

ANNEX III

ESCROW AGREEMENT

This Escrow Agreement (the “**Agreement**”) between:

- (1) The Contracting States signatories to the Joint Procurement Agreement for their allowances to be auctioned by the common auction platform,

Bulgaria, Croatia, Czechia, Estonia, Latvia, Lithuania, Hungary, Poland, Romania, Slovakia, as beneficiary Member States of the Modernisation Fund established pursuant to Article 10d of the EU ETS Directive for the allowances to be auctioned by the common auction platform for the Modernisation Fund,

The European Commission for the allowances to be auctioned by the common auction platform for the Innovation Fund, established pursuant to Article 10a(8) of the EU ETS Directive,

each a “**Depositor**” and together referred to as the “**Depositors**”,

collectively represented under this Agreement by the European Commission (hereinafter referred to as the “**Commission**” or the “**Representative**”) on the one part,

and

- (2) European Commodity Clearing AG, established at Augustusplatz 9, 04109 Leipzig, Germany, registration number HRB 22362, VAT registration number: DE 248 156 757, a Central Counterparty authorized in accordance with EMIR (hereinafter referred to as “**ECC**” or the “**Escrow Agent**” as the context may require), on the one part,

each a “**Party**”, and together referred to as the “**Parties**”,

WHEREAS

- (A) The following EU Member States and EEA-EFTA States are signatories to the Joint Procurement Agreement and are contracting States to the Service Contract for the third common auction platform, which is to auction their allowances: Belgium, Bulgaria, Czechia, Denmark, Estonia, Ireland, Spain, France, Finland, Greece, Italy, Cyprus, Croatia, Latvia, Lithuania, Luxembourg, Hungary, Malta, The Netherlands, Austria, Portugal, Romania, Slovenia, Slovakia, Sweden, Iceland, Liechtenstein, Norway (the “**Contracting States**”). These States are the Depositors under this Agreement for their allowances to be auctioned at the third common auction platform.
- (B) Article 10d of the EU ETS Directive establishes the Modernisation Fund, which must operate under the responsibility of the beneficiary Member States. The allowances for the Modernisation Fund are to be auctioned in accordance with the principles and modalities laid down in Article 10(4) of EU ETS Directive (set in the Auctioning Regulation) at the common auction platform. The following EU Member States are beneficiaries of the Modernisation Fund: Bulgaria, Croatia, Czechia, Estonia, Latvia, Lithuania, Hungary, Poland, Romania and Slovakia.
- (C) With the exception of Poland, all beneficiary Member States of the Modernisation Fund, are Contracting States. Pursuant to Article 4(2)(a) of the Joint Procurement Agreement they have authorised the Commission to sign the escrow and custody agreements on their behalf. An amendment to Annex III of the Joint Procurement Agreement was adopted on 12 November 2020 to allow non-participating Member States to become observers to the Joint Procurement Steering

