



EUROPEAN
COMMISSION

Brussels, 15.12.2022
COM(2022) 742 final

2022/0429 (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 XI (Electronic communication, audiovisual services and information society) and Protocol 37 (containing the list provided for in Article 101) to the EEA Agreement

(Cybersecurity Act)

(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 XI (Electronic communication, audiovisual services and information society) and Protocol 37 (containing the list provided for in Article 101) 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 XI (Electronic communication, audiovisual services and information society) and Protocol 37 (containing the list provided for in Article 101) to the EEA Agreement.

The purpose of the envisaged act is to incorporate Regulation (EU) 2019/881 of the European Parliament and of the Council of 17 April 2019 on ENISA (the European Union Agency for Cybersecurity) and on information and communications technology cybersecurity certification and repealing Regulation (EU) 526/2013 (Cybersecurity Act)¹ into the EEA Agreement.

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 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.

¹ OJ L 151, 7.6.2019, p. 15.

The annexed draft Decision of the EEA Joint Committee introduces participation rights for the EEA EFTA States in ENISA, which 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’*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 EEA Agreement.

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 Joint Committee Decision incorporates Regulation (EU) 2019/881 into the EEA Agreement, it is appropriate to base this Council decision on the same substantive legal base as the act that is incorporated. Therefore, the substantive legal basis of the proposed decision is Article 114 of the TFEU.

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.

4.3. 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.

5. PUBLICATION OF THE ENVISAGED ACT

As the act of the EEA Joint Committee will amend Annex XI (Electronic communication, audiovisual services and information society) and Protocol 37 (containing the list provided for in Article 101) 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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(Cybersecurity Act)

(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, Annex XI (Electronic communication, audiovisual services and information society) and Protocol 37 (containing the list provided for in Article 101) to the EEA Agreement.
- (3) Regulation (EU) 2019/881 of the European Parliament and of the Council⁵ is to be incorporated into the EEA Agreement.
- (4) Annex XI and Protocol 37 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,

³ OJ L 305, 30.11.1994, p. 6.

⁴ OJ L 1, 3.1.1994, p. 3.

⁵ Regulation (EU) 2019/881 of the European Parliament and of the Council of 17 April 2019 on ENISA (the European Union Agency for Cybersecurity) and on information and communications technology cybersecurity certification and repealing Regulation (EU) No 526/2013 (Cybersecurity Act) (OJ L 151, 7.6.2019, p. 15).

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 XI (Electronic communication, audiovisual services and information society) and Protocol 37 (containing the list provided for in Article 101) 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*



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ANNEX

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to the

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ANNEX

DECISION OF THE EEA JOINT COMMITTEE

No [...]

of [...]

amending Annex XI (Electronic communication, audiovisual services and information society) and Protocol 37 (containing the list provided for in Article 101) to the EEA Agreement

THE EEA JOINT COMMITTEE,

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

Whereas:

- (1) Regulation (EU) 2019/881 of the European Parliament and of the Council of 17 April 2019 on ENISA (the European Union Agency for Cybersecurity) and on information and communications technology cybersecurity certification and repealing Regulation (EU) No 526/2013 (Cybersecurity Act)¹ is to be incorporated into the EEA Agreement.
- (2) Regulation (EU) 2019/881 repeals Regulation (EU) No 526/2013 of the European Parliament and of the Council², which is incorporated into the EEA Agreement and which is consequently to be repealed under the EEA Agreement.
- (3) Annex XI and Protocol 37 to the EEA Agreement should therefore be amended accordingly,

HAS ADOPTED THIS DECISION:

Article 1

The text of point 5cp (Regulation (EU) No 526/2013 of the European Parliament and of the Council) of Annex XI to the EEA Agreement is replaced by the following:

‘32019 R 0881: Regulation (EU) 2019/881 of the European Parliament and of the Council of 17 April 2019 on ENISA (the European Union Agency for Cybersecurity) and on information and communications technology cybersecurity certification and repealing Regulation (EU) No 526/2013 (Cybersecurity Act) (OJ L 151, 7.6.2019, p. 15).

