EUROPEAN
COMMISSION

Brussels, 17.12.2024
COM(2024) 574 final

2024/0316 (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

(DORA)

(Text with EEA relevance)

EN EN

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.

The purpose of the envisaged act is to incorporate into the EEA Agreement Regulation (EU) 2022/2554 on digital operational resilience for the financial sector[1] and Directive (EU) 2022/2556 as regards digital operational resilience for the financial sector[2].

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

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1 Regulation (EU) 2022/2554 of the European Parliament and of the Council of 14 December 2022 on digital operational resilience for the financial sector and amending Regulations (EC) No 1060/2009, (EU) No 648/2012, (EU) No 600/2014, (EU) No 909/2014 and (EU) 2016/1011, OJ L 333, 27.12.2022, p. 1.

2 Directive (EU) 2022/2556 of the European Parliament and of the Council of 14 December 2022 amending Directives 2009/65/EC, 2009/138/EC, 2011/61/EU, 2013/36/EU, 2014/59/EU, 2014/65/EU, (EU) 2015/2366 and (EU) 2016/2341 as regards digital operational resilience for the financial sector, OJ L 333, 27.12.2022, p. 153.

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 replicates in essence the financial services approach to the role of the EU financial supervisory authorities and EFTA Surveillance Authority for digital operational resilience for the financial sector, which goes beyond what can be considered mere technical adaptations in the sense of Council Regulation (EC) No 2894/94[3]. 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*'[4].

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 (EC) No 2894/94.

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 (EC) 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.

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[3] Council Regulation (EC) No 2894/94 of 28 November 1994 concerning arrangements for implementing the Agreement on the European Economic Area, OJ L 305, 30.11.1994, p. 6.

[4] 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.

4.2.2. Application to the present case

Since the Joint Committee Decision incorporates into the EEA Agreement Regulation (EU) 2022/2554 and Directive (EU) 2022/2556, it is appropriate to base this Council decision on the same substantive legal base as the acts that are incorporated. Therefore, the substantive legal basis of the proposed decision is Article 53(1) and Article 114 of the TFEU.

4.3. Conclusion

The legal basis of the proposed decision should be Article 53(1) and Article 114 TFEU, in conjunction with Article 218(9) TFEU and Article 1(3) of Council Regulation (EC) No 2894/94.

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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(DORA)

(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 53(1) and 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 Area[5], 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[6] ('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) 2022/2554 of the European Parliament and of the Council[7] and Directive (EU) 2022/2556 of the European Parliament and of the Council[8] should be incorporated into the EEA Agreement.

(4) Annex IX (Financial services) 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,

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5 OJ L 305, 30.11.1994, p. 6.

6 OJ L 1, 3.1.1994, p. 3.

7 Regulation (EU) 2022/2554 of the European Parliament and of the Council of 14 December 2022 on digital operational resilience for the financial sector and amending Regulations (EC) No 1060/2009, (EU) No 648/2012, (EU) No 600/2014, (EU) No 909/2014 and (EU) 2016/1011, OJ L 333, 27.12.2022, p. 1.

8 Directive (EU) 2022/2556 of the European Parliament and of the Council of 14 December 2022 amending Directives 2009/65/EC, 2009/138/EC, 2011/61/EU, 2013/36/EU, 2014/59/EU, 2014/65/EU, (EU) 2015/2366 and (EU) 2016/2341 as regards digital operational resilience for the financial sector, OJ L 333, 27.12.2022, p. 153.

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 of 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

EUROPEAN
COMMISSION

Brussels, 17.12.2024
COM(2024) 574 final

ANNEX

ANNEX

to the

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(DORA)

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ANNEX

DRAFT DECISION OF THE EEA JOINT COMMITTEE

No […]

of […]

amending Annex IX (Financial services) 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) 2022/2554 of the European Parliament and of the Council of 14 December 2022 on digital operational resilience for the financial sector and amending Regulations (EC) No 1060/2009, (EU) No 648/2012, (EU) No 600/2014, (EU) No 909/2014 and (EU) 2016/1011[1] is to be incorporated into the EEA Agreement.

(2) Directive (EU) 2022/2556 of the European Parliament and of the Council of 14 December 2022 amending Directives 2009/65/EC, 2009/138/EC, 2011/61/EU, 2013/36/EU, 2014/59/EU, 2014/65/EU, (EU) 2015/2366 and (EU) 2016/2341 as regards digital operational resilience for the financial sector[2] is to be incorporated into the EEA Agreement.

