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Recommendation for a

COUNCIL DECISION

**authorising the European Commission to participate, on behalf of the European Union,
in the negotiations of the international instrument setting up the International Claims
Commission for Ukraine**

EXPLANATORY MEMORANDUM

With this recommendation, the Commission is requesting the authorisation from the Council to open negotiations on the international instrument setting up the International Claims Commission for Ukraine (hereinafter: ‘the instrument setting up the Claims Commission’), which will review, assess and decide eligible claims recorded in the Register of Damage Caused by the Aggression of the Russian Federation against Ukraine and determine the compensation due in each case.

1. CONTEXT OF THE PROPOSAL

• Reasons for and objectives of the proposal

On 14 November 2022, the United Nations General Assembly adopted resolution ES-11/5¹, (‘the UN General Assembly Resolution’) entitled “Furtherance of remedy and reparation for aggression against Ukraine”, in which the General Assembly recognised that the Russian Federation must be held to account for any violations of international law in or against Ukraine, including its aggression in violation of the Charter of the United Nations, as well as any violations of international humanitarian law and international human rights law, and that it must bear the legal consequences of all of its internationally wrongful acts, including making reparation for the injury, including any damage, caused by such acts.

That Resolution further recognised the need for the establishment, in cooperation with Ukraine, of an international mechanism for reparation for damage, loss or injury, arising from the internationally wrongful acts of the Russian Federation in or against Ukraine; and recommended the creation by Member States, in cooperation with Ukraine, of an international register of damage to serve as a record, in documentary form, of evidence and claims information on damage, loss, or injury to all natural and legal persons concerned, as well as the State of Ukraine, caused by internationally wrongful acts of the Russian Federation in or against Ukraine, as well as to promote and coordinate evidence-gathering.

In line with the UN General Assembly Resolution, States adopted a stepwise approach, choosing to establish the Register first, to be followed by the other elements of the compensation mechanism, namely a Claims Commission and a Compensation Fund. This approach was reflected in the Register’s Statute, where it is acknowledged that the Register, including its digital platform with all data about claims and evidence recorded therein, is meant as the first component of the compensation mechanism to be established by a separate international instrument in co-operation with Ukraine².

On 12 May 2023, the Committee of Ministers of the Council of Europe adopted the Resolution establishing the Enlarged Partial Agreement on the Register of Damage Caused by the Aggression of the Russian Federation against Ukraine (hereinafter: ‘Register of Damage’ or ‘Register’)³.

The Register of Damage, announced at the 4th Summit of Heads of State and Government of the Council of Europe in Reykjavik (16-17 May 2023), serves as a record, in documentary form, of evidence and claims information on damage, loss or injury caused to all natural and

¹ UNGA resolution A/RES/ES-11/5, OP2-OP4

² Appendix to Resolution CM/Res(2023) of 12 May 2023, Statute of the Register of Damage Caused by the Aggression of the Russian Federation against Ukraine, Article 2.5.

³ Resolution CM/Res(2023)3 establishing the Enlarged Partial Agreement on the Register of Damage Caused by the Aggression of the Russian Federation against Ukraine (Adopted by the Committee of Ministers on 12 May 2023 at the 1466th meeting of the Ministers’ Deputies).

legal persons concerned, as well as the State of Ukraine, on or after 24 February 2022 in the territory of Ukraine by the Russian Federation's internationally wrongful acts in or against Ukraine.

The Union joined the Enlarged Partial Agreement on the Register of Damage as a founding Associate Member by means of a Commission Decision, adopted on 11 May 2023, pursuant to Article 212 TFEU⁴. On 22 July 2024, the Council adopted the Decision on the Union's change of status from Associate Member to Participant⁵, thereby reiterating the Union's firm commitment to the activities of the Register, including via the payment of the annual compulsory contribution.

By establishing the Register of Damage, the Council of Europe and the founders of the Register followed through with the UN General Assembly Resolution.

At the 'Restoring Justice for Ukraine' Ministerial Conference of 2 April 2024, where the Register officially launched its activities, interested States agreed to organise a meeting in due course to discuss a draft instrument on the setting up of a Claims Commission as a next step towards a compensation mechanism for Ukraine.