- Committee for the purposes of the auctioning of allowances for the Modernisation Fund and the Innovation Fund.
- (D) Poland signed the amended Annex III of the Joint Procurement Agreement and became an observer for the purposes of the auctioning of allowances for the Modernisation Fund. Thereby, Poland is bound by Article 4 of that Agreement on the authority given to the Commission to act on its behalf and by the provisions on non-contractual liability as per Article 45 in conjunction with Article 38 of that Agreement.
 - (E) Article 10a(8) of the EU ETS Directive establishes the Innovation Fund. Article 16 of the Innovation Fund Regulation provides that the European Commission implements the Innovation Fund in direct management or in indirect management in accordance with relevant provisions of the Financial Regulation. In accordance with Article 20 of that Regulation, the Commission ensures that the allowances destined for the Innovation Fund are auctioned in accordance with the principles and modalities laid down in Article 10(4) of EU ETS Directive (set in the Auctioning Regulation). Article 19(3) of the Innovation Fund Regulation states that the revenues of the Innovation Fund constitute external assigned revenues within the meaning of Article 21 of the Financial Regulation. Those revenues are to be channelled through the Union Budget.
 - (F) Article 22 of the Auctioning Regulation requires each Member State to appoint an auctioneer and establishes the rules for the appointment of auctioneers by the Member States for the auctioning of their allowances. In accordance with Article 24 of the Auctioning Regulation, the European Investment Bank (“**EIB**”) is the auctioneer for the allowances to be auctioned from 2021 for the Modernisation Fund and for the Innovation Fund.
 - (G) Pursuant to the EU ETS Directive and the Registry Regulation, a Union Registry is established in which accounts can be opened to hold allowances created for the purposes of the European Union Emissions Trading System (“**EU ETS**”).
 - (H) Article 36 of the Registry Regulation provides that an allowance is a fungible, dematerialised instrument. The dematerialized nature of allowances implies that the record of the Union Registry constitutes prima facie and sufficient evidence of title over an allowance, and of any other matter which is directed or authorised to be recorded in the Union Registry by the Registry Regulation. The fungibility of allowances implies that any recovery or restitution obligations that may arise under national law in respect of an allowance only apply to the allowance in kind. Thus allowances may be kept in “book-entry” form in the Union Registry either (i) on an individual account opened in the name of the owner, or (ii) on an omnibus account opened in the name of a custodian.
 - (I) Following the entry into force of MiFID II, all emission allowances auctioned on an auction platform (including two-day spot contracts and five-day futures) should be treated as financial instruments pursuant to Section C (11) of Annex I of MiFID II.
 - (J) The Depositors are to be regarded as professional clients within the meaning of Article 4(1)(10) MiFID II.
 - (K) Pursuant to Article 13 of the Registry Regulation a clearing system or a settlement system that is connected to an auction platform appointed pursuant to the Auctioning Regulation may submit to a national administrator a request for the opening of an Auction Collateral Delivery Account in the Union Registry.
 - (L) ECC operates a clearing system within the meaning of the Settlement Finality Directive, and ECC is connected to the European Energy Exchange AG, (“**EEX**”) (the third common auction platform appointed in accordance with Article 26(1) of the Auctioning Regulation).
 - (M) Pursuant to Article 54 of the Registry Regulation *juncto* Article 46 of the Auctioning Regulation, allowances to be auctioned by an auction platform must be transferred in the Union Registry, prior

to the opening of a bidding window, from the EU (Aviation) Auction Account into an (omnibus) Auction Collateral Delivery Account and are “held in escrow by a clearing system or settlement system acting as custodian”, until their delivery to the successful bidders or their successors in title, pursuant to the results of the auction, after payment of the auction proceeds has been effected.

- (N) ECC holds an Auction Collateral Delivery Account in the Union Registry, on an omnibus basis, and keeps segregated Custody Accounts (as defined below) on its own books and records for each Contracting State under the Service Contract, for the Modernisation Fund and for the Innovation Fund, on which the allowances are credited.
- (O) The Parties have appointed ECC as custodian, with reference to Articles 46 and 47 of the Auctioning Regulation that have direct effect in Germany and in all other Member States, by means of a separate custody agreement entered into on or about the same date as this Agreement (the “**Custody Agreement**”).
- (P) Pursuant to Article 50 of the Auctioning Regulation, prior to the opening of the bidding window for the auctioning of two-day spot contracts or five-day futures, the auctioneer must give allowances as collateral “to be held in escrow by the clearing system or settlement system acting as custodian”. Therefore Parties now desire that ECC is appointed as escrow agent pursuant to Article 50 of the Auctioning Regulation.
- (Q) Taking into account that ECC is a Central Counterparty, the Parties hereby want to create a security interest over the Escrow Allowances (as defined below) to the benefit of the Escrow Agent.

IN CONSIDERATION OF THE FOREGOING, THE PARTIES HAVE AGREED AS FOLLOWS:

ARTICLE 1. DEFINITIONS AND INTERPRETATION

Article 1.1 Definitions

“**Auctioning Regulation**” means Commission Regulation (EU) No 1031/2010 of 12 November 2010 on the timing, administration and other aspects of auctioning of greenhouse gas emission allowances pursuant to Directive 2003/87/EC of the European Parliament and the Council establishing a system for greenhouse gas emission allowances trading within the Union, OJ L 302, 18.11.2010, p. 1–41.

