that is critical for financial entities, the ESAs shall apply the following approach:
 - (a) as a first step, the ESAs shall assess whether the ICT third-party service provider fulfils all of the ‘step 1’ sub-criteria set out in Articles 2(1), 3(1), and 5(1);
 - (b) as a second step, for those ICT third-party service providers that fulfil all of the ‘step 1’ sub-criteria referred to in point (a), the ESAs shall carry out their assessment in the light of the ‘step 2’ sub-criteria referred to in Articles 2(5), 3(4), 4(1), and 5(5).

By way of derogation from the first sub paragraph, for the assessment of the criterion (c) of Article 31(2) of Regulation (EU) 2022/2554, the first step shall be covered by the assessment to be carried out for the criteria (a), (b) and (d) of Article 31(2) of Regulation (EU) 2022/2554.
2. After the end of the time period for the submission of a reasoned statement referred to in Article 31(5), first subparagraph, of Regulation (EU) 2022/2554, the ESAs, through the Joint Committee and upon recommendation from the Oversight Forum, shall designate an ICT third-party service provider as critical for financial entities if it fulfils all the ‘step 1’ sub-criteria referred to in paragraph 1, point (a), and following a positive outcome of the assessment carried out in relation to the ‘step 2’ sub-criteria referred to in paragraph 1, point (b).

Article 2
Systemic impact of ICT third-party service providers on the stability, continuity or quality of the provision of financial services

1. When considering the criterion set out in Article 31(2), point (a), of Regulation (EU) 2022/2554, the ESAs shall assess whether the ICT third-party service provider fulfils the following ‘step 1’ sub-criteria:
 - (a) Sub-criterion 1.1: share of the number of financial entities, broken down by categories of financial entities as listed in Article 2(1) of Regulation (EU) 2022/2554, to which ICT services are provided by the same ICT third-party service provider where the ICT services support critical or important functions;
 - (b) Sub-criterion 1.2: share of the total value of assets of financial entities, broken down by categories of financial entities as listed in Article 2(1) of Regulation (EU) 2022/2554, to which ICT services are provided by the same ICT third-party provider where the ICT services support critical or important functions of financial entities.
2. The sub-criterion 1.1 set out in paragraph 1, point (a), shall be calculated as follows:

number of financial entities of a category of financial entities
as set out in Article 2(1) of Regulation (EU) 2022/2554,
to which ICT services are provided by the same ICT third party services provider
where the ICT services support critical or important functions of financial entities

total number of financial entities of a category of financial entities

as set out in Article 2(1) of Regulation (EU) 2022/2554

3. The sub-criterion 1.2 set out in paragraph 1, point (b), shall be calculated as follows:
total value of assets of financial entities of a category of financial entities
as listed in Article 2(1) of Regulation (EU) 2022/2554,
to which ICT services are provided by the same ICT third party provider
where the ICT services support critical or important functions of financial entities

total value of assets of all EU financial entities of the same category
as set out in Article 2(1) of Regulation (EU) 2022/2554
4. An ICT third-party service provider shall be considered as having fulfilled the ‘step 1’ sub-criteria referred to in paragraph 1 where both of the shares as calculated in accordance with paragraphs 2 and 3 are of at least 10% of the total number for at least one category of financial entities as set out in Article 2(1) of Regulation (EU) 2022/2554.
5. When considering the criterion set out in Article 31(2), point (a), of Regulation (EU) 2022/2554 and where the ICT third-party service provider fulfills the ‘step 1’ sub-criteria referred to in paragraph 1 of this Article, the ESAs shall carry out their assessment in the light of the following ‘step 2’ sub-criteria:
 - (a) Sub-criterion 1.3: the intensity of the impact of discontinuing the ICT services provided by the ICT third-party service provider on the activities and operations of financial entities identified in the ‘step 1’ sub-criteria referred to in paragraph 1 of this Article and the number of those financial entities affected;
 - (b) Sub-criterion 1.4: the dependence of the critical ICT third-party service provider on the same subcontractors providing ICT services supporting critical or important functions of financial entities.

Article 3

Systemic character and importance of the ICT services provided to financial entities

1. When considering the criterion set out in Article 31(2), point (b), of Regulation (EU) 2022/2554, the ESAs shall assess whether the ICT third-party service provider fulfils the following ‘step 1’ sub-criteria:
 - (a) Sub-criterion 2.1: number of global systemically important institutions (G-SIIs) and other systemically important institutions (O-SIIs) that are credit institutions to which ICT services are provided by the same ICT third-party service provider where the ICT services support critical or important functions;
 - (b) Sub-criterion 2.2: number of financial entities, other than credit institutions and G-SIIs and O-SIIs referred to in point (a) above, identified as systemic by competent authorities referred to under Article 46 of Regulation (EU) 2022/2554 to which ICT services are provided by the same ICT third-party service provider where the ICT services support critical or important functions.

