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Proposal for a

COUNCIL DECISION

on the position to be adopted on behalf of the European Union within the EEA Joint Committee, concerning the amendment to Annex XI (Electronic communication, audiovisual services and information society) and Protocol 37 (Containing the list provided for in Article 101) to the EEA Agreement

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

1. SUBJECT MATTER OF THE PROPOSAL

This proposal concerns the decision establishing the position to be adopted on the Union's behalf in the EEA Joint Committee in connection with the envisaged adoption of the Joint Committee Decisions (JCDs) concerning amendments of Annex XI (Electronic communication, audiovisual services and information society) and Protocol 37 (Containing the list provided for in Article 101) to the EEA Agreement.

2. CONTEXT OF THE PROPOSAL

2.1. The EEA Agreement

The Agreement on the European Economic Area ('the EEA Agreement') guarantees equal rights and obligations within the Internal Market for citizens and economic operators in the EEA. It provides for the inclusion of EU legislation covering the four freedoms throughout the 30 EEA States comprising of EU Member States, Norway, Iceland and Liechtenstein. In addition, the EEA Agreement covers cooperation in other important areas such as research and development, education, social policy, the environment, consumer protection, tourism and culture, collectively known as "flanking and horizontal" policies. The Agreement entered into force on 1 January 1994. The European Union together with its Member States is a party to the Agreement.

2.2. The EEA Joint Committee

The EEA Joint Committee is responsible for the management of the EEA Agreement. It is a forum for exchanging views linked to functioning of the EEA Agreement. Its decisions are taken by consensus. In accordance with the Treaty of Lisbon, responsibility for coordinating EEA matters on the EU side is with the European External Action Service.

2.3. The envisaged act of the EEA Joint Committee

The EEA Joint Committee is expected to adopt two EEA Joint Committee Decisions ('the envisaged acts') regarding the amendment of Annex XI (Electronic communication, audiovisual services and information society) and Protocol 37 (Containing the list provided for in Article 101) to the EEA Agreement.

The purpose of the envisaged two acts is to incorporate Regulation (EU) 2018/1971 establishing the Body of European Regulators for Electronic Communications (BEREC)[1], as well as Directive (EU) 2018/1972 establishing the European Electronic Communications Code (Recast), into the EEA Agreement.

The envisaged acts will become binding on the parties in accordance with Articles 103 and 104 of the EEA Agreement.

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

The EEAS with the Commission services submit the draft Decisions of the EEA Joint Committee for adoption by the Council as the Union's position. The EEAS would hope to be able to present them in the EEA Joint Committee at the earliest possible opportunity.

[1] Regulation (EU) 2018/1971 of the European Parliament and of the Council of 11 December 2018 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Agency for Support for BEREC (BEREC Office), amending Regulation (EU) 2015/2120 and repealing Regulation (EC) No 1211/2009, OJ L 321, 17.12.2018, p. 1.

The content and nature of the draft of the annexed Decisions of the EEA Joint Committee go beyond what can be considered mere technical adaptations in the sense of the Council Regulation No 2894/94. The Union position shall therefore be established by the Council.

The annexed Decisions of the EEA Joint Committee (JCDs) contains *inter-alia* the following adaptations.

3.1. Adaptations to Regulation (EU) 2018/1971 establishing the Body of European Regulators for Electronic Communications (BEREC) – JCD in Annex 1

Introduction

According to the institutional set-up of the EEA Agreement, the EFTA Surveillance Authority carries out the surveillance competences of the Commission in the EFTA pillar and will consequently mirror the Commission's surveillance powers provided for in Regulation (EU) 2018/1971 (BEREC Regulation) and in Directive (EU) 2018/1972 (the Directive establishing the European Electronic Communication Code (the EECC Directive)[2]) in the EFTA pillar.

The BEREC Regulation and the EECC Directive establish a number of tasks for the BEREC, which aim to ensure consistent implementation of the regulatory framework for electronic communications. As BEREC plays an important role in the application of the BEREC Regulation and the EECC Directive, the Regulation and the EECC Directive are intrinsically linked. This linkage is also translated into the two draft Joint Committee Decisions incorporating the Directive and the BEREC Regulation into the EEA Agreement. It is important to examine the two draft JCDs together to understand the complete set-up in the EEA context.