“**Central Counterparty**” means an entity which interposes either directly between an auctioneer and a bidder or its successor in title, or between intermediaries representing them, that acts as the exclusive counterparty to each of them guaranteeing the payment of the auction proceeds to the auctioneer or an intermediary representing it or the delivery of the auctioned allowances to the bidder or an intermediary representing it.

“**Covered Obligation(s)**” shall have the meaning given to it in Article 4.1 of this Agreement.

“**Custody Agreement**” means the separate custody agreement entered into by and between the Parties to this Escrow Agreement.

“**Escrow Allowances**” shall have the meaning given to it in Article 4.1 of this Agreement.

“**EU (Aviation) Auction Account**” means both the EU Auction Account and the EU Aviation Auction Account within the meaning of the Registry Regulation.

“**EU ETS**” means the EU emissions trading system, established by the ETS Directive.

“**EU ETS Directive**” means Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, OJ L 275 25.10.2003, p. 32.

“**Financial Collateral Directive**” means Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements.

“**Financial Regulation**” means 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.

“**Innovation Fund Regulation**” means Commission Delegated Regulation (EU) 2019/856 of 26 February 2019 supplementing Directive 2003/87/EC of the European Parliament and of the Council with regard to the operation of the Innovation Fund, OJ L 140, 28.5.2019, p. 6.

“**Joint Procurement Agreement**” means Joint Procurement Agreement to Procure Common Auction Platforms entered into force on 9 November 2011.

“**MiFID II**” means Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU and the associated EU regulatory and technical standards, OJ L 173, 12.6.2014, p. 349–496.

“**Registry Regulation**” means Commission Delegated Regulation (EU) 2019/1122 of 12 March 2019 supplementing Directive 2003/87/EC of the European Parliament and of the Council as regards the functioning of the Union Registry, OJ L 177, 2.7.2019, p. 3–62.

“**Service Contract**” means the contract No 340201/2020/835568/SER/CLIMA.B1 for the services of the third common auction platform entered into between the European Commission and the States signatories to the Joint Procurement Agreement on one hand, and EEX on 4 November 2020.

“**Settlement Agent**” means an entity acting as an agent providing accounts to the auction platform, through which accounts instructions for the transfer of the auctioned allowances given by the auctioneer or an intermediary representing it and the payment of the auction clearing price by a successful bidder, its successor in title, or an intermediary representing them are safely executed either simultaneously or nearly simultaneously in a guaranteed manner.

“**Settlement Finality Directive**” or “**SFD**” means Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems, OJ L 166, 11.6.1998, p. 45–50.

“**Transfer Order(s)**” shall have the meaning given to it in Article 2 (i) of the Settlement Finality Directive.

“**Union Registry**” means the register established pursuant to Article 19 of the EU ETS Directive.

Article 1.2 Interpretation

The headings in this Agreement are only for convenience and do not affect its meaning. Any reference to any provision of statute, enactment, order, regulation or other legislation refers to the provision as it is amended or re-enacted from time to time.

This Agreement is to be construed together with the rules of the system of ECC (the “**Clearing Conditions**”), the Service Contract and the Custody Agreement.

In case of discrepancies and/or conflicts between this Escrow Agreement and the Clearing Conditions, this Escrow Agreement shall prevail.

Unless otherwise defined herein, capitalized terms used herein shall have the meanings assigned to such terms in the Custody Agreement.

Any definition of “custodian”, “clearing system” or “settlement system” under any national law of the Member States that contradicts, limits their meaning or prevents their practical effectiveness (“*effet utile*”) as used in the Auctioning Regulation, and as construed in accordance with EU legislation including the Registry Regulation, does not apply to this Escrow Agreement nor to its implementation and enforcement.

ARTICLE 2. APPOINTMENT AS ESCROW AGENT

The Depositors hereby appoint ECC with effect from the date of this Agreement as Escrow Agent pursuant to Article 50 of the Auctioning Regulation to act in accordance with and subject to the terms of this Agreement.

The Escrow Agent hereby accepts such appointment and agrees to act in accordance with and subject to such terms.