2. An ICT third-party service provider shall be considered as having fulfilled the sub-criterion set out in paragraph 1, point (a), if the ICT services it provides are used at least by either of the following:
 - (a) one G-SII;
 - (b) at least three O-SIIs;
 - (c) at least one O-SII with an O-SII score above 3,000 calculated in accordance with Article 131(3) of Directive 2013/36/EU⁴.
3. An ICT third-party service provider shall be considered as having fulfilled the sub-criterion set out in paragraph 1, point (b), if the ICT services that it provides are used at least by either of the following:
 - (a) one financial entity that is a financial entity as referred to in Article 2(1), points (g), (h), (i) or (j) of Regulation (EU) 2022/2254 and which is identified as 'systemic' by competent authorities;
 - (b) at least three financial entities, other than credit institutions and than financial entities referred to in Article 2(1), points (g), (h), (i) or (j) of Regulation (EU) 2022/2254 and which are identified as 'systemic' by competent authorities.
4. When considering the criterion set out in Article 31(2), point (b), of Regulation (EU) 2022/2554 and where the ICT third-party service provider fulfills the 'step 1' sub-criteria referred to in paragraph 1 of this Article, the ESAs shall carry out their assessment in the light of the following 'step 2' sub-criterion:
 - Sub-criterion 2.3: G-SIIs or O-SIIs and other financial entities included in the assessment in the 'step 1' sub criteria referred to in paragraph 1 of this Article, including where those G-SIIs or O-SIIs provide financial infrastructure services to other financial entities, relying on an ICT service provided by the same ICT third-party service provider, are interdependent.

Article 4

Criticality or importance of the functions

1. When considering the criterion set out in Article 31(2), point (c), of Regulation (EU) 2022/2554, the ESAs shall carry out their assessment in the light of the following 'step 2' sub-criterion:
 - Sub-criterion 3.1: the ICT service provided ultimately by the same ICT third-party service provider supporting critical or important functions of financial entities is of a critical nature for the activities of the financial entities.

Article 5

Degree of substitutability

1. When considering the criterion set out in Article 31(2), point (d), of Regulation (EU) No 2022/2554, the ESAs shall assess whether the ICT third-party service provider fulfils the following 'step 1' sub-criteria:

⁴ Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ L 176, 27.6.2013, p. 338, ELI: <http://data.europa.eu/eli/dir/2013/36/oj>).

- (a) Sub-criterion 4.1: the share of the total number of financial entities, broken down by categories of financial entities as set out in Article 2(1) of Regulation (EU) 2022/2554, for which no alternative ICT third-party service provider is available which has the required capacity to provide the same ICT services that support critical or important functions of financial entities as the one provided by the relevant ICT third-party service provider;
 - (b) Sub-criterion 4.2: the share of the total number of financial entities, broken down by categories of financial entities as set out in Article 2(1) of Regulation (EU) 2022/2554, for which it is highly difficult to migrate an ICT service provided by the relevant ICT third-party service provider that supports critical or important functions of financial entities to another ICT third-party service provider.
2. The sub-criterion 4.1 set out in paragraph 1, point (a), shall be calculated as follows:

$$\frac{\text{number of financial entities of a category of financial entities as set out in Article 2(1) of Regulation (EU) 2022/2554, for which no alternative ICT third – party service provider is available which has the required capacity to provide the same ICT services that support critical or important functions of financial entities as the one provided by the relevant ICT third party service provider}}{\text{total number of financial entities of that category of financial entities as set out in Article 2(1)of Regulation 2022/2554}}$$
3. The sub-criterion set out in paragraph 1, point (b), shall be calculated as follows:

$$\frac{\text{number of financial entities of a category of financial entities as set out in Article 2(1)of Regulation (EU) 2022/2554, for which it is highly difficult to migrate or reintegrate an ICT service provided by the ICT third party provider that support critical or important functions to another ICT third party provider}}{\text{total number of EU financial entities of that category of financial entities as set out in Article 2(1) of Regulation (EU) 2022/2554}}$$
4. An ICT third-party service provider shall be considered as having fulfilled both sub-criteria 4.1 and 4.2 where either of the following is met:
 - (a) the share of the total number of financial entities referred to in paragraph 1, point (a), is of at least 10% of the total number of financial entities for a category of financial entities as set out in Article 2(1) of Regulation (EU) 2022/2554;
 - (b) the share of the total number of financial entities referred to in paragraph 1, point (b), is of at least 10% of the total number of financial entities or a category of financial entities as set out in Article 2(1) of Regulation (EU) 2022/2554.
5. When considering the criterion set out in Article 31(2), point (d), of Regulation (EU) 2022/2554 and where the ICT third-party service provider fulfills the ‘step 1’ sub-criteria referred to in paragraph 1 of this Article, the ESAs shall carry out their assessment in the light of the step two sub-criterion specified in Article 31(2), point (d)(i) of Regulation (EU) 2022/2554.

Article 6
Information sources to enable criticality assessment

1. The ESAs shall use the data provided by the registers of information referred to in Article 28(3) of Regulation (EU) No 2022/2554, for the assessment of the sub-criteria listed in Articles 2 to 5. The ESAs may also use additional available data they have at their disposal from all sources of information to perform the criticality assessment.
2. The ESAs shall take into account the most recent data available to them during the assessment year, or where applicable, the data that has been made available to them at the latest by 31 December of the year preceding the criticality assessment.

Article 7
Entry into force and application

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

However, the Lead Overseer shall apply the sub-criterion 1.4 referred to in Article 2, paragraph 5, point (b) as of (OP: please insert date: 24 months following the entry into force of DORA Regulation).

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

Done at Brussels, 22.2.2024

For the Commission
The President
Ursula VON DER LEYEN