The text of the Regulation shall, for the purposes of this Agreement, be read with the following adaptations:

- (a) Unless otherwise stipulated below, and notwithstanding the provisions of Protocol 1 to the Agreement, the term ‘Member State(s)’ and other terms referring to their authorities contained in the Regulation shall be understood to include, in addition to their meaning in the Regulation, the EFTA States and their authorities.

¹ OJ L 151, 7.6.2019, p. 15.

² OJ L 165, 18.6.2013, p. 41.

- (b) As regards the EFTA States, the Agency shall, as and when appropriate, assist the EFTA Surveillance Authority or the Standing Committee, as the case may be, in the performance of their respective tasks.
- (c) As regards the EFTA States, references to Union law shall be understood as references to the EEA Agreement.
- (d) The following paragraph shall be added in Article 14:
 “5. The EFTA States shall participate fully in the Management Board and shall within it have the same rights and obligations as EU Member States, except for the right to vote.”
- (e) The following paragraph shall be added in Article 28:
 “4. Regulation (EC) No 1049/2001 shall, for the application of this Regulation, apply to any documents of the Agency regarding the EFTA States as well.”
- (f) The following paragraph shall be added in Article 30:
 “3. The EFTA States shall participate in the contribution from the Union referred to in paragraph 1 point (a). For this purpose, the procedures laid down in Article 82(1)(a) of and Protocol 32 to the EEA Agreement shall apply *mutatis mutandis*.”
- (g) The following paragraph shall be added in Article 34:
 “By way of derogation from Article 12(2)(a) and 82(3)(a) of the Conditions of employment of Other Servants, nationals of the EFTA States enjoying their full rights as citizens may be engaged under contract by the Executive Director of the Agency.”
- (h) The following paragraph shall be added in Article 35:
 “The EFTA States shall grant privileges and immunities to the Agency and its staff equivalent to those contained in the Protocol on Privileges and Immunities of the European Union.”
- (i) The following paragraph shall be added in Article 40:
 “3. By way of derogation from Articles 12(2)(e), 82(3)(e) and 85(3) of the Conditions of Employment of Other Servants of the European Union, the languages referred to in Article 129(1) of the EEA Agreement shall be considered by the Agency, in respect of its staff, as languages of the Union referred to in Article 55(1) of the Treaty on European Union.”
- (j) The following paragraph shall be added in Article 62:
 “6. The EFTA States shall participate fully in the European Cybersecurity Certification Group, except for the right to vote.”

Article 2

The following point is added in Protocol 37 to the EEA Agreement:

- ‘43. European Cybersecurity Certification Group (Regulation (EU) 2019/881 of the European Parliament and of the Council).’

Article 3

The text of Regulation (EU) 2019/881 in the Icelandic and Norwegian languages, to be published in the EEA Supplement to the *Official Journal of the European Union*, shall be authentic.

Article 4

This Decision shall enter into force on [...], provided that all the notifications under Article 103(1) of the EEA Agreement have been made*, or on the day of the entry into force of Decision of the EEA Joint Committee No .../... of [...]³ [incorporating { Directive (EU) 2016/1148 (NIS Directive)} into the EEA Agreement], whichever is the later.

Article 5

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

[...]

* [No constitutional requirements indicated.] [Constitutional requirements indicated.]
³ OJ L ...

Joint Declaration by the Contracting Parties
**to Decision No .../... incorporating Regulation (EU) 2019/881 of the European
Parliament and of the Council into the Agreement**

The parties acknowledge that the incorporation of this act is without prejudice to the direct application of Protocol 7 on the privileges and immunities of the European Union to the nationals of EFTA states in the territory of each Member State of the European Union, pursuant to Article 11 of that Protocol.