ARTICLE 3. CUSTODY ACCOUNTS

The Escrow Agent shall open and maintain in its books and records for each Contracting State of the Service Agreement, for the Modernisation Fund and for the Innovation Fund, one or more individually segregated securities accounts for the custody and safekeeping of any general allowances and aviation allowances deposited by the Depositors with the Custodian (each a “**Custody Account**”).

Unless explicitly provided otherwise in this Agreement, the Custody Accounts are governed by the separate Custody Agreement.

ARTICLE 4. ESCROW AND COVERED OBLIGATIONS

Article 4.1 Security interest - Escrow Allowances

Each Depositor hereby agrees to pledge and give in escrow in favour of the Escrow Agent all the allowances it holds in its respective Custody Accounts (the “**Escrow Allowances**”) as security to deliver the auctioned allowances to the successful bidders after payment of the auction proceeds has been effected (each a “**Covered Obligation**” and together the “**Covered Obligations**”).

For avoidance of doubt, any Replacement Allowances (as defined in Article 7.2. of the Custody Agreement) are subject to the terms and conditions of this Escrow Agreement in the same way and covering the same Covered Obligations as the Lost Allowances that they are replacing, until they are released from escrow pursuant to Article 6 of this Agreement.

Article 4.2 Application of Settlement Finality Directive

Parties hereby agree that the Escrow Allowances shall constitute collateral security within the meaning of Article 2 (m) of Settlement Finality Directive benefitting from the protection of Article 9(1) of the Settlement Finality Directive, as transposed in transposed into German law by the “*Gesetz zur Änderung insolvenzrechtlicher und kreditwesenrechtlicher Vorschriften*” on 8 December 1999 (BGBl. 1999, Nr. 54, p. 2384).

ARTICLE 5. ESCROW PERIODS

The Escrow Agent shall hold each of the Escrow Allowances in escrow until the termination of their respective Escrow Period.

Each “Escrow Period” shall be the period beginning:

- (i) on the date the Escrow Allowances are deposited with the Escrow Agent (in accordance with Article 3.1 of the Custody Agreement); or
- (ii) in case of a Cancellation or Partial Cancellation (as defined in Article 6 of this Agreement below), on the date the Escrow Allowances that were released from escrow are reassigned as collateral to cover Covered Obligations of the next scheduled auctions pursuant to Article 6(ii) of this Agreement. Such date shall be the date of publication of the relevant adjustment of the auction calendar;

and ending on the date of release of the Escrow Allowances from escrow as set forth in Article 6 of this Agreement.

ARTICLE 6. RELEASE FROM ESCROW OF THE ESCROW ALLOWANCES

The Escrow Allowances provided as collateral in accordance with Article 4.1 of this Agreement shall automatically be released from escrow when the Covered Obligations have been satisfied or have been cancelled in the following limited circumstances:

- (i) Upon delivery of such Escrow Allowances by the ECC to the successful bidders or their successors in title according to the results of the auction (a “**Delivery**”), in accordance with Article 45(2) of the Auctioning Regulation; or
- (ii) Upon delivery of such Escrow Allowances to ECC, in case of failure of cash collection by ECC from one or more bidders (also a “**Delivery**”), in accordance with Article 45(4)(a) of the Auctioning Regulation; or
- (iii) Upon cancellation of an auction pursuant to Article 7(5), 7(6) and 9 of the Auctioning Regulation or upon failure of settlement, referred to in Article 45(5) of the Auctioning Regulation (collectively a “**Cancellation**”); or
- (iv) Upon withholding of such Escrow Allowances from the auction pursuant to Article 22(5) of the Auctioning Regulation (a “**Partial Cancellation**”).

ARTICLE 7. RESTRICTIONS ON TRANSFERS AND OTHER DISPOSITIONS

During the Escrow Period, no sale, transfer or other disposition may be made of any or all of the Escrow Allowances except as provided in this Agreement. During the Escrow Period, the Depositors shall not pledge or grant a security interest in the Escrow Allowances or grant a security interest in their rights under this Agreement.

