

DECISION OF THE EEA JOINT COMMITTEE

No 206/2016

of 30 September 2016

amending Annex IX (Financial services) to the EEA Agreement [2017/283]

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) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories⁽¹⁾ is to be incorporated into the EEA Agreement.
- (2) The EU and EEA EFTA Ministers of Finance and Economy, in their conclusions⁽²⁾ of 14 October 2014 regarding the incorporation of the EU ESAs Regulations into the EEA Agreement, welcomed the balanced solution found between the Contracting Parties, taking into account the structure and objectives of the EU ESAs Regulations and of the EEA Agreement, as well as the legal and political constraints of the EU and the EEA EFTA States.
- (3) The EU and EEA EFTA Ministers of Finance and Economy underlined that, in accordance with the two-pillar structure of the EEA Agreement, the EFTA Surveillance Authority will take decisions addressed to EEA EFTA competent authorities or market operators in the EEA EFTA States. The EU ESAs will be competent to perform actions of a non-binding nature, also vis-à-vis EEA EFTA competent authorities and market operators. Action on either side will be preceded by, as appropriate, consultation, coordination or exchange of information between the EU ESAs and the EFTA Surveillance Authority.
- (4) To ensure integration of the EU ESAs' expertise in the process and consistency between the two pillars, individual decisions and formal opinions of the EFTA Surveillance Authority addressed to one or more individual EEA EFTA competent authorities or market operators will be adopted on the basis of drafts prepared by the relevant EU ESA. This will preserve key advantages of supervision by a single authority. These principles will apply in particular to direct supervision by ESMA of trade repositories.
- (5) The Contracting Parties share the understanding that this Decision implements the agreement that was reflected in these conclusions, and should therefore be interpreted in line with the principles that they embody.
- (6) 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 16b (Directive 98/26/EC of the European Parliament and of the Council):

‘— **32012 R 0648**: Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 (OJ L 201, 27.7.2012, p. 1).’

2. The following point is inserted after point 31bb (Directive 2011/61/EU of the European Parliament and of the Council):

‘31bc. **32012 R 0648**: Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (OJ L 201, 27.7.2012, p. 1).’

⁽¹⁾ OJ L 201, 27.7.2012, p. 1.

⁽²⁾ Council Conclusions on the EU and EEA EFTA Ministers of Finance and Economy, 14178/1/14 REV1.

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 term “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 Securities and Markets Authority (ESMA) 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. This includes, in particular the duty to pass to each other, without undue delay, the information needed for each body to carry out its duties under this Regulation, such as the preparation of drafts by ESMA as set out in point (d). This extends to, amongst others, information received by either body as a result of applications for registration or replies to requests for information submitted to market operators, or obtained by either body during investigations or on-site inspections.

Without prejudice to Article 109 of this Agreement, ESMA and the EFTA Surveillance Authority shall pass to the other body any application, information, complaint or request which fall within the competence of that body.

In case of disagreement between ESMA and the EFTA Surveillance Authority with regard to the administration of the provisions of the Regulation, the Chairperson of ESMA and the College of the EFTA Surveillance Authority shall, taking into account the urgency of the matter, without undue delay convene a meeting to find consensus. Where such consensus is not found, the Chairperson of ESMA or the College of the EFTA Surveillance Authority may request that the Contracting Parties refer the matter to the EEA Joint Committee which shall deal with it in accordance with Article 111 of this Agreement which shall apply *mutatis mutandis*. In accordance with Article 2 of Decision of the EEA Joint Committee No 1/94 of 8 February 1994 adopting the Rules of Procedure of the EEA Joint Committee (OJ L 85, 30.3.1994, p. 60), a Contracting Party may request immediate organisation of meetings in urgent circumstances. Notwithstanding this paragraph, a Contracting Party may at any time refer the matter to the EEA Joint Committee at its own initiative in accordance with Articles 5 or 111 of this Agreement.

- (c) References to “members of the ESCB” or to “central banks” shall be understood to include, in addition to their meaning in the Regulation, the national central banks of the EFTA States, except as regards Liechtenstein for which such references shall not apply.
- (d) Decisions, interim decisions, notifications, simple requests, revocations of decisions and other measures of the EFTA Surveillance Authority under Articles 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.
- (e) In Articles 4(2)(a) and 7(5) and in Article 11(6) and (10), the words “or the EFTA Surveillance Authority, as the case may be,” shall be inserted after the word “ESMA”.
- (f) In Article 6(2)(c), the words “in the Union and, where it differs, in the EFTA States” shall be inserted after the words “takes effect”.
- (g) In Articles 9(1) and 11(3), as regards the EFTA States, the words “16 August 2012” shall read “the date of entry into force of Decision of the EEA Joint Committee No 206/2016 of 30 September 2016.”
- (h) In Article 12(2), as regards the EFTA States, the words “By 17 February 2013” shall read “Within sixth months of the date of entry into force of Decision of the EEA Joint Committee No 206/2016 of 30 September 2016”.
- (i) In Article 17:
 - (i) in paragraph 4 and in the first subparagraph of paragraph 5, the words “or the EFTA Surveillance Authority, as the case may be,” shall be inserted after the word “ESMA”;

