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2021/0001 (NLE)

Proposal for a

COUNCIL DECISION

on the position to be taken on behalf of the European Union in the EEA Joint Committee established by the Agreement on the European Economic Area as regards the amendment of Chapter IIa and Annexes I and II of Protocol 10 to the EEA Agreement, on simplification of inspections and formalities in respect of carriage of goods

EXPLANATORY MEMORANDUM

1. SUBJECT MATTER OF THE PROPOSAL

This proposal concerns the decision establishing the position to be taken on the Union's behalf in the EEA Joint Committee in connection with the envisaged adoption of the amendment of Protocol 10 to the Agreement between the European Community and the European Economic Area ('the EEA Agreement') on the simplification of inspections and formalities in respect of the carriage of goods and on customs security measures, and applicable only to the EU and Norway.

2. CONTEXT OF THE PROPOSAL

2.1. The amendment of the Protocol on the simplification of inspections and formalities in respect of the carriage of goods and on customs security measures

The Protocol on the simplification of inspections and formalities in respect of the carriage of goods and on customs security measures ('the Protocol) waives the obligation of traders to provide customs with an entry summary declaration prior to the import and export in bilateral trade between the EU and Norway. Meanwhile, in trade with third countries, Norway implements customs security measures equivalent to those in the EU. The Protocol entered into force on 1 July 2009 and has ensured both smooth trade flows between Norway and the EU and a high level of security in the supply chain.

Currently, each Party has its own system for managing the entry summary declarations (in the EU, this is the Import Control system ICS) but there is no bridge between both systems.

Since 2016, the Commission has conducted preliminary discussions in view of updating the legislation of the Agreement and integrating Norway's future participation in the EU's new customs pre-arrival security and safety programme, Import Control System 2 (ICS2), which is a centralised system.

The Union Customs Code (UCC) has provided for measures included in the new ICS2 project that will substantially change the advance cargo customs operations for goods entering the EU and overall common risk management framework. The new programme will remodel the existing process in terms of IT, legal, customs risk management/controls and from trade operational perspectives. It will collect data about all goods entering the EU prior to their arrival. Economic Operators (EOs) will have to declare safety and security data to ICS2, through the Entry Summary Declaration (ENS). The obligation to start filing such declarations will not be the same for all EOs. It will depend on the type of services that they provide in the international movement of goods and is linked to the three release dates of ICS2 (15 March 2021, 1 March 2023, and 1 March 2024). Advance cargo information and risk analysis will enable early identification of threats and help customs authorities to intervene at the most appropriate point in the supply chain

ICS2 therefore represents an essential EU customs instrument for improving the management of security and safety border controls at entry, supporting the EU's customs pre-arrival security and safety programme. In order to maintain the same level of security at the external borders, Norway has agreed to join the ICS2 project and be operational by the starting of the first release of ICS on 15 March 2021. These provisions will also apply in an equivalent manner with the similar amendments to the customs security agreement between EU and Switzerland.

The proposed amendments to the Agreement are the result of negotiations which started in November 2019 and ended in October 2020 between the EU, Switzerland and Norway. The amendments to Chapter IIa of the Protocol are destined to take into account the development of the relevant EU legislation also in the area of Authorised Economic Operators (AEO) and the risk management and risk analysis framework. This will ensure an equivalent level of security at the external borders and will improve the security and safety of the common security area.

The Agreement will also include a financing arrangement (Annex I, Title III), which covers the costs of the development and operational use of ICS2 by Norway and the functional details of ICS2, which are exposed in the technical arrangements (Annex I, Title II).

2.2. The EEA Joint Committee

The EEA Joint Committee is established by Article 92 of the EEA Agreement. The EEA Joint Committee consists of representatives of the Contracting Parties and can take decisions by agreement between the EU, on the one hand, and the EFTA States speaking with one voice, on the other.

The Joint Committee meets, in principle, at least once per month and its responsibility is to ensure the effective implementation and operation of the Agreement. To this end, it carries out exchanges of views and information and takes decisions in the cases provided for in the Agreement and relative to its Protocols. For that purpose, Protocol 10 can be amended by a decision of the EEA Joint Committee in accordance with Articles 93 (2), 99, 100, 102 and 103 of the Agreement.

In order to guarantee the legal security and the homogeneity of the EEA, the EEA Joint Committee should take a decision concerning an amendment to the Protocol in order to take into account the development of Union legislation. These amendments should be applied simultaneously with those introduced in Union legislation and with due respect for the internal procedures of the Contracting Parties.

