



EUROPEAN
COMMISSION

Brussels, 16.5.2022
COM(2022) 205 final

2022/0150 (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 of Protocol 31 to the EEA Agreement, on cooperation in specific fields outside the four freedoms, and Protocol 32, on financial modalities for implementation of Article 82

(InvestEU)

(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 Decision concerning an amendment of Protocol 31 to the EEA Agreement, on cooperation in specific fields outside the four freedoms, and Protocol 32, on financial modalities for implementation of Article 82

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.

2.3. The envisaged act of the EEA Joint Committee

The EEA Joint Committee is expected to adopt the EEA Joint Committee Decision ('the envisaged act') regarding the amendment of Protocol 31 to the EEA Agreement, on cooperation in specific fields outside the four freedoms, and Protocol 32, on financial modalities for implementation of Article 82.

The purpose of the envisaged act is to extend the cooperation of the Contracting Parties to the EEA Agreement to include the participation of the EEA EFTA States in the InvestEU programme. Regulation (EU) 2021/523 of the European Parliament and of the Council of 24 March 2021 establishing the InvestEU Programme and amending Regulation (EU) 2015/1017¹ shall therefore be incorporated into the EEA Agreement.

As Liechtenstein did not express its interest in participating in the InvestEU Programme, the draft Decision of the EEA Joint Committee concerns only Norway and Iceland. The EEA EFTA States also chose not to participate in the InvestEU Advisory Hub and may choose to participate in one or more financial products under the EU compartment of the InvestEU Fund. In order to enable an adequate financial contribution of the EEA EFTA States, such contribution shall be based on the risk profile of the financial products in which they choose to participate. The contribution from EEA EFTA States shall increase the EU guarantee.

¹ OJ L 107, 26.3.2021, p. 30–89

For the purpose of calculating the financial contribution of the EEA EFTA States to the InvestEU Fund, the proportionality factor as stipulated in Article 82(1) of the EEA Agreement for budget lines may not reflect accurately the share of the participation in the InvestEU Fund via the relevant financial products. Therefore, in accordance with Article 8 of Protocol 32, the EFTA States shall enter into contribution agreements with the EU represented by the Commission. In view of the financial contribution taking place via the chosen financial products, it must be left to the contribution agreements to establish the amounts of the EFTA States' financial contribution to the EU guarantee, lay down terms and conditions for the use of this contribution, establish the frequency and amounts of the payment of the contribution and establish rules for the reimbursement of unused funds and revenues to the EFTA States.

In line with the EU budgetary policy, any participation in an EU activity can take place only once the corresponding financial contribution is paid. The payment can however take place once this draft Council Decision is adopted and the subsequent EU call for funds, established by the European Commission, is submitted to the EEA EFTA States.

Therefore, in order to bridge the period between 1st January 2022 and the reception of the respective payment, the draft Joint Committee Decision shall also be retroactively applicable from 1st January 2022. The retroactivity does not affect the rights and obligations of persons concerned and respects the principle of the legitimate expectations.

The envisaged act 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 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 Article 1(3) of 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'*².

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.

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 EEA 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 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 substantive legal basis of the proposed decision shall correspond with the substantive legal basis of the legal act it incorporates into the EEA Agreement.

‘InvestEU programme’ is based on the TFEU Titles ‘Industry’ and ‘Economic, Social and Territorial Cohesion’ (Article 173 and third paragraph of Article 175).

Therefore, the substantive legal basis of the proposed decision comprises of the following provisions: Article 173 and the third paragraph of Article 175 TFEU.

4.3. Conclusion

The legal basis of the proposed decision should be Article 173 and the third paragraph of Article 175 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

Norway and Iceland shall financially contribute to the Budget of the Union. The exact amount will be determined in conformity with the provisions of the EEA Agreement, once this draft Council Decision is adopted.

6. PUBLICATION OF THE ENVISAGED ACT

As the act of the EEA Joint Committee will amend Protocol 31 to the EEA Agreement, on cooperation in specific fields outside the four freedoms and Protocol 32, 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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(InvestEU)

(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(s) 173 and the third paragraph of Article 175, 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 Area³, and in particular Article 1(3) thereof,

Having regard to the proposal from the European Commission,

Whereas:

- (1) The Agreement on the European Economic Area⁴ ('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, Protocol 31 to the EEA Agreement, on cooperation in specific fields outside the four freedoms, and Protocol 32, on financial modalities for implementation of Article 82.
- (3) Regulation (EU) 2021/523 of the European Parliament and of the Council⁵ is to be incorporated into the EEA Agreement.
- (4) Protocol 31 (on cooperation in specific fields outside the four freedoms) and Protocol 32 (on financial modalities for implementation of Article 82) 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,

³ OJ L 305, 30.11.1994, p. 6–8.

⁴ OJ L 1, 3.1.1994, p. 3.

⁵ Regulation (EU) 2021/523 of the European Parliament and of the Council of 24 March 2021 establishing the InvestEU Programme and amending Regulation (EU) 2015/1017, OJ L 107, 26.3.2021, p. 30–89.

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 Protocol 31 (on cooperation in specific fields outside the four freedoms) and Protocol 32 (on financial modalities for implementation of Article 82) to 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.

