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LEGISLATIVE ACTS AND OTHER INSTRUMENTS

Subject:	Draft DECISION OF THE EEA JOINT COMMITTEE amending Annex IX (Financial services) to the EEA Agreement

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) 2019/2099 of the European Parliament and of the Council of 23 October 2019 amending Regulation (EU) No 648/2012 as regards the procedures and authorities involved for the authorisation of CCPs and requirements for the recognition of third-country CCPs[1] is to be incorporated into the EEA Agreement.

[1] OJ L 322, 12.12.2019, p. 1, ELI: http://data.europa.eu/eli/reg/2019/2099/oj.

(2) The third-country central counterparty (CCP) framework under Regulation (EU) No 648/2012 sets out a mechanism whereby the European Securities and Markets Authority (ESMA), following the adoption of an equivalence decision by the European Commission, is empowered to recognise third-country CCPs to enable such CCPs to provide services to Union entities. Following the recognition of third-country CCPs, ESMA remains responsible for ensuring ongoing compliance of those third-country CCPs with Union requirements. Among other things, ESMA is empowered to monitor third-country regulatory frameworks, conduct investigations and on-site inspections, and impose fines and penalties. With this framework incorporated into the EEA Agreement, a third-country CCP by default cannot be established in an EFTA State. However, a third-country CCP is able to have land or business premises located in an EFTA State or to outsource certain services or activities to a third party established in an EFTA State. Regardless of the location of such land, business premises, or third parties, it is important for the integrity and consistency of the third-country CCP framework under Regulation (EU) No 648/2012 for ESMA's authority to not be undermined even where the object of its activities or duties involve an entity established in an EFTA State. To maintain ESMA's authority with respect to third-country CCPs, while also respecting the balanced approach laid down in the EEA Agreement, the EFTA Surveillance Authority should only carry out its duties and activities within the EFTA States in full cooperation with ESMA. Any decisions to be taken with respect to this framework where the object is an entity established or located in an EFTA State should be taken by the EFTA Surveillance Authority based on a draft decision by ESMA.

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

HAS ADOPTED THIS DECISION:

Article 1

Point 31bc (Regulation (EU) No 648/2012 of the European Parliament and of the Council) of Annex IX to the EEA Agreement shall be amended as follows:

1. The following indent is added:

‘- **32019 R 2099**: Regulation (EU) 2019/2099 of the European Parliament and of the Council of 23 October 2019 (OJ L 322, 12.12.2019, p. 1).’

2. The text of adaptation (d) is replaced by the following:

‘Decisions, interim decisions, notifications, simple requests, revocations of decisions, risk assessments and other measures of the EFTA Surveillance Authority under Articles 25f(1), 25h(4), 25k(1a), 49, 56(2), 58(1), 61(1), 62(3), 63(4), 64(5), 65(1), 66(1), 71 and 73(1) shall, without undue delay, be adopted on the basis of drafts prepared by ESMA at its own initiative or at the request of the EFTA Surveillance Authority.’

3. The text of adaptation (j) is replaced by the following:

‘In Articles 18, 24a and 25, references to Union currencies shall be understood as referring to the official currencies of the Contracting Parties to the EEA Agreement.’

4. The following adaptations are inserted after adaptation (j):

‘(ja) In Article 25:

(i) in the fifth subparagraph of paragraph 2b, as regards the EFTA states, the words “central bank of issue shall also inform the European Parliament and the Council” shall read “central bank of issue shall also inform the European Parliament, the Council, and the Standing Committee of the EFTA States”;

(ii) in the second subparagraph of paragraph 6b, the words “, the EFTA Surveillance Authority” shall be inserted after the words “the Commission”.

(jb) In Article 25c(2), the following point shall be inserted after point (g):

“(h) the EFTA Surveillance Authority.”

(jc) In Article 25e, the words “or the EFTA Surveillance Authority” shall be inserted after the word “ESMA”.

(jd) In Article 25f:

(i) in paragraph 1, the words “or, in the case of related third parties established in an EFTA State, the EFTA Surveillance Authority” shall be inserted after the word “ESMA”;

(ii) in paragraph 2, the words “or the EFTA Surveillance Authority, as the case may be,” shall be inserted after the word “ESMA”;

(iii) in paragraph 3, the words “or, as the case may be, the EFTA Surveillance Authority” shall be inserted after the word “ESMA”;

(iv) in paragraph 3, point (g), the following text shall be added after “Regulation (EU) No 1095/2010”:

“, or, in the case of a decision taken by the EFTA Surveillance Authority, 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.”;

(v) in paragraph 5, the following subparagraph shall be inserted:

“The EFTA Surveillance Authority shall, without undue delay, forward the information received under this Article to ESMA.”