The draft JCD (in Annex 1) contains three different sets of adaptations that will be presented below: the modalities for the participation of the EFTA States in BEREC (section B), the adaptations pertaining to the relationship between the EFTA Surveillance Authority and BEREC (section C), other adaptations pertaining to the participation of the EFTA States in BEREC (section D) as well as general adaptations commonly used in an EEA context (section E).

Modalities for the participation of the EFTA States in BEREC

BEREC was established by Regulation (EC) No 1211/2009 and by Regulation (EU) 2018/1971 to contribute to the development and to the better functioning of the internal market for electronic communications networks and services by aiming to ensure the consistent implementation of the regulatory framework for electronic communications. The Regulation also recognises the desirability of achieving such objectives in an EEA context and states that the BEREC BoR (Board of Regulators), the working groups and the Management Board should be open to the participation of national regulatory authorities (NRAs) of the EEA EFTA States in order to extend the consistent implementation of the regulatory framework for electronic communications to Iceland, Liechtenstein and Norway.[3]

According to Article 101 of the EEA Agreement:

> "1. In respect of committees which are covered neither by Article 81 [i.e. programme committees] nor by Article 100 [i.e. comitology committees] experts from EFTA States shall be associated with the work when this is called for by the good functioning of this Agreement.

[2] OJ L 321, 17.12.2018, p. 36.

[3] See recital 34 of Regulation (EU) 2018/1971.

These committees are listed in Protocol 37. The modalities of such an association are set out in the relevant sectoral Protocols and Annexes dealing with the matter concerned.

2. If it appears to the Contracting Parties that such an association should be extended to other committees which present similar characteristics, the EEA Joint Committee may amend Protocol 37."[4]

BEREC is neither a comitology committee, nor established pursuant to a programme. As a forum for cooperation among regulators, BEREC falls within the category of 'other committees' in the sense of Article 101 EEA that are listed in Protocol 37. In accordance with that provision, "*the modalities of association are set out in the relevant sectoral Annex dealing with the matter concerned*". Such modalities are introduced in the Annexes (to the EEA Agreement) below the relevant point and are preceded by an introductory sentence reading "*Modalities for the association of the EFTA States in accordance with Article 101 of the Agreement*" (see, e.g. EEA JCD No 192/2014, No 18/2013, No 92/2010, No 10/2004). Such modalities are not regarded as "adaptation texts", as they do not purport to alter the rules contained in the act incorporated into the EEA Agreement, but rather to supplement them as necessary to ensure the good functioning of the association.

The modalities for association provide that the EEA EFTA NRAs shall participate fully in the work of the BEREC BoR, the working groups of BEREC and the Management Board of the BEREC Office, that the EEA EFTA NRAs shall have the same rights and obligations as other EU NRAs except for the right to vote, but shall not be eligible for the chairmanship of the BEREC BoR and the Management Board of the BEREC Office. The EEA EFTA NRAs may however chair working groups. The national regulatory authorities of the EEA EFTA States shall be represented at an appropriate level in accordance with the provisions of the BEREC Regulations (see Article 7 BEREC Regulation). The EFTA NRAs' participation is crucial to foster regulatory convergence.

The modalities also provide that BEREC and the BEREC Office will assist the EEA EFTA NRAs and the EFTA Surveillance Authority.

Adaptations pertaining to the relationship between the EFTA Surveillance Authority and BEREC

Adaptations (a)(i) and (ii) specify that BEREC is to assist and advise the EFTA Surveillance Authority, respectively to issue guidelines upon the request of the latter.

Since the EEA EFTA NRAs will not have voting rights in BEREC, adaptation (a)(iii), which adds a new paragraph 1a to Article 4, provides that the positions of the national regulatory authorities of the EEA EFTA States shall be recorded separately by BEREC when issuing opinions in accordance with Article 4(1)(c)(i) and (ii) of the Regulation. This concerns in particular opinions on draft measures of EEA EFTA NRAs in accordance with Articles 32 and 33 of the EECC Directive and opinions on cross-border disputes in accordance with Article 27 of the EECC Directive.