Subsequently, the Secretariat of the Register of Damage prepared a 'zero draft' of the instrument setting up the Claims Commission (hereinafter: 'draft instrument') and, together with Ukraine and the Netherlands, organised preparatory meetings to exchange preliminary views on such draft and its further revised versions (9-10 July 2024, 12-13 September 2024 and 13-15 November 2024; and 28-30 January 2025). The 94 States that voted in favour of the above-mentioned UN General Assembly resolution were invited to the meetings. In the course of these meetings, delegations were encouraged to seek a mandate to participate in a future Diplomatic Conference to adopt and sign the instrument setting up the Claims Commission, taking into account that it may take the form of a legally binding international instrument.

In accordance with relevant provisions of the draft instrument, the Claims Commission should be an administrative body to review, assess and decide eligible claims and determine the amount of compensation due in each case. To this end, the draft instrument envisages that the work of the Register is to be transferred to the Claims Commission, including facilities and resources for its administrative build-up.

The draft instrument has been prepared on the understanding that there is not yet consensus with respect to the institutional framework of the future Claims Commission, or its functioning and governance. In the preparatory meetings held so far, the participating States discussed the following options for the establishment of the Claims Commission: (i) under the auspices of the Council of Europe through a Council of Europe convention; (ii) through a standalone international instrument establishing the Claims Commission; (iii) through a standalone international instrument establishing the Claims Commission, which would nonetheless rely on secretarial support from the Council of Europe (the so-called 'hybrid model'). The formal negotiations of the instrument setting up the Claims Commission are nonetheless expected to start by March 2025.

⁴ C(2023) 3241, 11.5.2023.

⁵ Council Decision (EU) 2024/2045 of 22 July 2024 on the position to be taken on behalf of the Union within the Council of Europe bodies as regards the status of the European Union in the Enlarged Partial Agreement on the Register of Damage caused by the Aggression of the Russian Federation against Ukraine, OJ L, 2024/2045, 24.7.2024, ELI: <http://data.europa.eu/eli/dec/2024/2045/oj>.

The objective of this recommendation is therefore to ensure the timely participation of the Union in the forthcoming negotiations of the instrument setting up the Claims Commission, during which the nature of such instrument, the features of the Claims Commission and all the relevant rules concerning its framework, governance and functioning will be agreed upon.

- **Consistency with existing policy provisions in the policy area**

The Union's participation in the negotiations of the instrument setting up the Claims Commission is consistent with its commitment to ensuring that damages caused by the Russian Federation's aggression against Ukraine and other violations of international law by the Russian Federation are duly compensated. This commitment was already demonstrated by the Union's participation, first as a founding Associate Member and then as a Participant, in the Enlarged Partial Agreement establishing the Register of Damage.

Furthermore, the participation in the establishment of the Claims Commission complements several initiatives undertaken at Union level since February 2022, which are aimed at ensuring that the Russian Federation is held accountable for its war of aggression against Ukraine and that individuals responsible for international crimes committed in and against Ukraine are brought to justice. Notably, the Union has enabled the setting up of the International Centre for the Prosecution of the Crime of Aggression against Ukraine (ICPA) at Eurojust. Eurojust has been assisting national authorities participating in the JIT and the ICPA through its tailor-made operational, technical, logistical and financial support, including via its Core International Crimes Evidence Database. The present proposal is likewise consistent with the Union's participation in international forums and structures aimed at enhancing the cooperation among national competent authorities investigating the international crimes committed in and against Ukraine and ensuring that there will be no impunity for such crimes. These forums include the US-UK-EU Atrocity Crimes Advisory Group which facilitates assistance by experts to the Prosecutor General's Office of Ukraine, as well as the Dialogue Group, which acts as an international coordination platform for initiatives concerning support to Ukraine's investigative and prosecutorial capacities, actions by international organisations and CSOs. .

