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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 an amendment to Annex IX (Financial Services) to the EEA Agreement

[Capital Requirements Regulation (EU) No 575/2013 (CRR) and Directive 2013/36/EU (CRD IV)]

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

- **Reasons for and objectives of the proposal**

The draft Decision of the EEA Joint Committee (annexed to the proposed Council Decision) aims to amend Annex IX (Financial Services) to the EEA Agreement in order to incorporate Capital Requirements Regulation (EU) No 575/2013 and Directive 2013/36/EU¹ into the EEA Agreement.

The adaptations appearing in the drafts 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.

- **Consistency with existing policy provisions in the policy area**

The annexed draft EEA Joint Committee Decision extends the already existing EU policy to the EEA EFTA States (Norway, Iceland and Liechtenstein).

- **Consistency with other Union policies**

The extension of the EU acquis to the EEA EFTA States, through its incorporation into the EEA Agreement is conducted in conformity with the objectives and principles of that Agreement, aiming at establishing a dynamic and homogeneous European Economic Area, based on common rules and equal conditions of competition.

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

- **Legal basis**

The legislation to be incorporated into the EEA Agreement is based on Article 114 of the Treaty on the Functioning of the European Union.

Article 1(3) of Council Regulation (EC) No 2894/94 concerning arrangements for implementing the EEA Agreement provides that the Council establishes the position to be adopted on the Union's behalf on such Decisions, on a proposal from the Commission.

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.

- **Subsidiarity (for non-exclusive competence)**

The proposal complies with the subsidiarity principle for the following reason.

¹ Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012, as corrected by OJ L 208, 2.8.2013, p. 68 and OJ L 321, 30.11.2013, p. 6.
Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC, as corrected by OJ L 208, 2.8.2013, p. 73..

The objective of this proposal, namely to ensure the homogeneity of the Internal Market, cannot be sufficiently achieved by the Member States and can therefore, by reason of the effects, be better achieved at Union level.

The process of incorporation of the EU acquis into the EEA Agreement is conducted in conformity with the Council Regulation (EC) No 2894/94 of 28 November 1994 concerning arrangements for implementing the Agreement on the European Economic Area which confirms the approach taken.

- **Proportionality**

In accordance with the principle of proportionality, this proposal does not go beyond what is necessary in order to achieve its objective.

- **Choice of the instrument**

In conformity with Article 98 of the EEA Agreement, the chosen instrument is the EEA Joint Committee decision. The EEA Joint Committee shall ensure the effective implementation and operation of the EEA Agreement. To this end, it shall take decisions in the cases provided for in the EEA Agreement.

3. RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS

Not applicable

4. BUDGETARY IMPLICATIONS

There are no budgetary implications expected as a result of incorporation of the above mentioned Regulation into the EEA Agreement.

5. OTHER ELEMENTS

- **Detailed explanation of the specific provisions of the proposal**

Prudential assessment of non-resident proposed acquirers (Joint declaration to the JCD) relative to Directive 2013/36/EU

The EEA Agreement does in principle not purport to regulate the relations of the Contracting Parties with third countries (see notably 16th recital of the Preamble to the EEA Agreement). The EEA Agreement does not provide for the liberalisation of capital flows or give rights regarding freedom of establishment or participation in the capital of firms as regards non-residents (see, Art. 31 and 34, 40 and 124 EEA).

The Joint declaration to the JCD consequently states that the Contracting Parties share the understanding that the incorporation into the EEA Agreement of Directive 2013/36/EU is without prejudice to national rules of general application concerning the screening for security or public order of foreign direct investment.

Exemption of certain Icelandic public credit institutions (adaptation (e) relative to Directive 2013/36/EU)

Article 2(5) CRD IV exempts certain public institutions from the scope of the Directive. Three Icelandic institutions are to be exempted from CRD IV under this provision.

Byggðastofnun (the Icelandic Regional Development Institute) is an independent institution owned by the Icelandic state. Its main function is to contribute to regional development through the implementation of the government's regional strategies. Its operations are aimed at strengthening settlements in rural areas through the support of viable, long-term projects with diverse economic bases. The Institute supports and strengthens local development by the provision of credit and other forms of financial support, with the aim of improving economic and living conditions particularly in those regions threatened by depopulation. The institute provides additional financial support through loans with conditions to companies, individuals and municipalities enabling participation in the general economic development and stimulating innovation. The Institute's obligations are guaranteed by the Icelandic state. *Íbúðalánasjóður* is the successor of *Byggingarsjóðir ríkisins*, which was exempted from the scope of Directive 2006/48/EC, in accordance with point 14(a) of Annex IX EEA.

Lánasjóður sveitarfélaga ohf. is a special purpose credit institution. Ownership of the institution is restricted by law to municipalities (currently 75 municipalities share ownership). The institution's purpose is limited by law to provide credit to the municipalities and their fully-owned institutions, and only as regards investments which have wide economic meaning. The institution is analogous to *KommuneKredit* in Denmark, which is exempted from CRD IV pursuant to point 5 of Article 2(5).

