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2021/0351 (NLE)

Proposal for a

COUNCIL DECISION

on the position to be adopted on behalf of the European Union, within the EEA Joint Committee concerning an amendment to Protocol 32 to the EEA Agreement, on financial modalities for implementation of Article 82

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

1. SUBJECT MATTER OF THE PROPOSAL

This proposal concerns the decision establishing the position to be taken on behalf of the European Union in the EEA Joint Committee regarding the amendment of Protocol 32 of the Agreement between the European Community and the European Economic Area ('the EEA Agreement') on financial modalities for implementation of Article 82 of the EEA Agreement. It amends the rules applicable to the participation of the EEA EFTA States (Norway, Iceland, and Liechtenstein) to Union programmes in order to take into account the specificities of the Multiannual Financial Framework for the 2021-2027 period as regards the impact of the United Kingdom withdrawal from the European Union on the financial contribution of the EEA EFTA States to the EU budget.

2. CONTEXT OF THE PROPOSAL

2.1. The EEA Agreement

The EEA Agreement aims at promoting a continuous and balanced strengthening of trade and economic relations between the European Union, Iceland, Liechtenstein and Norway with equal conditions of competition, and the respect of the same rules, with a view to creating a homogeneous European Economic Area, hereinafter referred to as the 'EEA'. The EEA Agreement guarantees equal rights and obligations within the Internal Market for individuals and economic operators in the EEA. It provides for the inclusion of EU legislation covering the four freedoms — the free movement of goods, services, persons and capital — throughout the 30 EEA States. 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.

Article 82 of the EEA Agreement defines the rules that should apply to the financial participation of the EEA EFTA States when participating in Union Programmes. Protocol 32 of the EEA Agreement further defines the rules that should apply as regards financial modalities for implementation of Article 82.

2.2. The EEA Joint Committee

The EEA Joint Committee is established under 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 Union, on the one hand, and the EEA EFTA States speaking with one voice, on the other.

The responsibility of the Joint Committee 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 EEA Agreement and relative to its Protocols. For that purpose, on the basis of Article 98 of the Agreement, Protocol 32 can be amended by a decision of the EEA Joint Committee in accordance with Articles 93 (2), 99, 100, 102 and 103 of the EEA Agreement.

In order to guarantee the legal security and the homogeneity of the EEA, the EEA Joint Committee should take a decision concerning amendments to the Anexes and the Protocols 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 EEA Joint Committee

The EEA Joint Committee is to adopt amendments to Protocol 32 of the EEA Agreement ('the envisaged act').

The purpose of the envisaged act is to determine detailed conditions of participation of the EEA EFTA States to EU programmes in order to include the necessary modifications stemming from the adoption of a new Multiannual Financial Framework, and the budgetary consequences of the withdrawal of the United Kingdom from the Union.

The envisaged act aims at including five paragraphs in Protocol 32 of the EEA agreement:

Article 1 shall be complemented to include the following provisions:

- a provision on the financial participation of the EEA EFTA States to the appropriations entered in the EU Budget for payments on completion lines following the United Kingdom's withdrawal from the Union. Completion lines exclusively include payments on commitments signed under the 2014-2020 MFF for which the United Kingdom will continue to pay its share until all commitments are paid. The EEA Agreement does not make a difference between completion lines and new EU programmes lines, which would result in the EEA EFTA States making a higher contribution to the EU Budget than necessary. It should be recalled that in cases of previous enlargements, a reverse mechanism took place, which led the EEA EFTA States to pay a lower amount than necessary to the EU Budget. Therefore, as from the amendment of Protocol 32, in case of enlargement of the EU, this mechanism will not take place anymore and would lead to a higher proportionality factor for completion lines;
- a provision on the inclusion of Next Generation EU (NGEU) credits in the calculation of the contribution of the EEA EFTA States for the financing of the Horizon Europe Programme and the Union Civil Protection Mechanism in order to reflect the increased budget of these programmes;
- two additional provisions clarifying how the EEA EFTA States' contribution will be calculated in case of enlargement of the EU or withdrawal of a Member State from the Union.