- **Consistency with other Union policies**

The Union's unwavering support for Ukraine reflects a shared commitment to democratic principles and to the safeguarding of the rules-based international order and peace in Europe. The present proposal is therefore consistent with other Union policies that aim to safeguard the international order and peace in Europe, notably in the context of the current war of aggression against Ukraine. The Union has joined the Register of Damage as full Participant, which is consistent with its long-standing cooperation with the Council of Europe in the fields of human rights and fundamental freedoms, democracy and the rule of law.

To achieve these objectives, the Ukraine Facility Regulation⁶, adopted on the basis of Article 212 TFEU, aims at 'supporting initiatives and bodies and organisations involved in supporting and enforcing democracy, international justice and anti-corruption efforts in Ukraine' (Article 3(i)) and 'strengthening compliance with international law' (Article 3(h)).

Finally, in particular with a view to safeguarding peace, preventing conflicts and strengthening international security, in accordance with the UN Charter, the Union has adopted an unprecedented amount of restrictive measures against the Russian Federation with a view to increase the costs of the Russian Federation for its illegal actions and to thwart its ability to

⁶ Regulation (EU) 2024/792 of the European Parliament and of the Council of 29 February 2024 establishing the Ukraine Facility, OJ L, 2024/792, 29.2.2024.

continue its aggression. To enhance the enforcement of restrictive measures, the Union has, among others, set up the Freeze and Seize Task Force, adopted a Directive that harmonises the definition of, and criminal penalties for the violation of Union restrictive measures⁷. The Commission appointed an EU Sanctions Envoy to ensure continuous, high-level discussions with third countries to avoid the evasion or circumvention of the Union restrictive measures, in particular those adopted against Russia, and has published guidance to national authorities and private operators in dealing with the interpretation of the relevant Union rules on the matter.

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

• Legal basis

Article 218(3) TFEU provides for the submission by the Commission of ‘recommendations to the Council, which shall adopt a decision authorising the opening of negotiations and, depending on the subject of the agreement envisaged, nominating the Union negotiator or the head of the Union's negotiating team.’

Pursuant to Article 218(4) TFEU, ‘the Council may address directives to the negotiator and designate a special committee in consultation with which the negotiations must be conducted’.

According to established case-law of the European Court of Justice⁸, the substantive legal basis depends primarily on the objective and content of the envisaged act. If the envisaged act pursues two aims or has two components and if one of those aims or components is identifiable as the main one, whereas the other is merely incidental, a legal act must be founded on a single substantive legal basis, namely that required by the main or predominant aim or component. The present recommendation aims at ensuring that the Union is authorised to participate in the negotiations of the instrument setting up the Claims Commission.

The establishment of the Claims Commission is meant to provide the necessary technical and financial assistance to a third country, notably Ukraine, to ensure that the Russian Federation is held fully accountable for its war of aggression against Ukraine and that all damages, losses and injuries caused to all natural and legal persons concerned, as well as the State of Ukraine, including its regional and local authorities, state-owned or controlled entities, by the Russian Federation's internationally wrongful acts in or against Ukraine are duly compensated. The ultimate objective of the instrument setting up the Claims Commission is therefore addressing administrative, financial, procedural, legal and policy issues of the Claims Commission to ensure that the Russian Federation will make full reparation as provided for in the mandate and function of the Claims Commission in the zero-draft of the international instrument and which is consistent with the aim under Article 212 TFEU. This would also be consistent with both the substantive legal basis of the Council Decision on the change of the Union's status from Associate Member to Participant in the Register of Damage adopted on the basis of Article 212 TFEU, and with the envisaged Union's annual contribution to the Claims Commission under the Regulation establishing the Ukraine Facility, which provides financial assistance equally on the basis of Article 212 TFEU.

⁷ Directive (EU) 2024/1226 of the European Parliament and of the Council of 24 April 2024 on the definition of criminal offences and penalties for the violation of Union restrictive measures and amending Directive (EU) 2018/1673, OJ L, 2024/1226, 29.4.2024, ELI: <http://data.europa.eu/eli/dir/2024/1226/oj>.