National treatment for third-country branches and cooperation with third-country authorities (adaptations (g) and (h) relative to Directive 2013/36/EU)

Under Article 47(3) CRD IV, the Union is conferred the competence to conclude agreements with third countries according to branches of their credit institutions equal treatment on the territory of the Union.

In an EEA context, the Contracting Parties agree that the EEA Agreement does in principle not purport to regulate their relations with third countries (see notably 16th recital of the Preamble to the EEA Agreement). By incorporating CRD IV into the EEA Agreement, the EFTA States do not transfer any competence to the Union with respect to negotiating market access for third-country branches. Adaptation (g) therefore disapplies Article 47(3) as regards the EFTA States, and specifies that the EFTA States may conclude bilateral agreements with third countries regarding market access for branches.

However, in order to promote convergence in third-country policy between the Union and the EFTA States, adaptation (g) also provides that the Contracting Parties to the EEA Agreement inform and consult each other regarding negotiations of agreements with third countries in the framework of the EEA Joint Committee.

Adaptation (g) is modelled on the solutions agreed between the Union and the EFTA States under the Solvency II and MiFID regimes (see, point 1(d) and (e) and point 31ba(b) of Annex IX EEA).

Article 48 CRD IV contains rules regarding the conclusion of supervisory agreements regarding consolidated supervision between the Union and third countries. These agreements must provide for the possibility for third country supervisors to obtain information from the EU national competent or sectoral authorities (NCAs), and for European Banking Authority (EBA) to collect information received by EU NCAs from third countries' supervisors. Since the European Union cannot conclude agreements committing the EFTA NCAs to pass information to third countries supervisors, adaptation (h) disapplies Article 48 CRD IV (similarly to the agreed solution found as regards Article 75(2) and (3) EMIR, see point 31bc(zc) of Annex IX EEA).

In order to enable the transfer of information received by EFTA NCAs from third country supervisors to EBA when it is required in order to perform its technical tasks as regards the EFTA States, adaptation (h) also provides that the EFTA States will also endeavour to include clauses in supervisory agreements allowing their NCAs to pass relevant information to EBA.

Reservation of future Union legislation (adaptations (k) and (o) relative to Directive 2013/36/EU)

In line with Article 7 EEA, only acts that have been incorporated into the EEA Agreement are binding upon the EEA EFTA States. Therefore, adaptation (k) aligns the text of Article 89(5) CRD IV to reflect that, in an EEA context, Article 89 shall cease to apply only when new Union legislation regarding disclosure obligations becomes applicable in the EEA.

Similarly, adaptation (o) adjusts the text of Article 151(1) to reflect that the transitional measures contained under Chapter 1 of Title XI CRD IV only apply until a Decision of the EEA Joint Committee incorporating the delegated act adopted pursuant to Article 460 Regulation (EU) No 575/2013 becomes applicable.

Competence to authorise systemic risk buffers (adaptation (n) relative to Directive 2013/36/EU)

Under Article 133(14) CRD IV, EU NCAs must in certain cases await the opinion of the Commission before adopting measures setting or resetting a systemic risk buffer. When the opinion is negative, those NCAs shall either comply with the opinion, or explain their reasons for not doing so.

Under Article 133(15) CRD IV, the Commission, where it is satisfied that the systemic risk buffer does not entail disproportionate adverse effects on the financial system of other Member States or the Union and drawing on an opinion from the ESRB, shall adopt an implementing act authorising the NCA to adopt the systemic risk buffer. EBA may also submit an opinion to the Commission.

Under the system set-up by points 31f and 31g of Annex IX EEA, the ESRB and EBA may issue recommendations concerning situations taking place in the EFTA States, and EBA may also perform non-binding mediation pursuant to Article 19 EBA Regulation in disagreements involving an EFTA State. The competence to adopt decisions binding in the EFTA pillar under Article 19 EBA is vested in the EFTA Surveillance Authority.

However, the functions of the Commission in the context of procedures for verification or approval of the conformity of actions undertaken by EFTA States with the rules contained in the EEA Agreement is to be carried out by an entity in the EFTA pillar, in accordance with paragraph 4(d) of Protocol 1 to the EEA Agreement. In light of the importance and complexity of decisions regarding systemic risk buffers, this competence shall, as regards the EFTA States, be vested in the Standing Committee of the EFTA States.

Adaptation (n) therefore establishes the competence of the Standing Committee of the EFTA States as regards the issuance of opinions or recommendations for the sake of clarity (as these powers are not clearly allocated in the text of paragraph 4(d) of Protocol 1 EEA), while also ensuring that the ESRB and EBA should transmit their assessments under paragraph 14 and 15 of Article 133 CRD IV, where relevant, to that Standing Committee.