- (ii) in paragraph 5, the words “Union law” shall be replaced by the words “the EEA Agreement”.
- (j) In Articles 18 and 25, the words “Union currencies” shall be replaced by the words “official currencies of Contracting Parties to the EEA Agreement”.
- (k) In Article 55(1), the words “or, in the case of a trade repository established in an EFTA State, with the EFTA Surveillance Authority,” shall be inserted after the word “ESMA”.
- (l) In Article 56:
 - (i) in paragraph 1, the words “or, in the case of a trade repository established in an EFTA State, to 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”.
- (m) In Article 57, the words “or the EFTA Surveillance Authority, as the case may be,” shall be inserted after the word “ESMA”.
- (n) In Article 58, the words “or the EFTA Surveillance Authority, as the case may be,” shall be inserted after the word “ESMA”.
- (o) In Article 59:
 - (i) in paragraph 1, the words “or the EFTA Surveillance Authority, as the case may be,” shall be inserted after the word “ESMA”;
 - (ii) paragraph 2 shall be replaced by the following:

“ESMA and the EFTA Surveillance Authority shall communicate to each other and to the Commission any decision taken in accordance with paragraph 1.”.
- (p) In Article 60, the words “or the EFTA Surveillance Authority” shall be inserted after the word “ESMA”.
- (q) In Article 61:
 - (i) in paragraph 1, the words “or, in the case of trade repositories or related third parties to whom the trade repositories have outsourced operational functions or activities that are established in an EFTA State, the EFTA Surveillance Authority,” shall be inserted after the word “ESMA”;
 - (ii) in paragraph 2, 3 and 5, as regards the EFTA States, the word “ESMA” shall read “the EFTA Surveillance Authority”;
 - (iii) as regards the EFTA States, point (g) of paragraph 3 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.”;
 - (iv) in paragraph 5, the following subparagraph shall be added:

“The EFTA Surveillance Authority shall without undue delay forward the information received under this Article to ESMA.”.
- (r) In Article 62:
 - (i) in paragraph 1, the words “or, in the case a person subject to investigation is established in an EFTA State, the EFTA Surveillance Authority” shall be inserted after the word “ESMA”;
 - (ii) in paragraph 1, the following subparagraph shall be added:

“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.”;

- (iii) as regards the EFTA States, in paragraphs 2, 3, 4 and the first and second sentences of paragraph 6, the word “ESMA” shall read “the EFTA Surveillance Authority”;
- (iv) as regards the EFTA States, the second sentence of paragraph 3 shall read as follows:

“The decision shall specify the subject matter and purpose of the investigation, the periodic penalty payments provided for in Article 66 and 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) as regards the EFTA States, in the third sentence of paragraph 6 the words “ESMA’s file” shall read “the file of ESMA and the EFTA Surveillance Authority”;
- (vi) as regards the EFTA States, the fourth sentence of paragraph 6 shall read as follows:

“The lawfulness of the EFTA Surveillance Authority’s decision shall be subject to review only by the EFTA Court in accordance with the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice.”.
- (s) In Article 63:
 - (i) in paragraph 1, the words “or, in the case of legal persons established in an EFTA State, the EFTA Surveillance Authority,” shall be inserted after the word “ESMA”;
 - (ii) in paragraph 1, the following subparagraph shall be added:

“The EFTA Surveillance Authority shall without undue delay forward the information obtained under this Article to ESMA.”;
 - (iii) as regards the EFTA States, in paragraphs 2 to 7 and the first, second and third sentences of paragraph 9, the word “ESMA” shall read “the EFTA Surveillance Authority”;
 - (iv) in paragraph 2, the following subparagraph shall be added:

“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.”;
 - (v) as regards the EFTA States, the second sentence of paragraph 4 shall read as follows:

“The decision shall specify the subject matter and purpose of the investigation, appoint the date on which it is to begin and indicate the periodic penalty payments provided for in Article 66 as well as 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.”;
 - (vi) as regards the EFTA States, in the fourth sentence of paragraph 9 the words “ESMA’s file” shall read “the file of ESMA and the EFTA Surveillance Authority”;
 - (vii) as regards the EFTA States, the fifth sentence of paragraph 9 shall read as follows:

“The lawfulness of the EFTA Surveillance Authority’s decision shall be subject to review only by the EFTA Court in accordance with the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice.”.
- (t) In Article 64:
 - (i) as regards the EFTA States, in paragraph 1, first sentence, the words “ESMA shall appoint an independent investigating officer within ESMA to investigate the matter” shall read “the EFTA Surveillance Authority shall appoint an independent investigating officer within the EFTA Surveillance Authority to investigate the matter following consultations with ESMA.”;
 - (ii) in paragraph 1, the following subparagraph shall be added:

“The investigating officer appointed by the EFTA Surveillance Authority shall not be involved or have been directly or indirectly involved in the supervision or registration process of the trade repository concerned and shall perform his functions independently from the College of the EFTA Surveillance Authority and ESMA’s Board of Supervisors.”;

- (iii) as regards the EFTA States, in paragraphs 2, 3 and 4, the words “and the EFTA Surveillance Authority” shall be inserted after the word “ESMA”;
- (iv) as regards the EFTA States, in paragraph 5, after the words “Article 67,”, the remainder of the sentence shall read as follows:

“the EFTA Surveillance Authority shall decide if one or more of the infringements listed in Annex I has been committed by the persons who have been subject to investigation, and in such a case, shall take a supervisory measure in accordance with Article 73 and impose a fine in accordance with Article 65.

The EFTA Surveillance Authority shall provide ESMA with all information and files necessary for the performance of its obligation under this paragraph.”;
- (v) in paragraph 6, the words “or the EFTA Surveillance Authority’s” shall be inserted after the words “ESMA’s”;
- (vi) in paragraph 8, as regards the EFTA States, the word “ESMA” shall read “the EFTA Surveillance Authority”.
- (u) In Article 65:
 - (i) in paragraph 1, the words “or, in the case of a trade repository established in an EFTA State, the EFTA Surveillance Authority,” shall be inserted after the word “ESMA”;
 - (ii) as regards the EFTA States, in paragraph 2, the word “ESMA” shall read “the EFTA Surveillance Authority”.
- (v) In Article 66:
 - (i) in paragraph 1, the words “or, in the case the trade repository or person concerned is established in an EFTA State, the EFTA Surveillance Authority,” shall be inserted after the words “ESMA”;
 - (ii) in paragraph 4, as regards the EFTA States, the word “ESMA” shall read “the EFTA Surveillance Authority”.
- (w) In Article 67:
 - (i) in paragraph 1, the following subparagraphs shall be added:

“Before preparing any draft for the EFTA Surveillance Authority under Articles 65 and 66, ESMA shall give the persons subject to the proceedings the opportunity to be heard on its findings. ESMA shall base its drafts only on findings on which the persons subject to the proceedings have had the opportunity to comment.

The EFTA Surveillance Authority shall base its decisions under Articles 65 and 66 only on findings on which the persons subject to the proceedings have had the opportunity to comment.”;
 - (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 “internal preparatory documents of ESMA and the EFTA Surveillance Authority”.
- (x) In Article 68:
 - (i) in paragraph 1, the following shall be added:

“The EFTA Surveillance Authority shall also disclose to the public every fine and periodic penalty that it has imposed pursuant to Articles 65 and 66, subject to the conditions laid down in this paragraph as regards the disclosure of fines and periodic penalties by ESMA”;
 - (ii) as regards the EFTA States, in paragraphs 3 and 4, the word “ESMA” shall read “the EFTA Surveillance Authority”;
 - (iii) as regards the EFTA States, in paragraph 3, the words “the European Parliament, the Council” shall read “ESMA and the Standing Committee of the EFTA States”;

(iv) as regards the EFTA States, in paragraph 4, the words “the Court of Justice” shall read “the EFTA Court”;

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

“The Standing Committee of the EFTA States shall determine the allocation of the amounts of the fines and periodic penalty payments collected by the EFTA Surveillance Authority.”.

(y) In Article 71:

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

(ii) as regards the EFTA States, in paragraph 2, the word “ESMA” shall read “the EFTA Surveillance Authority”;

(iii) in the second sentence of paragraph 3, the words “or, in the case of a trade repository established in an EFTA State, not to prepare a draft for the EFTA Surveillance Authority to that effect,” shall be inserted after the word “concerned”.

