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2022/0412 (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 Annex IX (Financial Services) to the EEA Agreement

(Central Securities Depository - Liechtenstein)

(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 Annex IX (Financial Services) 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 EEA Agreement entered into force on 1 January 1994. The Union together with its Member States is a party to the EEA 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 the functioning of the EEA Agreement. Its decisions are taken by consensus and are binding on the Parties. The responsibility for coordinating EEA matters on the EU side is with the Secretariat General of the European Commission.

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 Annex IX (Financial Services) to the EEA Agreement.

Regulation (EU) No 909/2014 of the European Parliament and of the Council of 23 July 2014 on improving securities settlement in the European Union and on central securities depositories and amending Directives 98/26/EC and 2014/65/EU and Regulation (EU) No 236/2012¹ was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 18/2019 of 8 February 2019² and is referred to in point 31bf of Annex IX to the EEA Agreement.

Adaptation (c) in point 31bf of Annex IX to the EEA Agreement grants Liechtenstein a derogation to allow third-country Central Securities Depositories (*'CSDs'*) already providing services referred to in Article 25(2) of Regulation (EU) No 909/2014 to financial intermediaries in Liechtenstein or already having set up a branch in Liechtenstein to continue to provide such services for up to five years after the date of entry into force of Decision of the EEA Joint Committee No 18/2019 of 8 February 2019.

The purpose of the envisaged act is to extend, at the request of Liechtenstein, the derogation set out in point 31bf(c) of Annex IX to the EEA Agreement beyond 8 February 2024, for a period of application of the derogation that should not exceed 7 years from the date of entry

¹ OJ L 257, 28.8.2014, p. 1.

² OJ L 60, 28.2.2019, p. 31.

into force of the Decision of the EEA Joint Committee [foreseen in February 2023]. The envisaged act would therefore allow third-country CSDs already providing services referred to in Article 25(2) of Regulation (EU) No 909/2014 to financial intermediaries in Liechtenstein or already having set up a branch in Liechtenstein to continue to provide such services for a period not exceeding seven years after the date of entry into force of the envisaged act. Nevertheless, the draft Proposal also specifies that Adaptation (c) in point 31bf of Annex IX to the EEA Agreement shall be reviewed if Articles 25 or 69 of Regulation (EU) No 909/2014 are amended during that period of time.

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

2.4. Other elements

Detailed explanation of the specific provisions of the proposal

Liechtenstein's situation (adaptation 3(c))

Liechtenstein and Switzerland are linked by a dense network of treaties, including notably the Customs Treaty of 1923, and the Currency Treaty of 1980 pursuant to which Liechtenstein (already using the Swiss Franc as its official currency since 1921) is included in the currency area of Switzerland. In the financial services sector, the Currency Treaty provides for the direct applicability of certain Swiss legal and administrative rules (cf. Annexes to the Currency Treaty). As a result, certain financial intermediaries (e.g. banks, investment undertakings) must comply with reporting requirements of the Swiss National Bank (SNB) for the purpose of enabling it to conduct monetary policy. The common economic and currency area has historically led to strong economic ties between the two countries that persisted after Liechtenstein's accession to the EEA Agreement.

For these reasons, the Liechtenstein financial market is fully integrated with and relies extensively on Swiss financial market infrastructures. Any disruption of the current setup may lead to challenges for Liechtenstein financial market participants. Adaptation 3(c) therefore provides that third-country Central Securities Depositories already providing services referred to in Article 25(2) of the CSDR Regulation to financial intermediaries in Liechtenstein or already having set up a branch in Liechtenstein may be allowed to continue to provide the services referred to in Article 25(2) for a period not exceeding 7 years after the date of entry into force of the annexed draft Decision of the EEA Joint Committee. Nevertheless, the draft Proposal also specifies that Adaptation (c) in point 31bf of Annex IX to the EEA Agreement shall be reviewed if Articles 25 or 69 of Regulation (EU) No 909/2014 are amended during that period of time.