2.3. The envisaged act of the Joint Committee

During its next meeting or by exchange of letters, the Joint Committee is to adopt a decision regarding the amendment of the Protocol ('the envisaged act').

The purpose of the envisaged act is to ensure the highest standard of security and control for goods crossing the borders and entering the customs territories of the EU and Norway.

The envisaged act will become binding on the parties in accordance with article 104 of the Agreement which provides that '*Decisions taken by the EEA Joint Committee in the cases provided for in this Agreement shall, unless otherwise provided for therein, upon their entry into force be binding on the Contracting Parties which shall take the necessary steps to ensure their implementation and application*'.

Pursuant to article 103 of the Agreement, "*If upon the expiry of a period of six months after the decision of the EEA Joint Committee such a notification has not taken place, the decision of the EEA Joint Committee shall be applied provisionally pending the fulfilment of the constitutional requirements unless a Contracting Party notifies that such a provisional application cannot take place. In the latter case, or if a Contracting Party notifies the non-ratification of a decision of the EEA Joint Committee, the suspension provided for in Article 102 (5) shall take effect one month after such a notification but in no event earlier than the date on which the corresponding EC act is implemented in the Community*".

3. POSITION TO BE TAKEN ON THE UNION'S BEHALF

3.1. General overview of Protocol 10

The Protocol previously amended in 2009 by Decision of the EEA Joint Committee[1] underlines the special bilateral trade relations between the EU and Norway and the strong mutual interest that exists in implementing equivalent customs security measures. Protocol 10 to the Agreement was amended in the mutual interest of the European Community and the EFTA States to avoid unnecessary restrictions and to provide a set of provisions establishing equivalent customs security measures for the transport of goods coming from and going to third countries.

The Protocol is based on Regulation (EU) No 952/2013 of the European Council and the Council of 9 October 2013 laying done the Union Customs Code and the following Implementing and Delegating Acts:

- Commission Implementing Regulation (EU) 2015/2447, including the relevant column in Annex B;
- Commission Implementing Regulation (EU) 2017/2089, which includes the responsibilities of the parties with regards to data protection and controllership;
- Commission Implementing Decision on the Work Programme;
- Commission Delegating Regulation (EU) 2015/2446, including the relevant columns of Annex B.

In order to increase security in the international trade of goods, the EU introduced new measures in 2006 designed to ensure higher standards in customs controls (IP/06/1821). These include rules and time limits for traders on the submission of information on goods before they are imported to or exported from the EU (electronic entry and exit declarations); an EU system of risk analysis and management; and a system to facilitate EU Authorised Economic Operators (AEOs). The EU and Norway also agreed to work towards a common framework for risk management, including the exchange of risk-related information as appropriate.

It is in the context of the development of such a common framework for improved customs controls and following the modernisation of the Customs Union and its legislation that the Agreement has been amended. This should ensure the highest standard of security and control for goods crossing the borders and entering the customs territories of the EU and the Kingdom of Norway.

3.2. Proposed amendments to the Protocol in the context of Norwegian participation in ICS2 programme

ICS2 is the first line of defence in terms of protecting the internal market and EU citizens. Through improved data-driven customs security processes it supports effective risk-based customs controls whilst facilitating free flow of legitimate trade across the EU external borders.

The programme will help establish an integrated EU approach to reinforce customs risk management framework. This is a core delivery of the Union Customs Code and customs risk management strategy, in line with the action plan adopted by the Council in 2014 and the objectives of the Von der Leyen Commission for taking the Customs Union to the next level.

[1] Decision of the EEA Joint Committee No 76/2009 of 30 June 2009 amending Protocol 10 on simplification of inspections and formalities in respect of carriage of goods

As an advance cargo information system, ICS2 will collect data about all goods entering the EU prior to their arrival. Economic Operators will have to declare safety and security data to ICS2, through a so-called Entry Summary Declaration. The obligation to start filing such declarations will not be the same for all Economic Operators. It will depend on the type of services that they provide in the international movement of goods and is linked to the three release dates of ICS2 (15 March 2021, 1 March 2023, and 1 March 2024).

On 7 October 2020, Norway confirmed to participate in the Import Control System 2 (ICS2), allowing for the participation of the partner country in the common framework of ICS2, which will be launched on 15 March 2021.

As such, the adhesion to the ICS2 programme entails technical and financial adaptations in relation to the Agreement, and most particularly amendments that reflect the modernisation of the Customs Union and its legislation.