⁸ Judgment of 24 June 2014 (Grand Chamber), *European Parliament v Council*, C-658/11, para 55-57 and Judgment of the Court of Justice in case C-130/10 *European Parliament v Council*, para 80.

At the same time, the context of this initiative and the preamble of the zero draft show that the envisaged Claims Commission pursues the objective of ensuring respect for international law and holding the Russian Federation accountable for its unlawful acts. As illustrated by the UNGA resolutions referred to in the preamble of the draft instrument, this mechanism will be set up to respond to the crime of aggression committed by the Russian Federation against Ukraine, in manifest violation of Article 2(4) of the UN Charter. The setting up of this mechanism will thus also form part of the efforts of the international community to ensure international peace and security. From the perspective of the EU, participation in this mechanism corresponds to the objectives underpinning the EU's external action, as set out in Article 21(2) TEU.

This recommendation is based on Article 212 TFEU in conjunction with Article 218(3) and (4) TFEU and foresees the appointment of the Commission as the Union negotiator.

- **Subsidiarity (for non-exclusive competence)**

In accordance with Article 216(1) TFEU, the Union's participation in the negotiations of the instrument setting up the Claims Commission falls within the external competence of the Union.

According to Article 212(3), second subparagraph, TFEU, the negotiation of an international agreement by the Union is without prejudice to the Member States' competence to negotiate in international bodies and to conclude such agreements. In view of the joined objectives of the EU and its Member States to ensure the payment of war damages by the Russian Federation, it is appropriate that both the Union and those Member States which so decide, participate in these negotiations.

- **Proportionality**

The Union's objectives with regard to this proposal as set out above can only be achieved by the Union's participation in the negotiations of the instrument setting up the Claims Commission.

- **Choice of the instrument**

The Union's participation in the negotiations of the instrument setting up the Claims Commission needs to be established by a Council Decision authorising the opening of negotiations, nominating the Union's negotiator and addressing directives to the negotiator under Article 218(3) and (4) TFEU.

3. RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS

- **Ex-post evaluations/fitness checks of existing legislation**

Not applicable.

- **Stakeholder consultations**

Not applicable.

- **Collection and use of expertise**

Not applicable.

- **Impact assessment**

Not applicable.

- **Regulatory fitness and simplification**

Not applicable.

- **Fundamental rights**

The aggression of the Russian Federation against Ukraine is a grave violation of international law which causes and has already caused massive damages in Ukraine and to the Ukrainian population. The present proposal aims at strengthening the Union's commitment to ensuring that, via the Claims Commission, such damages can be duly compensated, including those resulting from the violation by the Russian Federation of fundamental rights such as the rights to life, to the integrity of the person and to property, as well as of the prohibition of torture and inhuman or degrading treatment or punishment.

4. BUDGETARY IMPLICATIONS

As provided in the draft instrument, in accordance with international law the Russian Federation should bear the costs of the work of the Claims Commission. In the draft instrument, it is further stipulated, however, that until the Russian Federation discharges its obligation, the Claims Commission should be financed through the annual contributions of its Members, and voluntary contributions. These contributions shall be considered advances on payments owed by the Russian Federation under international law and recoverable from the Russian Federation. More specifically, the annual contributions from Members should be determined by the Financial Committee of the Assembly, based on the scale adopted by the United Nations for its regular budget. Under the draft instrument, the Members are not expected to contribute to the compensation fund which will be set up to execute the decisions of the Claims Commission awarding compensation.

Therefore, if the Union intends to participate as a Member in the instrument setting up the Claims Commission, it will be required to pay an annual contribution. Further details on the Union's financial impact may be found in the legislative financial statement annexed to this proposal.