(3) Annex IX to the EEA Agreement should therefore be amended accordingly,

HAS ADOPTED THIS DECISION:

Article 1

Annex IX to the EEA Agreement shall be amended as follows:

1. The following indent is added in point 1 (Directive 2009/138/EC of the European Parliament and of the Council), point 14 (Directive 2013/36/EU of the European Parliament and of the Council), point 19b (Directive 2014/59/EU of the European Parliament and of the Council), point 30 (Directive 2009/65/EC of the European Parliament and of the Council), point 31ba (Directive 2014/65/EU of the European Parliament and of the Council) and point 31bb (Directive 2011/61/EU of the European Parliament and of the Council);

   '- **32022 L 2556**: Directive (EU) 2022/2556 of the European Parliament and of the Council of 14 December 2022 (OJ L 333, 27.12.2022, p. 153).'

2. The following is added in point 16e (Directive (EU) 2015/2366 of the European Parliament and of the Council) and point 31d (Directive (EU) 2016/2341 of the European Parliament and of the Council):

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[1] OJ L 333, 27.12.2022, p. 1.
[2] OJ L 333, 27.12.2022, p. 153.

‘, as amended by:

- **32022 L 2556**: Directive (EU) 2022/2556 of the European Parliament and of the Council of 14 December 2022 (OJ L 333, 27.12.2022, p. 153).’

3. The following is inserted after point 31pc (Commission Delegated Regulation (EU) 2023/2486):

‘31q. **32022 R 2554**: Regulation (EU) 2022/2554 of the European Parliament and of the Council of 14 December 2022 on digital operational resilience for the financial sector and amending Regulations (EC) No 1060/2009, (EU) No 648/2012, (EU) No 600/2014, (EU) No 909/2014 and (EU) 2016/1011 (OJ L 333, 27.12.2022, p. 1).

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

(a) Notwithstanding the provisions of Protocol 1 to this Agreement, and unless otherwise provided for in this Agreement, the terms Member State(s) and competent authorities shall be understood to include, in addition to their meaning in the Regulation, the EFTA States and their competent authorities, respectively.

(b) Unless otherwise provided for in this Agreement, the European Supervisory Authorities (ESAs) and the EFTA Surveillance Authority shall cooperate, exchange information and consult each other for the purposes of the Regulation, in particular prior to taking any action.

(c) Decisions, requests, recommendations, opinions, plans and other measures of the EFTA Surveillance Authority under Articles 31, 33, 35-39, 42 and 43 shall, without undue delay, be adopted on the basis of drafts prepared by the competent ESA pursuant to Article 31(1) at its own initiative or at the request of the EFTA Surveillance Authority.

(d) When the Regulation refers to the national central banks, it shall, as regards Liechtenstein, refer to the Ministry of Finance in Liechtenstein.

(e) In point (61) of Article 3, the words “or the EFTA Surveillance Authority, as the case may be” shall be inserted after the words “European Supervisory Authority”.

(f) In point (30) of Article 3 and Article 55(3), the words “Union or national law” shall be replaced with “provisions of the EEA Agreement or national law”.

(g) In Articles 6(10) and 19(5), the words “Union and national sectoral law” shall be replaced with “the EEA Agreement and national sectoral law”.

(h) In Article 19(7), the words “and the national central banks of the EFTA States” shall be inserted after the words “members of the European System of Central Banks”.

(i) In Article 31(1):

(i) the words “, or the EFTA Surveillance Authority, as regards ICT third-party service providers established in an EFTA State or ICT third-party service providers established in a third country but with a subsidiary in an EFTA State," shall be inserted after the word "Joint Committee";

(ii) the words "or, as the case may be, the EFTA Surveillance Authority," shall be inserted after the word "the ESA that is responsible";

(iii) the following shall be added to point (b):

"The EFTA Surveillance Authority shall be the Lead Overseer for each critical ICT third-party service providers established in an EFTA State, or ICT third-party service providers established in a third country but with a subsidiary in an EFTA State. The ESAs shall, through the Joint Committee, appoint the relevant ESA that is to assist the EFTA Surveillance Authority in fulfilling its role under the Regulation, including preparing the drafts referred to in adaptation (c).