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

The Commission submits the annexed draft Decision of the EEA Joint Committee for adoption by the Council as the Union's position. The position, once adopted, should be presented in the EEA Joint Committee at the earliest possible opportunity.

The annexed draft Decision of the EEA Joint Committee would allow third-country CSDs already providing services referred to in Article 25(2) of Regulation (EU) No 909/2014 to financial intermediaries in Liechtenstein or already having set up a branch in Liechtenstein to continue to provide such services for a period not exceeding seven years after the date of entry into force of the present Decision. This goes 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*’³.

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 in conjunction with Article 1(3) of Council Regulation No 2894/94 depends primarily on the substantive legal basis of the EU legal act to be incorporated into the EEA Agreement.

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

Since the envisaged act concerns the incorporation of Regulation (EU) No 909/2014 into the EEA Agreement and, more specifically, the modification of the adaptation (c) in point 31bf of Annex IX to the EEA Agreement, it is appropriate to base this Council decision on the same substantive legal base as Regulation (EU) No 909/2014. 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 TFEU, in conjunction with Article 218(9) TFEU and Article 1(3) of Council Regulation No 2894/94 concerning arrangements for implementing the EEA Agreement.

³ 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.

5. PUBLICATION OF THE ENVISAGED ACT

As the act of the EEA Joint Committee will amend Annex IX (Financial Services) 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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on the position to be adopted, on behalf of the European Union, within the EEA Joint Committee concerning an amendment to Annex IX (Financial Services) to the EEA Agreement

(Central Securities Depository - Liechtenstein)

(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 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 Area⁴, and in particular Article 1(3) thereof,

Having regard to the proposal from the European Commission,

Whereas:

- (1) The Agreement on the European Economic Area⁵ ('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 IX (Financial Services) to the EEA Agreement.
- (3) Regulation (EU) No 909/2014 of the European Parliament and of the Council⁶ was incorporated into EEA Agreement by Decision of the EEA Joint Committee No 18/2019 of 8 February 2019⁷ and is referred to in point 31bf of Annex IX to the EEA Agreement.
- (4) Adaptation (c) in point 31bf of Annex IX to the EEA Agreement grants Liechtenstein a derogation to allow third-country Central Securities Depositories already providing services referred to in Article 25(2) of Regulation (EU) No 909/2014 to financial intermediaries in Liechtenstein or already having set up a branch in Liechtenstein to continue to provide such services referred to in Article 25(2) for a period not

⁴ OJ L 305, 30.11.1994, p. 6.

⁵ OJ L 1, 3.1.1994, p. 3.

⁶ Regulation (EU) No 909/2014 of the European Parliament and of the Council of 23 July 2014 on improving securities settlement in the European Union and on central securities depositories and amending Directives 98/26/EC and 2014/65/EU and Regulation (EU) No 236/2012, OJ L 257, 28.8.2014, p. 1.

⁷ OJ L 60, 28.2.2019, p. 31.

exceeding 5 years after the date of entry into force of Decision of the EEA Joint Committee No 18/2019 of 8 February 2019.

- (5) On 2 November 2022, Liechtenstein submitted a request for the extension of the derogation referred to in recital 4 beyond 8 February 2024, for a period that should not exceed seven years.
- (6) Annex IX (Financial Services) to the EEA Agreement should therefore be amended to the effect that third-country Central Securities Depositories already providing services referred to in Article 25(2) of Regulation (EU) No 909/2014 to financial intermediaries in Liechtenstein or already having set up a branch in Liechtenstein are allowed to continue to provide such services for a period not exceeding seven years after the date of entry into force of the attached draft decision. Nevertheless, the draft Proposal also specifies that Adaptation (c) in point 31bf of Annex IX to the EEA Agreement shall be reviewed if Articles 25 or 69 of Regulation (EU) No 909/2014 are amended during that period of time.
- (7) The position of the Union within the EEA Joint Committee should therefore be based on the attached draft 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 amendment to Annex IX (Financial Services) 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*