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PROPOSAL

From: Secretary-General of the European Commission,
signed by Mr Jordi AYET PUIGARNAU, Director

date of receipt: 31 January 2019

To: Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of
the European Union

No. Cion doc.: COM(2019) 32 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 Annex IX (Financial Services) to the EEA Agreement
(Markets in Financial Instruments Regulation (MiFIR) and Directive MiFID
II)

Delegations will find attached document COM(2019) 32 final.

Encl.: COM(2019) 32 final



Brussels, 31.1.2019
COM(2019) 32 final

2019/0022 (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

(Markets in Financial Instruments Regulation (MiFIR) and Directive MiFID II)

(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 the Markets in Financial Instruments Regulation (MiFiR) and and Directive MiFID II¹ into the EEA Agreement.

The adaptations appearing in the drafts of the annexed Decisions 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 2894/94² 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

¹ Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012, as corrected by OJ L 270, 15.10.2015, p. 4, OJ L 187, 12.7.2016, p. 30 and OJ L 278, 27.10.2017, p. 54.

Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, as corrected by OJ L 188, 13.7.2016, p. 28, OJ L 273, 8.10.2016, p. 35 and OJ L 64, 10.3.2017, p. 116.

² OJ L 305, 30.11.1994, p. 6–8.

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.

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**

Articles 11-13, Article 41(2) – Prudential assessment of non-resident proposed acquirers (Joint declaration to the JCD) and most-favoured treatment for EEA firms (adaptation (f) relative to Directive 2014/65/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 2014/65/EU is without prejudice to national rules of general application concerning the screening for security or public order of foreign direct investment.

In addition, adaptation (f) clarifies that third-country firms may not be treated more favourably than EEA firms when authorised by an EEA national competent or sectoral authority (NCA). Waivers for equity instruments (adaptation (g) relative to Regulation (EU) No 600/2014)

Article 4(4) MiFIR provides that ESMA shall monitor the application of waivers granted by NCAs, and submit an annual report to the Commission. As ESMA will also be competent to monitor the application of waivers in the EEA EFTA States, adaptation (g)(i) ensures that ESMA shall also submit its annual report to the EFTA Surveillance Authority to enable it to carry out its surveillance function pursuant to Article 109 EEA.

In addition, the cut-off date for waivers, granted by EEA EFTA NCAs pursuant to legislation in force prior to MiFIR and to be reviewed by ESMA by 3 January 2019 in accordance with Article 4(7) MiFIR, is adjusted by adaptation (g)(ii) to reflect the date of entry into force of MiFIR in an EEA context.

Opt-out notifications by trading venues (adaptation (i) relative to Regulation (EU) No 600/2014)

Pursuant to Article 36(5) MiFIR, a trading venue shall notify ESMA and its NCA if it does not wish to be bound by Article 36 for exchange-traded derivatives.

As regards trading venues in the EEA EFTA States, the EFTA Surveillance Authority is the competent supervisory authority and shall receive their notifications. Adaptation (i)(i) therefore adjusts the text of Article 36(5) MiFIR to that effect.

In order to guarantee the transparency of information on the extended internal market for all EEA operators, adaptation (i)(ii) provides that ESMA shall also include the notifications received by the EFTA Surveillance Authority on its list for publication.

Obligation to license new benchmarks (adaptation (j) relative to Regulation (EU) No 600/2014)

In line with Art. 7 EEA, only acts that have been incorporated into the EEA Agreement are binding upon the EEA EFTA States. The obligation to license new benchmarks developed after the date of entry into force of MiFIR may hence only apply as from the date of entry into force of the Joint Committee Decision incorporating it into the EEA Agreement. Adaptation (j)(i) adjusts the text of Article 37(2) to that effect.

In addition, adaptation (j)(ii) adjusts references to Articles 101 and 102 TFEU regarding competition rules to point at Articles 53 and 54 EEA, which form the common legal framework of reference between the Contracting Parties to the EEA Agreement.

Proposal for a

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(Markets in Financial Instruments Regulation (MiFIR) and Directive MiFID II)

(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 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, amend Annex IX to the EEA Agreement, which contains provisions on financial services.
- (3) Regulation (EU) No 600/2014 of the European Parliament and of the Council⁵ and Directive 2014/65/EU of the European Parliament and of the Council⁶ are to be incorporated into the EEA Agreement.

³ OJ L 305, 30.11.1994, p. 6.

⁴ OJ L 1, 3.1.1994, p. 3.

⁵ Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012, as corrected by OJ L 270, 15.10.2015, p. 4, OJ L 187, 12.7.2016, p. 30 and OJ L 278, 27.10.2017, p. 54.

⁶ Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, as corrected by OJ L 188, 13.7.2016, p. 28, OJ L 273, 8.10.2016, p. 35 and OJ L 64, 10.3.2017, p. 116.

- (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,

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 decisions 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*