According to adaptation (a)(v), the EFTA Surveillance Authority is to take the utmost account of any guideline, opinion, recommendation, common position and best practices adopted by BEREC.

[4] In the last twenty-five years, the EEA EFTA States have been associated to a variety of EU bodies pursuant to this provision. The full list of such bodies can be found in the updated version of Protocol 37. See here.

Other adaptations pertaining to the participation of the EEA EFTA States in BEREC

The BEREC Office is a body of the EU with legal personality[5] and is an agency that supports BEREC. In line with prior incorporation into the EEA Agreement of founding documents for EU agencies[6], participation of the EFTA States in the activities of the BEREC Office is regulated in the adaptations to the BEREC Regulation. Since the BEREC Office doesn't carry out any policy tasks on its own behalf, this participation is of a rather administrative nature.

Pursuant to adaptation (e) to the BEREC Regulation, the EEA EFTA States will contribute financially to the resources of the BEREC Office by participating in the Union subsidy. In line with past practice, this financial contribution will be established in accordance with the procedures contained in Article 82(1)(a) of the EEA Agreement.

Under Articles 12(2)(a) and 82(3)(a) of the Conditions of employment of other servants of the EU ('CEOS'), temporary agents or contract staff, respectively, shall normally be engaged provided that they are citizens of an EU Member State, unless otherwise decided by the appointing authority. Adaptation (f) therefore provides a broad derogation for EEA EFTA nationals, which should be regarded as eligible on the same terms and under the same conditions as EU nationals.

Articles 12(2)(e), 82(3)(e) and 85(3) CEOS refer to Article 55(1) TEU on the languages of the Union. With respect to its staff, adaptation (f) furthermore provides that the BEREC Office shall consider the official languages referred to in Article 129(1) EEA as languages of the Union with respect to its staff.

Finally, adaptation (g) provides that the EEA EFTA States shall apply the same privileges and immunities as the EU Member States with respect to the BEREC Office and its staff, as described in Protocol (No7) annexed to the TEU and TFEU.

Other adaptations

In line with Article 7 of the EEA Agreement, only acts that have been incorporated into the Agreement are binding upon the EFTA States. Therefore, the reference to Union law in Article 4(4) is adjusted to reflect that, in an EEA context, the legal framework of reference is the EEA Agreement (adaptation (a)(iv)).

In order to facilitate consistent enforcement of EEA rules, adaptations (b) and (d) to the Regulation provide that, along with the Commission, the EFTA Surveillance Authority shall also be represented in the BEREC BoR and the Management Board. The EFTA Surveillance Authority, contrary to the Commission, will not have voting rights in the Management Board.

Adaptation (c) to Article 13(3) adjusts the text to make it possible for the EFTA Surveillance Authority to participate in working groups established by the BEREC BoR. As is the case for the Commission, the EFTA Surveillance Authority cannot take part in working groups which are established to carry out the tasks referred to point (c)(ii) of Article 4(1) of the Regulation.

Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents is not part of the EEA Agreement. Adaptation (h) to Article 36 aims at ensuring that any documents prepared by BEREC or the BEREC Office regarding the EEA EFTA States will be dealt with according to that Regulation. The same adaptation is normally foreseen with regard to agencies in which the EEA EFTA States participate.

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5 Article 2(1) of the BEREC Regulation.

6 The list of EU agencies with EFTA participation, and the JCDs incorporating their founding Regulations into the EEA Agreement, can be found at http://www.efta.int/eea/eu-agencies .

Adaptation (i) adjusts the text of Article 40(2) to reflect the role of the EFTA Surveillance Authority in the relevant provision and to clarify that in EEA context the reference to "Union and national law" should be understood as "the EEA Agreement and national law".

Adaptation (j) adjusts the text of Article 41(1)(a) to provide the EFTA Surveillance Authority with the same access to the information and communication system as the Commission, which is important to ensure good cooperation and consistent implementation of the regulatory framework for electronic communications.