Regulation (EU) 2024/792 establishing the Ukraine Facility provides for the legal basis for the Union's contribution to the Claims Commission until 2027. On the basis of the objectives set out in Regulation (EU) 2024/792, and in particular under Chapter V, Article 34(3) of said Regulation provides that '[a]ssistance under this Chapter shall also strengthen capacities for conflict prevention, peacebuilding and address pre- and post-crisis needs, including through, confidence-building measures and processes that promote justice, truth-seeking, comprehensive post-conflict rehabilitation for an inclusive, peaceful society, as well as collection of evidence of crimes committed during the war. Funding for initiatives and bodies involved in supporting and enforcing international justice in Ukraine may be provided under this Chapter'. Therefore, as the instrument setting up the Claims Commission aims to enforce international justice in Ukraine by contributing to a mechanism that will compensate the damages suffered by Ukraine and its population and caused by the Russian Federation's violations of international law, Article 34(3) of Regulation (EU) 2024/792 provides for the appropriate legal basis for the Union to provide its financial contribution to the Claims Commission until 2027.

The budget line that would cater for this expenditure would be line 16 06 03 01 — Union accession assistance and other measures, whereby in the relative budget remarks it is explained that this item 'will also cover support for [...] other measures that are

complementary to EU action, such as accountability mechanisms for Russia's war of aggression'.

With regard to the method of implementation, Article 245 of Regulation (EU, Euratom) 2024/2509 of the European Parliament and of the Council of 23 September 2024 on the financial rules applicable to the general budget of the Union (recast)⁹, which enables the Union to pay membership fees to bodies of which the Union is a member, is applicable for the Union's contribution to the Claims Commission.

5. OTHER ELEMENTS

• Implementation plans and monitoring, evaluation and reporting arrangements

Regarding reporting arrangements, the Council may designate a special committee within the meaning of Article 218(4) TFEU, which should be consulted for conducting the negotiations. If this committee will be designated, the Commission should regularly report to it on the steps undertaken pursuant to the Council Decision and consult it on a regular basis.

Whenever so requested by the Council, the Commission should report to it on the conduct and the outcome of the negotiations, including in writing.

• Explanatory documents (for directives)

Not applicable.

• Detailed explanation of the specific provisions of the proposal

Article 1 includes the authorisation of the Commission to participate, on behalf of the Union, in the negotiations of an international agreement establishing the International Claims Commission for Ukraine. Article 1 further sets out that the negotiations should be conducted on the basis of the negotiating directives of the Council attached in the annex to the Decision.

Article 2 provides for the nomination of the Commission as Union negotiator.

Article 3 provides for the designation of a special committee in consultation with which the negotiations must be conducted.

Article 4 provides that the Decision is addressed to the Commission.

Article 5 provides for the entry into force of the Decision.

⁹ Regulation (EU, Euratom) 2024/2509 of the European Parliament and of the Council of 23 September 2024 on the financial rules applicable to the general budget of the Union (recast), OJ L, 2024/2509, 26.9.2024, ELI: <http://data.europa.eu/eli/reg/2024/2509/oj>.

Recommendation for a

COUNCIL DECISION

authorising the European Commission to participate, on behalf of the European Union, in the negotiations of the international instrument setting up the International Claims Commission for Ukraine

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, in particular Article 212, in conjunction with Article 218(3) and (4) thereof,

Having regard to the recommendation from the European Commission

Whereas:

- (1) Following the unprovoked and unjustified war of aggression waged by the Russian Federation against Ukraine,¹⁰ on 14 November 2022, the United Nations General Assembly adopted Resolution ES-11/5, entitled “Furtherance of remedy and reparation for aggression against Ukraine”.¹¹
- (2) In addition to recalling the obligations of States under Article 2 of the Charter of the United Nations, including that of refraining in their international relations from the threat or use of force against the territorial integrity or political independence of any State, the General Assembly expressed grave concern at the loss of life, civilian displacement, catastrophic destruction of infrastructure and natural resources, loss of public and private property, and economic calamity caused by the Russian Federation’s aggression against Ukraine.¹²
- (3) The United Nations General Assembly recognised that the Russian Federation must be held to account for any violations of international law committed against Ukraine. In addition, it further stressed that the Russian Federation must bear the legal consequences of all of its internationally wrongful acts, including making reparation for the injury, including any damage, caused by its wrongful acts.¹³
- (4) Under this framework, the United Nations General Assembly emphasised the need to establish, in cooperation with Ukraine, an international mechanism for reparation for damage, loss or injury, arising from the internationally wrongful acts of the Russian Federation in or against Ukraine.¹⁴ To this end, it recommended the creation of an international register of damage to serve as a record, in documentary form, of evidence and claims information on damage, loss or injury to all natural and legal persons concerned, as well as the State of Ukraine, caused by internationally wrongful acts of the Russian Federation in or against Ukraine, as well as to promote and coordinate evidence-gathering.¹⁵

¹⁰ UN DOC A/ES-11/L.1.