(j) In Article 31(5), the words ", or the EFTA Surveillance Authority, as the case may be" shall be inserted after the word "Joint Committee".

(k) In Article 31(8) (ii), the words "or, as regards the EFTA States, tasks for the purposes of supporting the same tasks as referred to in Article 127(2) of the Treaty on the Functioning of the European Union" shall be inserted after the words "Treaty on the Functioning of the European Union".

(l) In Article 31(11), the words ", or the EFTA Surveillance Authority, as the case may be" after the words "Joint Committee".

(m) In Article 32(4), the following subparagraphs shall be added:

"The competent authorities of the EFTA States shall have the same rights and obligations as the competent authorities of the EU Member States in the work of the Oversight Forum.

The EFTA Surveillance Authority shall have the right to appoint two representatives to the Oversight Forum, one of which shall be a high-level representative, with the same rights and obligations as the representatives of the ESAs.".

(n) In Article 32(8), the words "Union rules" shall be replaced by the words "provisions of the EEA Agreement".

(o) In Article 34(1), the following sentence shall be added:

"The EFTA Surveillance Authority, in its role as a Lead Overseer, shall participate in JON.".

(p) In Article 35(3), the following subparagraph shall be added:

"Before preparing a draft recommendation under paragraph 1, point (d) for the EFTA Surveillance Authority, the responsible ESA shall give the opportunity to the ICT third-party service provider to provide, within 30 calendar days, relevant information evidencing the expected impact on costumers that are entities falling outside of the scope of this Regulation and, where appropriate, formulating solutions to mitigate risks.".

(q) In Article 35(9), the following sentence shall be added:

"The Standing Committee of the EFTA States shall determine the allocation of the amounts periodic penalty payments collected by the EFTA Surveillance Authority, in its role as a Lead Overseer.".

(r) In Article 35(11), the following subparagraph shall be inserted after the first subparagraph:

"Before preparing a draft decision on periodic penalty payments under paragraph 6 for the EFTA Surveillance Authority, the responsible ESA shall give the representatives of the critical ICT third-party service provider subject to the proceedings the opportunity to be heard on the findings and shall base its decisions only on findings on which the critical ICT third-party service provider subject to the proceedings has had an opportunity to comment.".

(s) In Article 36(2), the words "or the EFTA Surveillance Authority" shall be inserted after the words "EBA, ESMA or EIOPA".

(t) In Article 37(3), as regards the EFTA States, point (f) shall read as follows:

"indicate the right to have the decision reviewed by the EFTA Court in accordance with Article 36 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice.".

(u) In Article 40(2):

(i) the words "and the EFTA Surveillance Authority" shall be added after the words "the ESAs".

(ii) the following subparagraph shall be added:

"The participation of the EFTA Surveillance Authority in the joint examination team shall, in cases when the oversight activities do not involve ICT third-party service provider or a subsidiary established in an EFTA State, be on a voluntary basis.".

(v) In Article 49(1), the words "and the EFTA Surveillance Authority" shall be inserted after the word "ESAs".

(w) In Article 49(2) and 56(1), the words ", the EFTA Surveillance Authority" shall be inserted after the word "ESAs".

(z) In Article 64, as regards the EFTA States, the words "17 January 2025" shall read "a date designated under national law no later than 12 months after the date of entry into force of Decision of the EEA Joint Committee No [nn/yyyy] of month/year] (This decision)."

2. The following indent is added in points 31baa (Regulation (EU) No 600/2014 of the European Parliament and of the Council), 31bc (Regulation (EU) No 648/2012 of the European Parliament and of the Council), 31bf (Regulation (EU) No 909/2014 of the European Parliament and of the Council), 31eb (Regulation (EC) No 1060/2009 of the European Parliament and of the Council) and 31l (Regulation (EU) 2016/1011 of the European Parliament and of the Council):

'- **32022 R 2554**: Regulation (EU) 2022/2554 of the European Parliament and of the Council of 14 December 2022 (OJ L 333, 27.12.2022, p. 1).'

Article 2

The texts of Regulation (EU) 2022/2554 and Directive (EU) 2022/2556 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 3

This Decision shall enter into force on […], provided that all the notifications under Article 103(1) of the EEA Agreement have been made[*]**.**

Article 4

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.]