3.2. Adaptations to Directive (EU) 2018/1972 establishing the European Electronic Communications Code (Recast) – JCD in Annex 2

The Directive aims to create an internal market for electronic communications within the EU and replaces Directives 2002/19/EC, 2002/20/EC, 2002/21/EC, and 2002/22/EC, which have been incorporated into Annex XI of the EEA Agreement. In parallel with the adoption of the Directive, the EU has adopted a new Regulation (EU) 2018/1971 establishing the Body of European Regulators for Electronic Communications (BEREC) and Agency for Support for BEREC (BEREC Office).

The Directive establishes a number of tasks for BEREC, which aim to ensure consistent implementation of the regulatory framework for electronic communications. As BEREC plays an important role in the application of the Regulation and Directive, the BEREC Regulation and the Directive are intrinsically linked. This linkage is also translated into the two draft JCDs incorporating the Directive and the BEREC Regulation into the EEA Agreement, which are attached to this draft Council Decision. It is important to examine those two draft JCDs together to understand the complete setup in the EEA context.

One important task assigned to BEREC is to issue, where appropriate, opinions on National Regulatory Authorities' (NRAs) measures and on cross-border disputes (Articles 27, 32 and 33 of the Directive). For the purposes of the EEA Agreement, the draft JCD to the Regulation specifies the modalities for the participation of the EEA EFTA NRAs in BEREC. It also provides that the positions of the EEA EFTA NRAs on opinions of BEREC are recorded separately, and that the EFTA Surveillance Authority is to take the utmost account of any guideline, opinion, recommendation, common position and best practices adopted by BEREC. The draft JCD furthermore contains some other necessary adaptations in an EEA context.

The draft JCD incorporating the Directive in turn provides for other adaptations to the Directive that are necessary in light of the EEA Agreement.

Union law/ the EEA Agreement (adaptation (a))

In line with Article 7 of the EEA Agreement, only acts that have been incorporated into the Agreement are binding upon the EFTA States. Therefore, the reference to Union law must be adjusted to reflect that, in an EEA context, the legal framework of reference is the EEA Agreement.

Opinions of the Radio Spectrum Policy Group (adaptation (b)):

According to adaptation (b) to Article 28, the EFTA Surveillance Authority is competent to take decisions addressed to the EFTA States.

The adaptation further provides that the EFTA Surveillance Authority should take utmost account of the opinion of RSPG. This is to ensure that the EFTA Surveillance Authority draws upon the same expertise as the Commission when fulfilling its task vis-à-vis the EFTA States under the two-pillar structure of the EEA Agreement.

Furthermore, in cases where both EFTA States and EU Member States are concerned, the EFTA Surveillance Authority and the Commission are to cooperate with a view to agreeing on decisions to resolve the cross-border harmful interference.

Reference to Article 267 TFEU / Article 34 SCA (adaptation (c)):

Adaptation (c) adjusts the legal framework as regards courts or tribunals in the EFTA States by replacing the reference to Article 267 TFEU with a reference to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice.

Identification of transnational markets (adaptation (d)):

The adaptation text suggested in the draft JCD corresponds to what is currently foreseen in adaptation (d) under Directive 2002/21/EC (see point 5cl in Annex XI EEA) regarding the modalities of cooperation between the EFTA Surveillance Authority and the Commission.

Reference to the "Charter" adjusted (adaptation (e)):

The Charter of Fundamental Rights of the European Union is an instrument of the EU's primary law which is not binding upon non-Member States and is not relevant in an EEA context. Therefore, adaptation (g) to the Directive adjusts the reference to the Charter contained in Article 100(1) to refer to "fundamental rights and general principles of the EEA Agreement, and the references in Article 100(2) to refer to "fundamental rights".

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. It also includes instruments that do not have a binding effect under international law, but that are '*capable of decisively influencing the content of the legislation adopted by the EU legislature*'[7].

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 will be binding under international law in accordance with Articles 103 and 104 of the EEA Agreement.

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 in conjunction with Article 1(3) of Council Regulation No 2894/94 concerning arrangements for implementing the Agreement on the European Economic Area.

[7] 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.