¹¹ UN Doc A/RES/ES-11/5.

¹² Ibid Recitals 2, 9.

¹³ Ibid para 2.

¹⁴ UN Doc A/RES/ES-11/5 para 3.

¹⁵ Ibid para 4.

- (5) On 12 May 2023, the Committee of Ministers of the Council of Europe adopted the Resolution CM/Res(2023)3 establishing the Enlarged Partial Agreement on the Register of Damage Caused by the Aggression of the Russian Federation against Ukraine.
- (6) In order to push forward accountability efforts towards the establishment of an international mechanism for reparation for damage, loss or injury, and arising from the internationally wrongful acts of the Russian Federation in or against Ukraine, States adopted a stepwise approach, choosing to establish the Register first, to be followed by the other elements of the compensation mechanism, namely a Claims Commission and a Compensation Fund. This approach was reflected in the Register's Statute, where it is acknowledged that the Register, including its digital platform with all data about claims and evidence recorded therein, is meant as the first component of the compensation mechanism to be established by a separate international instrument in co-operation with Ukraine and relevant international organisations and bodies.
- (7) After joining the Register of Damage as a founding Associate Member on 11 May 2023 by means of a notification to the Secretary-General of the Council of Europe, the Union changed its status to Participant on 22 July 2024.
- (8) On 29 February 2024, the European Parliament and the Council adopted Regulation (EU) 2024/792 establishing the Ukraine Facility, by which the co-legislators have *inter alia* provided the legal basis for assistance for initiatives and bodies involved in supporting and enforcing international justice in Ukraine, including by covering the Union's financial contribution to the Register of Damage.
- (9) In 2024, the Office of the President of Ukraine, the Ministry of Foreign Affairs of Ukraine, the Ministry of Foreign Affairs of the Kingdom of the Netherlands and the Register of Damage for Ukraine invited the States that supported the adoption of United Nations General Assembly Resolution A/RES/ES-11/5 to Preparatory Meetings on an International Instrument to establish a Claims Commission for Ukraine in The Hague, the Netherlands. The first formal negotiation round is expected to take place in March 2025.
- (10) The Secretariat of the Register of Damage prepared a 'zero draft' of an international instrument for the establishment of a Claims Commission for Ukraine. The 'zero draft' includes provisions on the Claims Commission's mandate, function, legal status, seat, membership and participation, organisational structure, financing and budget as well as on the procedure for the review of claims, membership of the Russian Federation, and transfer of the work of the Register of Damage.
- (11) Given the interest of the Union in reiterating its firm commitment in ensuring that the Russian Federation bears the legal consequences of its internationally wrongful acts against Ukraine, including the obligation to make reparation for any damage, loss and injury caused by those acts, it is appropriate for the Union to participate in the negotiations of the international instrument setting up the Claims Commission.

HAS ADOPTED THIS DECISION:

Article 1

The Commission is hereby authorised to negotiate, on behalf of the Union, an international instrument setting up an International Claims Commission for Ukraine.

Article 2

The negotiations shall be conducted on the basis of the negotiating directives set out in the Annex.

Article 3

The Commission is hereby nominated as the Union negotiator.

Article 4

The Union's participation in the negotiations referred to in Article 1 shall be conducted in consultation with the the special committee designated in accordance with Article 218(4) TFEU.

The Commission shall regularly report to the special committee referred to in the first subparagraph on the steps undertaken pursuant to this Decision and consult it on a regular basis.

Article 5

This Decision is addressed to the Commission.

Done at Brussels,

*For the Council
The President*