3.3. Proposed legal amendments to the Protocol in the context of the modernisation of the UCC

The main changes introduced in the draft amended Protocol are mainly based on the Union Customs Code Regulation (EU) No 952/2013 and its Implementing Acts Reg.(EU)2015/2447 and Delegating Acts.(EU) 2015/2446. These changes align the amended Protocol with the most recent EU legislation relevant to customs security measures, to entry and exit summary declarations (ENS and EXS), to the development and deployment of the relevant electronic systems, to authorised economic operators (AEO), to common risk analysis process and risk management framework in line with the most recent legislation related to the protection of personal data.

The following legal texts have been used as the basis for the major amendments to the Protocol:

- **Regulation (EU) No 952/2013 of the European Council and the Council of 9 October 2013** laying done the Union Customs Code:
  - Article 46 regarding risk management and customs controls;
  - Article 127 regarding the relevant provisions for lodging of an entry summary declaration: form and content, use of electronic systems, lodging and waivers, time limits, registration, persons lodging, security and safety related risk analysis, multiple filing;
  - Article 128 regarding risk analysis;
  - Article 6(1), Articles 12, 16, 46, 47, and Articles 127 to 133 establish the legal basis for the development and deployment of ICS2;
- **Commission Implementing Regulation (EU) 2019/2151 of 13 December 2019** establishing the work programme relating to the development and deployment of the electronic systems provided for in the Union Customs Code;
- **Commission Delegating Regulation (EU) 2015/2446** (as applicable on 16 July 2020):
  - Articles 104, 106, 112, 113, 113a regarding the entry summary declaration;
  - Annex B on data requirements;
- **Commission Implementing Regulation (EU) 2015/2447** (as applicable on 20 July 2020):

- Article 24 regarding compliance for authorised economic operators replacing the existing article 2 Annex II of the Agreement;
- Articles 182, 183, 184, 185, 186, 188, 189 regarding the entry summary declaration;
- Annex B on data structure and format;

The latest amendments to Annex B of Commission Delegated Regulation (EU) 2015/2446 and Annex B of Commission Implementing Regulation (EU) 2015/2447 have yet to be formally adopted. As such, a placeholder has been left within the proposed amendment to this Agreement to update the footnotes once the amendments have been published (see Annex I, Article 2 of the amended Protocol).

The amendment of Article 24 of Commission Implementing Regulation (EU) 2015/2447 was adopted by the European Commission Customs Code Committee on 28 September 2020. The date of publication of the amendment has not yet been determined.

3.4. Proposed structural amendments to the Protocol

In terms of the structure of the amended Protocol, there has been a need to split into two different Titles the sections of covering the Entry (Title I) and Exit (Title IV) of goods within Annex I on Entry and Exit Summary Declarations, mainly due to the more detailed provisions concerning Entry Summary Declarations (ENS) and ICS2.

In line with the reasoning behind this structural revision of Annex I, two new Titles have been created to cover:

– Title II: the Technical Arrangements for the Import Control System 2;

– Title III: the Financial Arrangements for the Import Control System 2.

3.5. Position to be taken by the Union

Article 92 of the Agreement provides that the Contracting Parties shall hold consultations in the EEA Joint Committee on any point of relevance to the Agreement. The Contracting Parties are to cooperate in good faith with a view to facilitating, at the end of the process, the decision-taking in the EEA Joint Committee. To that effect, the EEA Joint Committee established under the EEA Agreement should adopt a Decision agreeing to the amendment of Chapter IIa and Annexes I and II of Protocol 10. This is done by a EEA Joint Committee Decisison during a meeting of the EEA Joint Committee in which the EU is a represented party.

The position to be taken by the EU within the EEA Joint Committee should be established by Council decision on the basis of a proposal from the Commission.

By mutual agreement, the amended Protocol shall then be implemented by the Contracting Parties.

4. LEGAL BASIS

4.1. Procedural legal basis

4.1.1. Principles

Article 218(9) of the Treaty on the Functioning of the European Union (TFEU) provides for decisions establishing '*the positions to be adopted on the Union's behalf in a body set up by an agreement, when that body is called upon to adopt acts having legal effects, with the exception of acts supplementing or amending the institutional framework of the agreement*.'

The concept of '*acts having legal effects*' includes acts that have legal effects by virtue of the rules of international law governing the body in question.[2].

4.1.2. Application to the present case

The EEA Joint Committee is a body set up by an agreement, namely the EEA Agreement.

The act which the EEA Joint Committee is called upon to adopt constitutes an act having legal effects.

