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PROPOSAL

From:	Secretary-General of the European Commission, signed by Ms Martine DEPREZ, Director
date of receipt:	8 July 2021
To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
No. Cion doc.:	COM(2021) 376 final
Subject:	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 31 to the EEA Agreement, on cooperation in specific fields outside the four freedoms (European Defence Fund)

Delegations will find attached document COM(2021) 376 final.

Encl.: COM(2021) 376 final

EUROPEAN
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Brussels, 8.7.2021
COM(2021) 376 final

2021/0189 (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 31 to the EEA Agreement, on cooperation in specific fields outside the four freedoms

(European Defence Fund)

(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 of the four freedoms

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 the EEA Joint Committee Decision ('the envisaged act') regarding the amendment of Protocol 31 to the EEA Agreement, on cooperation in specific fields outside of the four freedoms.

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 European Defence Fund. Regulation (EU) 2021/697[1] of the European Parliament and of the Council of 29 April 2021 establishing the European Defence Fund and repealing Regulation (EU) 2018/1092 shall therefore be incorporated into the EEA Agreement.

The EEA EFTA States consider that defence matters fall outside the scope of the EEA Agreement, and therefore that the adoption of this Decision does not extend the scope of the EEA Agreement to include defence matters beyond the participation of the EEA EFTA States in the European Defence Fund.

As Liechtenstein and Iceland did not express their interest in participating in the European Defence Fund, the draft Decision of the EEA Joint Committee therefore concerns only Norway.

[1] OJ L 170, 12.5.2021, p. 149.

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 2021 and the reception of the respective payment, the draft Joint Committee Decision shall also be retroactively applicable from 1st January 2021. 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 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*'[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 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.

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[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.

4.2. 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.

The European Defence Fund aims at fostering the competitiveness and innovativeness of the Union's defence technological and industrial base by supporting defence-oriented R&D activities. Regulation (EU) 2021/697 of the European Parliament and of the Council of 29 April 2021 establishing the European Defence Fund and repealing Regulation (EU) 2018/1092 is thus based on the Treaty on the Functioning of the European Union (TFEU) Titles 'Industry' and 'Research and technological development and space' (Articles 173, 182, 183 and 188).

Therefore, the substantive legal basis of the proposed decision comprises of the following provisions: Article 173(3), Article 182(4), Article 183 and the second paragraph of Article 188 TFEU.

4.3. Conclusion

The legal basis of the proposed decision should be Article 173(3), Article 182(4), Article 183 and the second paragraph of Article 188 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 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 of the four freedoms, it is appropriate to publish it in the *Official Journal of the European Union* after its adoption.

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(European Defence Fund)

(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 173(3), Article 182(4), Article 183 and the second paragraph of Article 188, 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[3], 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[4] ('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, which contains provisions on cooperation in specific fields outside of the four freedoms.

(3) Regulation (EU) 2021/697 of the European Parliament and of the Council[5] is to be incorporated into the EEA Agreement.

(4) Protocol 31 (on cooperation in specific fields outside of the four freedoms) to the EEA Agreement should therefore be amended accordingly.

(5) 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,

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3 OJ L 305, 30.11.1994, p. 6–8.

4 OJ L 1, 3.1.1994, p. 3.

5 Regulation (EU) 2021/697 of the European Parliament and of the Council of 29 April 2021 establishing the European Defence Fund and repealing Regulation (EU) 2018/1092, OJ L 170, 12.5.2021, p. 149.

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) 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