Definition of 'residential property' in Norway (adaptation (e) relative to Regulation (EU) 575/2013)

Cooperative housing is a common living arrangement in Norway. Shareholders acquire a share in a cooperative that owns or controls the building(s) and property in which they live. Each shareholder is entitled to occupy a specific unit.

A creditor's protection relating to a cooperative housing apartment in Norway is generally interpreted as equivalent to a direct holding. However, for the sake of legal certainty, it should be clarified that the right to inhabit an apartment in housing cooperatives in Norway is included within the definition of 'residential property' in CRR. Therefore, adaptation (e) adjusts the text of Article 4(1)(75) which concerns Sweden, to include the Norwegian situation.

Competence of the Commission to accept limits to large exposures, and of the Council to authorise stricter national measures in case of macroprudential or systemic risk (adaptations (i) and (j) relative to Regulation (EU) 575/2013)

Under Article 395 CRR, EU NCAs must in certain cases obtain approval of the Commission before adopting structural measures requiring credit institutions authorised in that Member State to reduce their exposures to different legal entities. The Commission, drawing on an opinion from EBA, may only reject a national measure where it entails disproportionate adverse effects on the financial system of other Member States or the Union.

Under Article 458 CRR, Member States must in certain cases be authorised by the Council before adopting certain stricter national measures aimed to counteract macroprudential and systemic risk of consequence to the national financial system and real economy. The Commission is entrusted to propose a draft measure to the Council to authorise or reject the national measure. The Council shall only reject the national measures in a limited number of circumstances, taking into account opinions from the ESRB and EBA. Other Member States may recognise national measures adopted under Article 458 CRR and apply them to branches located within the authorised Member State.

Under the system set-up by points 31f and 31g of Annex IX EEA, the ESRB and EBA may issue opinions concerning situations taking place in the EFTA States.

However, the functions of the Commission in the context of procedures for verification or approval of the conformity of actions undertaken by EFTA States with the rules contained in the EEA Agreement is to be carried out by an entity in the EFTA pillar, in accordance with paragraph 4(d) of Protocol 1 to the EEA Agreement. In light of the importance and complexity of decisions regarding structural measures limiting large exposures under Article 395, this competence shall, as regards the EFTA States, be vested in the Standing Committee of the EFTA States.

Similarly, the functions conferred to the Council under Article 458 CRR shall be exercised, as regards the EFTA States, by the Standing Committee of the EFTA States. However, this decision should be based on a proposal from the EFTA Surveillance Authority, mirroring the framework applicable in the EU.

For the sake of clarity, adaptations (i)(ii) and (j)(ii) therefore establish the competence of the Standing Committee of the EFTA States to take such decisions (as these powers are not clearly allocated, within the EFTA pillar, by paragraph 4(d) of Protocol 1 EEA), while also ensuring that EBA and, where relevant, the ESRB, should transmit their assessments under Articles 395(8) or 458(4) CRR to the Standing Committee of the EFTA States (adaptations (i)(iii) and (j)(iii)).

Application of the Basel I floor transitional provisions (recital 6 of the preamble relative to Regulation (EU) 575/2013)

CRR Article 500 implements the so-called "Basel I floor", which was established in part 2-1-C (paragraphs 45 to 47) of the Basel II Accord. The article expired at the end of 2017. Article 152 of Directive 2006/48/EC, which have been continued in Article 500 of Regulation (EU) 575/2013, have limited the potential for unwarranted reductions in own funds from the use of

internal models. Even though Article 500 has expired, the competent authority must still address the model risk.

Recital 6 of the preamble recalls that there are several provisions in the framework which allow competent authorities to address the same issue, including the possibility for measures to counterbalance unwarranted reductions in the riskweighted exposure amounts and to impose prudent margins of conservatism in the calibration of internal models.

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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 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 Area², and in particular Article 1(3) thereof,

Having regard to the proposal from the European Commission,

Whereas:

- (1) The Agreement on the European Economic Area³ ('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, amend Annex IX to the EEA Agreement, which contains provisions on financial services.
- (3) Regulation (EU) No 575/2013 of the European Parliament and of the Council⁴ and Directive 2013/36/EU of the European Parliament and of the Council⁵ are to be incorporated into the EEA Agreement.
- (4) Annex IX to the EEA Agreement should therefore be amended accordingly.
- (5) The position of the Union within the EEA Joint Committee should therefore be based on the attached draft decision,

² OJ L 305, 30.11.1994, p. 6.

³ OJ L 1, 3.1.1994, p. 3.

⁴ Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ L 176, 27.6.2013, p. 1), as corrected by OJ L 208, 2.8.2013, p. 68, OJ L 321, 30.11.2013, p. 6 and OJ L 20, 25.1.2017, p. 2.

⁵ Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ L 176, 27.6.2013, p. 338), as corrected by OJ L 208, 2.8.2013, p. 73 and OJ L 20, 25.1.2017, p. 1.

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*