(je) In Article 25g:

(i) the following sentence shall be added after the first sentence of the first subparagraph of paragraph 1:

"In the case of such related third parties established in an EFTA State, the EFTA Surveillance Authority may, in cooperation with ESMA, conduct necessary investigations of such related third parties.";

(ii) in the second sentence of the first subparagraph of paragraph 1, the second subparagraph of paragraph 1, and the first sentence of the first subparagraph of paragraph 2, the words "or, as the case may be, the EFTA Surveillance Authority in cooperation with ESMA" shall be inserted after the word "ESMA";

(iii) the following subparagraph shall be inserted in paragraph 1:

"In the case of such related third parties established in an EFTA State, officials of and other persons authorised by ESMA shall be entitled to assist the EFTA Surveillance Authority in the carrying out of its duties under this Article and have the right to participate in investigations upon ESMA's request.";

(jf) In Article 25h:

(i) the following sentence shall be added after the first sentence of the first subparagraph of paragraph 1:

"In the case of business premises, land or property of Tier 2 CCPs and of such related third parties located or established in an EFTA State, the EFTA Surveillance Authority, in cooperation with ESMA, may conduct all necessary on-site inspections of those business premises, land or property in an EFTA State.";

(ii) in the second subparagraph of paragraph 1, the words ", or, as the case may be, the EFTA Surveillance Authority, in cooperation with ESMA" shall be inserted after the word "ESMA";

(iii) in paragraph 2 and the second subparagraph of paragraph 3, the words ", or, as the case may be, the EFTA Surveillance Authority," shall be inserted after the first instances of the word "ESMA";

(iv) in paragraph 2, the words "or, as the case may be, the EFTA Surveillance Authority" shall be inserted after the second instance of the word "ESMA";

(v) in paragraph 2, the following subparagraph shall be inserted:

"In the case of business premises, land or property that is located in an EFTA State and belonging to the legal persons subject to an inspection, officials of and other persons authorised by ESMA shall be entitled to assist the EFTA Surveillance Authority in the carrying out of its duties under this Article and have the right to participate in on-site inspections."

(vi) in paragraph 4, the following subparagraph shall be inserted:

"Tier 2 CCPs having business premises, land or property located in an EFTA State or related third parties referred to in paragraph 1 which are established in an EFTA State shall submit to on-site inspections ordered by decision of the EFTA Surveillance Authority. The decision by the EFTA Surveillance Authority shall be valid only for those business premises, land or property physically located in an EFTA State. The decision shall specify the subject matter and purpose of the inspection, appoint the date on which it is to begin and indicate the periodic penalty payment provided for in Article 25k as well as the right to have 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."

(jg) In Article 25k:

(i) the following paragraph is inserted after paragraph 1:

"1a. The EFTA Surveillance Authority shall, by decision, impose periodic penalty payments to compel a related third party referred to in Article 25f(1) which is established in an EFTA State to provide complete information which has been requested by a decision pursuant to Article 25f;"

(ii) as regards the EFTA States, in paragraph 4, the words "ESMA's" and "ESMA" shall read "the EFTA Surveillance Authority's" and "the EFTA Surveillance Authority", respectively.

(jh) In Article 25l:

(i) in paragraph 1, the following subparagraphs shall be inserted:

"Before preparing any draft for the EFTA Surveillance Authority on a periodic penalty payment under Article 25k, ESMA shall give the persons subject to the proceedings the opportunity to be heard on its findings. ESMA shall base its draft only on findings on which the persons subject to the proceedings have had an opportunity to comment.

The EFTA Surveillance Authority shall base its decisions under Article 25k only on findings on which the persons subject to the proceedings have had an opportunity to comment.

The third and fourth subparagraphs of this paragraph shall not apply where urgent action is needed in order to prevent significant and imminent damage to the financial system. In such a case, ESMA may prepare a draft and the EFTA Surveillance Authority may adopt an interim decision. ESMA shall give the persons concerned the opportunity to be heard as soon as possible after preparing such a draft.";

(ii) as regards the EFTA States, in paragraph 2, the words "ESMA's file" shall read "the file of ESMA and the EFTA Surveillance Authority";

(iii) as regards the EFTA States, in paragraph 2, the words "ESMA's internal preparatory documents" shall read "the internal preparatory documents of ESMA and the EFTA Surveillance Authority".

(ji) In Article 25m:

(i) in paragraph 1, the following subparagraph shall be inserted:

"The EFTA Surveillance Authority shall also disclose to the public every periodic penalty that it has imposed pursuant to Article 25k of this Regulation subject to the conditions laid down in this paragraph as regards the disclosure of periodic penalties by ESMA.";

(ii) in paragraph 3, the following subparagraph shall be inserted:

"Where the EFTA Surveillance Authority decides to impose no periodic penalty payments under Article 25k on related third parties referred to in Article 25f(1) located or established in an EFTA State, the EFTA Surveillance Authority shall inform ESMA, the European Parliament, the Council, the Commission, and the Standing Committee of the EFTA States accordingly and shall set out the reasons for its decision."

(iii) in paragraph 5, the following subparagraph shall be inserted:

"The Standing Committee of the EFTA States shall determine the allocation of the amounts of the periodic penalty payments collected by the EFTA Surveillance Authority."

(jj) In Article 49:

(i) in the first sentence of paragraph 1a, the words "or, in the case of a CCP established in an EFTA State, the EFTA Surveillance Authority" shall be inserted after the word "ESMA";

(ii) in the third sentence of paragraph 1a and in paragraphs 1b, 1d and 1e, the words "or, in the case of a CCP established in an EFTA State, the EFTA Surveillance Authority, " shall be inserted after the word "ESMA".'

Article 2

The text of Regulation (EU) 2019/2099 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 …, …

For the EEA Joint Committee
The President

The Secretaries
To the EEA Joint Committee

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[*] [No constitutional requirements indicated.] [Constitutional requirements indicated.]