Done at Brussels,

*For the Council
The President*



EUROPEAN
COMMISSION

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ANNEX

ANNEX

to the

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(InvestEU)

ANNEX

DECISION OF THE EEA JOINT COMMITTEE

No [...]

of [...]

amending Protocol 31 (cooperation in specific fields outside the four freedoms) and Protocol 32 (financial modalities for implementation of Article 82) to the EEA Agreement

THE EEA JOINT COMMITTEE,

Having regard to the Agreement on the European Economic Area (“the EEA Agreement”),
and in particular Articles 86 and 98 thereof,

Whereas:

- (1) It is appropriate to extend the cooperation of the Contracting Parties to the EEA Agreement to include Regulation (EU) 2021/523 of the European Parliament and of the Council of 24 March 2021 establishing the InvestEU Programme and amending Regulation (EU) 2015/1017¹.
- (2) Pursuant to Article 5 of Regulation (EU) 2021/523, contributions to the EU guarantee from the EFTA States are allowed, for the purpose of participation in certain financial products under the EU compartment of the InvestEU Fund. The EFTA States’ contributions to the provisioning of the EU guarantee may be accompanied by a back-to-back-guarantee covering the respective contingent liability in relation to the EU guarantee. Alternatively, they may also provide the full contribution to the InvestEU Fund in cash.
- (3) The conditions for the participation of EFTA States and their institutions, undertakings, organisations and nationals in programmes of the European Union are set out in the EEA Agreement and in particular in Article 81 thereof.
- (4) 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 crisis² allocates additional external assigned revenue to the InvestEU Programme established by Regulation (EU) 2021/523 of the European Parliament and of the Council. It is appropriate to clarify in Protocol 32 on financial modalities for the implementation of Article 82 of the EEA Agreement that, for the purpose of calculating the EFTA States’ financial contributions to the InvestEU Programme, the basis for calculation should be increased by appropriations corresponding to external assigned revenue under Article 3(1) of Council Regulation (EU) 2020/2094 in relation to their participation in that programme.
- (5) Protocols 31 and 32 to the EEA Agreement should therefore be amended accordingly, in order to allow for this extended cooperation to take place from 1 January 2022,

¹ OJ L 107, 26.3.2021, p. 30.

² OJ L 433I, 22.12.2020, p. 23.

HAS ADOPTED THIS DECISION:

Article 1

The following Article shall be added after Article 19 (Reduction of economic and social disparities) of Protocol 31 to the EEA Agreement:

‘Article 20

Improving the competitiveness and socio-economic convergence and cohesion under the InvestEU Programme

1. The EFTA States shall, as from 1 January 2022, participate in the activities which may result from the following Union act:
 - **32021 R 0523**: Regulation (EU) 2021/523 of the European Parliament and of the Council of 24 March 2021 establishing the InvestEU Programme and amending Regulation (EU) 2015/1017 (OJ L 107, 26.3.2021, p. 30).
2. The EFTA States shall not participate in the InvestEU Advisory Hub.
3. The EFTA States may choose to participate in one or more financial products under the EU compartment of the InvestEU Fund. The contribution of the EFTA States shall be based on the risk profile of the financial products in which they choose to participate. The contribution from EFTA States shall increase the EU guarantee.
4. For the purpose of calculating the financial contribution of the EFTA States to the InvestEU Fund, the proportionality factor as stipulated in Article 82(1) of the EEA Agreement for budget lines shall not apply. In accordance with Article 8 of Protocol 32, the EFTA States shall enter into contribution agreements with the EU represented by the Commission. The contribution agreements shall establish the amounts of the EFTA States’ financial contribution to the EU guarantee, lay down terms and conditions for the use of this contribution, establish the frequency and amounts of the payment of the contribution and establish rules for the reimbursement of unused funds and revenues to the EFTA States.
5. When the EFTA States’ contribution to the EU guarantee is not providing provisioning in cash in full, i.e. the provisioning is set at less than 100%, the EFTA States shall commit to cover the respective contingent liability through an irrevocable, unconditional and on demand back-to-back-guarantee. The back-to-back guarantee shall be provided concurrently with the signature of a contribution agreement.
6. Liechtenstein shall be exempted from the participation in, and the financial contribution to, this programme.’

Article 2

The text of Article 1(10) of Protocol 32 to the EEA Agreement is replaced by the following:

- ‘10. For the purpose of calculating the operational contribution pursuant to Article 82(a) and (b) of the Agreement, the commitment and payment appropriations entered in the European Union budget definitively adopted for the applicable years for financing the Horizon Europe Programme (established by Regulation (EU) 2021/695 of the European Parliament and of the Council), the InvestEU Programme (established by Regulation (EU) 2021/523 of the European Parliament and of the Council) and the Union Civil Protection Mechanism (governed by Decision No 1313/2013/EU of the

European Parliament and of the Council), shall be increased by the appropriations corresponding to external assigned revenue allocated to those activities under Article 3(1) of 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 crisis³.’

Article 3

This Decision shall enter into force on the day following the last notification under Article 103(1) of the EEA Agreement *.

It shall apply from 1 January 2022.

Article 4

This Decision shall be published in the EEA Section of, and in the EEA Supplement to, the *Official Journal of the European Union*.

Done at Brussels, [...].

For the EEA Joint Committee

The President

[...]

The Secretaries

To the EEA Joint Committee

[...]

³ OJ L 433I, 22.12.2020, p. 23.

* [No constitutional requirements indicated.] [Constitutional requirements indicated.]