ARTICLE 8. ACTION, SUIT OR OTHER PROCEEDING

The Escrow Agent shall without delay notify the Representative in writing after the receipt by the Escrow Agent of notice of any demand or claim or the commencement of any action, suit or proceeding, which in any way, directly or indirectly, arises out of or relates to (i) this Agreement, (ii) the services of the Escrow Agent hereunder, or (iii) the Escrow Allowances held by it hereunder.

Upon the receipt of such notice, the Escrow Agent shall at the request of the Representative provide all reasonable assistance to determine ownership or disposition of the Escrow Allowances or deposit the Escrow Allowances with the clerk of any appropriate court or retain the Escrow Allowances pending receipt of a final, non-appealable order of a court having jurisdiction over all of the Parties hereto

directing to whom and under what circumstances the Escrow Allowances are to be disbursed and delivered or returned.

The provisions of this Article 8 shall survive in the event the Escrow Agent resigns or is discharged pursuant to Article 9 below.

ARTICLE 9. TERM AND TERMINATION OF THIS AGREEMENT

9.1 Term

This Agreement is entered into and applies as from the date on which the last party has signed the Agreement (the “**Effective Date**”).

9.2 Termination

Without prejudice to Article 8, this Escrow Agreement shall automatically terminate in case of termination of the Service Contract or in case of replacement of the Escrow Agent following an amendment of the Service Contract, or in case of termination of the Custody Agreement, but only after completion of all Covered Obligations.

ARTICLE 10. INDEMNITY

The Escrow Agent shall, at all times, indemnify and keep indemnified and hold harmless the Depositors against all losses, costs, claims, expenses, proceedings, damages, demands, actions, compensation, settlements, awards and liabilities of any nature arising from or relating to:

- (i) the Escrow Agent's failure to comply with this Agreement;
- (ii) the Escrow Agent's use or misuse of the Escrow Allowances;
- (iii) any other violation of the rights of the Depositors or the Representative;
- (iv) any actions or omissions which are attributable to the Escrow Agent; or
- (v) the Escrow Agent's failure to comply with applicable laws or regulations.

ARTICLE 11. MISCELLANEOUS

Article 11.1. Governing law

This Agreement shall for all purposes be deemed to be made under and shall be construed in accordance with the laws of Germany. Each of the Parties hereby agrees that any action, proceeding or claim against it arising out of or relating in any way to this Agreement shall be brought and enforced in the courts of Germany, and irrevocably submits to such personal jurisdiction, which jurisdiction shall be exclusive. Each of the Parties hereby waives any objection to such exclusive jurisdiction and that such courts represent an inconvenient forum.

Article 11.2. Entire Agreement

This Agreement, supplemented by the Custody Agreement, the Services Contract, the Clearing Conditions, contains the entire agreement of the Parties hereto with respect to the subject matter hereof.

Article 11.3. Notices

Any notice or other communication required or which may be given hereunder shall take place in accordance with Article I.8 to the Service Contract.

Article 11.4. Amendments, written form

This Agreement may not be limited, amended or terminated or repealed, in whole or in part, except by an agreement in writing by the Parties. This shall also apply to changes to this Article stipulating the written form.

Article 11.5 Severability clause

If any of the provisions of this Agreement becomes or is held to be invalid, illegal or unenforceable, all other provisions of this Agreement remain in full force and effect.

The invalid, illegal or unenforceable provision is deemed to be amended and replaced by a valid, legal or enforceable provision that legally and economically accomplishes as far as legally possible the economic purpose and the actual intent of the Parties concerning the invalid, illegal or unenforceable provision.

The same applies should any omission or gaps in the Agreement become apparent or evident; such an omission or gap shall, without affecting or impairing the validity, legality and enforceability of the remaining provisions hereof, be deemed to be filled with such provision as comes as close as possible to the original intent of the Parties.


SIGNATURES

**For the Escrow Agent,
European Commodity Clearing AG**

**For the Depositors,
as represented by the Commission**

Peter Reitz,
Chief Executive Officer


Mr Mauro Petriccione,
Director-General DG Climate Action

Signature:  _____
Done at Leipzig on 08.12.2020

Signature: _____
Done at Brussels, on _____

and

Dr. Götz Dittrich, Chief Operating Officer

Signature:  _____
Done at Leipzig on 08.12.2020