4.2. Substantive legal basis

4.2.1. Principles

The substantive legal basis for a decision under Article 218(9) TFEU in conjunction with Article 1(2) of Council Regulation No 2894/94 depends primarily on the substantive legal basis of the EU legal acts to be incorporated into the EEA Agreement.

4.2.2. Application to the present case

The main objective and content of the envisaged acts relate to approximation of laws therefore, the substantive legal basis of the proposed decision is Article 114 TFEU.

4.3. Conclusion

The legal basis of the proposed decision should be Article 114, in conjunction with Article 218(9) TFEU and Article 1(3) of Council Regulation No 2894/94 concerning arrangements for implementing the Agreement on the European Economic Area.

5. PUBLICATION OF THE ENVISAGED ACT

As the acts of the EEA Joint Committee will amend Annex XI (Electronic communication, audiovisual services and information society) and Protocol 37 (Containing the list provided for in Article 101) to the EEA Agreement, it is appropriate to publish it in the *Official Journal of the European Union* after its adoption.

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Proposal for a

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(Text with EEA relevance)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 114 TFEU, in conjunction with Article 218(9) thereof,

Having regard to Council Regulation (EC) No 2894/94 of 28 November 1994 concerning arrangements for implementing the Agreement on the European Economic Area[8], and in particular Article 1(3) thereof,

Having regard to the proposal from the European Commission,

Whereas:

(1) The Agreement on the European Economic Area[9] ('the EEA Agreement') entered into force on 1 January 1994.

(2) Pursuant to Article 98 of the EEA Agreement, the EEA Joint Committee may decide to amend, inter alia, Annex XI (Electronic communication, audiovisual services and information society) and Protocol 37 (Containing the list provided for in Article 101) to the EEA Agreement.

(3) Regulation (EU) 2018/1971 of the European Parliament and of the Council[10] is to be incorporated into the EEA Agreement.

(4) For the EEA Agreement to function well, Protocol 37 to the EEA Agreement is to be extended to include the Body of European Regulators for Electronic Communications (BEREC) established by Regulation (EU) 2018/1971.

(5) To ensure consistent implementation of the regulatory framework for electronic communications within the scope of the EEA Agreement, the national regulatory authorities of the EFTA States will participate fully in the work of the Board of Regulators of BEREC, the working groups of BEREC and the Management Board of the BEREC Office, except for the right to vote. The positions of the national regulatory authorities of the EFTA States will be recorded separately when BEREC

8 OJ L 305, 30.11.1994, p. 6.

9 OJ L 1, 3.1.1994, p. 3.

10 Regulation (EU) 2018/1971 of the European Parliament and of the Council of 11 December 2018 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Agency for Support for BEREC (BEREC Office), amending Regulation (EU) 2015/2120 and repealing Regulation (EC) No 1211/2009, OJ L 321, 17.12.2018, p. 1.

issues an opinion. The EFTA Surveillance Authority will take the utmost account of opinions adopted by BEREC.

(6) Directive (EU) 2018/1972 of the European Parliament and of the Council[11], is to be incorporated into the EEA Agreement.

(7) Directive (EU) 2018/1972 repeals, with effect from 21 December 2020, Directives 2002/19/EC, 2002/20/EC, 2002/21/EC and 2002/22/EC, which have been incorporated into the EEA Agreement and which are consequently to be repealed under the EEA Agreement with effect from 21 December 2020.

(8) Annex XI and Protocol 37 to the EEA Agreement should therefore be amended accordingly,

(9) The position of the Union in the EEA Joint Committee should therefore be based on the draft EEA Joint Committee Decision set out in the Annex to this Decision,

HAS ADOPTED THIS DECISION:

Article 1

The position to be adopted on the Union's behalf within the EEA Joint Committee on the proposed amendment of Annex XI (Electronic communication, audiovisual services and information society) and Protocol 37 (Containing the list provided for in Article 101) to the EEA Agreement shall be based on the draft decisions of the EEA Joint Committee attached to this Decision.

Article 2

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

Done at Brussels,

For the Council
The President

[11] Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (Recast), as corrected by OJ L 334, 27.12.2019, p. 164, OJ L 321, 17.12.2018, p. 36.