A new Article 8 shall be added in order to address the financial modalities for contributions of the EEA EFTA States as regards budgetary guarantees. The specificity of budgetary guarantees does not allow including EEA EFTA State's financial contribution in the standard procedure used for all other EU programmes. Such contribution for budgetary guarantees will instead be set in specific contribution agreements.

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*'. In addition, in accordance with Article 119 of the Agreement, "*the Annexes and the acts referred to therein as adapted for the purposes of this Agreement as well as the Protocols shall form an integral part of this Agreement*."

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

The Commission submits the draft Decision of the EEA Joint Committee for adoption by the Council as the Union's position. The Commission would hope to be able to present it in the EEA Joint Committee at the earliest possible opportunity.

The content and nature of the draft of the annexed Decision 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.

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*'[1].

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.

4.2. Substantive legal basis

4.2.1. Principles

The substantive legal basis for a decision under Article 218(9) TFEU depends primarily on the objective and content of the envisaged act in respect of which a position is taken on the Union's behalf. 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.

With regard to an envisaged act that simultaneously pursues a number of objectives, or that has several components, which are inseparably linked without one being incidental to the

[1] 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.

other, the substantive legal basis of a decision under Article 218(9) TFEU will have to include, exceptionally, the various corresponding legal bases.

4.2.2. Application to the present case

The envisaged act pursues objectives and has components in the area of financial rules and financial assistance. These elements of the envisaged act are inseparably linked without one being incidental to the other.

Therefore, the substantive legal basis of the proposed decision comprises the following provisions: the Treaty on the Functioning of the European Union, and in particular Article 122, and Article 322(1) thereof.

4.3. Conclusion

The legal basis of the proposed decision should be Article 122and Article 322(1) TFEU, 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. BUDGETARY IMPLICATIONS

The envisaged act modifies the calculation of the amount of assigned revenues from the EEA EFTA States added to the EU appropriations by (a) decreasing the EEA EFTA proportionality factor applied to amounts on completion lines – without creating any lack of appropriations – and (b) including the NGEU credits in the calculation of the EEA EFTA States' contribution, therefore increasing the amount of the EEA EFTA contribution for programmes to which the EEA EFTA States participate and which benefit from NGEU credits: Horizon Europe Programme and the Union Civil Protection Mechanism.

6. PUBLICATION OF THE ENVISAGED ACT

As the act of the EEA Joint Committee will amend Protocol 32 to the EEA Agreement, on financial modalities for implementation of Article 82, it is appropriate to publish it in 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 122 and Article 322(1), in conjunction with Article 218(9) thereof,

Having regard to Council Regulation (EC) 2894/94 of 28 November 1994 concerning arrangements for implementing the Agreement on the European Economic Area[2], 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 ('the EEA Agreement') entered into force on 1 January 1994.

(2) The legislation of the European Union has been amended, in particular by the adoption of the Council Regulation (EU) 2020/2094 of 14 December 2020 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis and of Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility.

(3) Pursuant to Article 98 of the EEA Agreement, the EEA Joint Committee established by Article 92 of the EEA Agreement may adopt decisions amending Protocol 32 on financial modalities for implementation of Article 82 of the EEA Agreement, in accordance with Articles 93 (2), 99, 100, 102 and 103 of the Agreement.

(4) The provisions of Protocol 32 to the EEA Agreement should therefore be amended accordingly.

(5) The position of the Union in the EEA Joint Committee should 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 behalf of the Union, within the EEA Joint Committee on the proposed amendments of Protocol 32 on financial modalities for implementation of Article 82

[2] OJ L 305, 30.11.1994, p. 6–8.

of the EEA Agreement, shall be based on the draft decision of the EEA Joint Committee attached to this Decision.

Article 2

This Decision shall enter into force on the date of its adoption. It shall apply from 1 January 2021.

Done at Brussels,

For the Council
The President