(z) In Article 72(1), the following subparagraphs shall be added:

“As regards trade repositories established in an EFTA State, fees shall be charged by the EFTA Surveillance Authority on the same basis as fees charged to other trade repositories in accordance with this Regulation and with the delegated acts referred to in paragraph 3.

The amounts collected by the EFTA Surveillance Authority in accordance with this paragraph shall be passed on to ESMA without undue delay.”.

(za) In Article 73:

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

(ii) as regards the EFTA States, in paragraph 2, the word “ESMA” shall read “the EFTA Surveillance Authority”;

(iii) in paragraph 3, the following subparagraphs shall be added:

“Without undue delay, the EFTA Surveillance Authority shall notify any decision adopted pursuant to paragraph 1 to the trade repository concerned, and shall communicate it to the competent authorities and to the Commission. ESMA shall make public any such decision on its website within 10 working days from the date when it was adopted. The EFTA Surveillance Authority shall also make public any of its own decisions on its website within 10 working days from the date when it was adopted.

When making public a decision of the EFTA Surveillance Authority as referred to in the third subparagraph, ESMA and the EFTA Surveillance Authority shall also make public the right for the trade repository concerned to have the decision reviewed by the EFTA Court, the fact, where relevant, that such proceedings have been instituted, specifying that actions brought before the EFTA Court do not have suspensory effect, and the fact that it is possible for the EFTA Court to suspend the application of the contested decision in accordance with Article 40 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice.”.

(zb) In Article 74:

(i) in paragraph 1, the words “or the EFTA Surveillance Authority, as the case may be,” shall be inserted before the words “may delegate specific supervisory tasks”;

(ii) in paragraphs 2 to 5, the words “or, as the case may be, the EFTA Surveillance Authority” shall be inserted after the word “ESMA”;

(iii) the following paragraph shall be added:

“6. Prior to delegation of a task, the EFTA Surveillance Authority and ESMA shall consult each other.”.

(zc) Articles 75(2) and (3) and 76 shall not apply.

(zd) In Article 81(3), as regards the EFTA States:

(i) in point (f), the words “the Union as referred to in Article 75” shall read “its EFTA State of establishment granting mutual access to, and exchange of information on, derivative contracts held in trade repositories”;

(ii) in point (i), the words “ESMA as referred to in Article 76” shall read “its EFTA State of establishment granting access to information on derivative contracts held in trade repositories established in that EFTA State”;

(iii) the text of point (j) shall read as follows:

“the Agency for the Cooperation of Energy Regulators, subject to the content and entry into force of a decision of the EEA Joint Committee incorporating Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of the Energy Regulators.”.

(zf) In Article 83, the words “or the EFTA Surveillance Authority” shall be inserted after the word “ESMA”.

(zg) In Article 84, the words, the EFTA Surveillance Authority’ shall be inserted after the word “ESMA”.

(zh) In Article 87(2), as regards the EFTA States, the words “by 17 August 2014” shall read “within one year of the date of entry into force of Decision of the EEA Joint Committee No 206/2016 of 30 September 2016”.

(zi) In Article 89:

(i) in paragraph 1, the following subparagraph shall be added after the first subparagraph:

“For three years after the entry into force of Decision of the EEA Joint Committee No 206/2016 of 30 September 2016, the clearing obligation set out in Article 4 shall not apply to OTC derivative contracts that are objectively measurable as reducing investment risks directly relating to the financial solvency of pension scheme arrangements as defined in Article 2(10) that are established in an EFTA State. The transitional period shall also apply to entities established for the purpose of providing compensation to members of pension scheme arrangements in case of a default.”;

(ii) in paragraphs 3, 5, 6 and 8, as regards the EFTA States, the words “are adopted by the Commission” shall read “adopted by the Commission apply in the EEA”;

(iii) in paragraph 3, as regards the EFTA States, the words “decisions of the EEA Joint Committee containing” shall be inserted after the words “entry into force of all the”;

(iv) in paragraphs 5 and 6, as regards the EFTA States, the words “the decisions of the EEA Joint Committee containing” shall be inserted after the words “entry into force of”.

(zj) In points (a) and (c) of Part IV of Annex I and in point (g) of Part I and in point (c) of Part II of Annex II, the words “or the EFTA Surveillance Authority, as the case may be,” shall be inserted after the word “ESMA”.

Article 2

The text of Regulation (EU) No 648/2012 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 1 October 2016, 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 201/2016 of 30 September 2016 ⁽¹⁾, whichever is the later.

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, 30 September 2016.

For the EEA Joint Committee

The President

Bergdís ELLERTSDÓTTIR

(*) Constitutional requirements indicated.

(¹) See page 22 of this Official Journal.