The envisaged act does not supplement or amend the institutional framework of the Agreement.

Therefore, the procedural legal basis for the proposed decision is Article 218(9) TFEU, and taking into consideration Article 1(2) of Council Regulation No 2894/94 concerning arrangements for implementing the Agreement on the European Economic Area establishing that "*The Community's position regarding EEA Joint Committee decisions which simply extend acts of Community legislation to the EEA, subject to any technical adjustments needed, shall be adopted by the Commission."*

4.2. Substantive legal basis

4.2.1. Principles

The substantive legal basis for a decision under Article 218(9) TFEU and Article 1(2) of Council Regulation No 2894/94 depends primarily on the objective and content of the envisaged act in respect of which a position is taken on the Union's behalf concerning arrangements for implementing the Agreement on the European Economic Area. 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, the decision under Article 218(9) TFEU must be founded on a single substantive legal basis, namely that required by the main or predominant aim or component.

4.2.2. Application to the present case

The main objective and content of the envisaged act relate to common commercial policy.

Therefore, the substantive legal basis of the proposed decision is Article 207(4) TFEU.

4.3. Conclusion

The legal basis of the proposed decision should be the first subparagraph of Article 207(4), in conjunction with Article 218(9) TFEU and Article 1(2) of Council Regulation No 2894/94.

5. BUDGETARY IMPLICATIONS

The proposed amendments relating to the amendment of the Agreement on customs security measures is based on the principle that Norway will join the ICS2 programme as of its first release on 15 March 2021. Further releases will take place in 2023 and 2024.

This incurs budgetary implications for Norway. The breakdown of costs are laid out in article 17 of Annex I and have been further communicated to Norway via a non-paper.

Norway will contribute to each release of ICS2, hence paying a flat fee for the development costs incurred by the European Commission. For Release 1, these costs amount to EUR 520,000, for Release 2 EUR 550,000 and for Release 3 EUR 550,000, and are based on an allocation formula of 4%.

[2] Judgment of the Court of Justice of 7 October 2014, Germany v Council, C-399/12, ECLI:EU:C:2014:2258, paragraphs 61 to 64.

Norway will also contribute to the operational costs incurred by the European Commission to cover the yearly costs for the conformance testing, the maintenance of the infrastructure (hardware, software, hosting, licenses, etc.), of the ICS2 central components and of the related applications and services required for their operation and interconnection (quality assurance, helpdesk and IT Service Management). These operational costs are based on the 4% allocation formula but are not a fixed yearly rate. As such, the maximal operational costs are capped at EUR 450,000 per year.

6. PUBLICATION OF THE ENVISAGED ACT

As the act of the EEA Joint Committee will amend the Protocol 10 to the EEA Agreement on the simplification of inspections and formalities in respect of the carriage of goods, it is appropriate to publish it in the *EEA Section of the Official Journal of the European Union* after its adoption.

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article(s) Article 207(4) TFEU in conjunction with Article 218(9) thereof,

Having regard to the proposal from the European Commission,

Whereas:

(1) Protocol 10 to the EEA Agreement on the simplification of inspections and formalities in respect of the carriage of goods and on customs security measures ('the Protocol') was amended by the EEA by Joint Committee Decision[3] and entered into force on 1 July 2009.

(2) Pursuant to Article 98 the Agreement, the EEA Joint Committee may adopt decision amending Chapter IIa and the Annexes to Protocol 10 during its next session or by exchange of letters,

(3) In application of article 9h(3) of the Protocol, amendments to Chapter 3 and to Annexes I and II to Protocol 10 are necessary to take into account the development of Union legislation on matters covered by this Chapter and Annexes I and II. Pursuant to article 9(h)3, if the decision cannot be adopted for simultaneous implementation, the amendments provided for in the draft decision submitted for the Contracting Parties' approval shall be applied from 15 March 2021, in compliance with the internal procedures of the Contracting Parties. This choice of date coincides with the first Release of the Import Control System 2, in which Norway has agreed to participate.

(4) It is appropriate to establish the position to be taken on the Union's behalf in the EEA Joint Committee, as the amendment will be binding on the Union,

HAS ADOPTED THIS DECISION:

Article 1

The position to be taken on the Union's behalf in the next meeting of the EEA Joint Committee or by exchange of letters shall be based on the draft act of the EEA Joint Committee attached to this Decision.

[3] Decision 76/2009, OJ L 232, 3.9.2009, p. 40

Article 2

This Decision is addressed to the Commission.

Done at Brussels,

For the Council
The President