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COVER NOTE

From:	Secretary-General of the European Commission, signed by Mr Jordi AYET PUIGARNAU, Director
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To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
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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 XI (Electronic communication, audiovisual services and information society) and Protocol 37 (containing the list provided for in Article 101) to the EEA Agreement (General Data Protection Regulation)

Delegations will find attached document COM(2018) 249 final.

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Brussels, 2.5.2018
COM(2018) 249 final

2018/0117 (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
(General Data Protection Regulation)**

(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 XI (Electronic communication, audiovisual services and information society) and Protocol 37 (containing the list provided for in Article 101) to the EEA Agreement in order to incorporate the General Data Protection Regulation (Regulation (EU) 2016/679)¹.

- **Consistency with existing policy provisions in the policy area**

The annexed draft 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 their 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 16 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 Commission in cooperation with the EEAS submits the draft Decision of the EEA Joint Committee for adoption by the Council as the Union's position. The Commission would hope to be able to present it 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.

¹ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, (OJ L 119, 4.5.2016, p. 1).

² OJ L 305, 30.11.1994, p. 6–8

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 the incorporation of Regulation (EU) 2016/679 into the EEA Agreement.

5. OTHER ELEMENTS

- **Justification of the main proposed adaptations**

Participation clause (adaptation (a) and (k))

As a result of the incorporation of the GDPR into the EEA Agreement, the supervisory authorities of the EEA EFTA States shall participate to the fullest extent possible in the so-called one-stop-shop and the consistency mechanism and shall, but for the right to vote and to stand for election as chair or deputy chairs of the Board, have the same rights and obligations as supervisory authorities of the EU Member States in the European Data Protection Board (the 'Board'). The positions of the supervisory authorities of the EFTA States shall also be recorded separately.

Adaptation (a) also ensures that the rules of procedures of the Board shall give full effect to the participation of the supervisory authorities of the EEA EFTA States and the EFTA Surveillance Authority with the exception of voting rights and to stand for election as chair or deputy chairs of the Board.

As the GDPR vests national supervisory authorities with competences to be exercised at national level and requires international coordination and convergence practice, the participation on equal footing of the supervisory authorities of the EEA EFTA States in the one-stop-shop mechanism and the consistency mechanism is necessary for coherent supervisory cooperation and convergence in the EEA.

In order to facilitate and ensure consistent enforcement of EEA rules by the EFTA Surveillance Authority regarding the EEA EFTA States and to enable the exercise of the EFTA Surveillance Authority's functions under Article 108 of the EEA Agreement, adaptation (k) provides that the EFTA Surveillance Authority shall have the right to participate in the meetings of the Board without voting rights and that the EFTA Surveillance Authority shall designate a representative for the Board. In addition, as stated above, adaptation (a) provides that the rules of procedures of the Board shall give full effect to the participation of the EFTA Surveillance Authority.

Information on negotiations with third countries (adaptation (f))

The adaptation foresees that the EEA EFTA States are kept informed of consultations with third countries with the aim of adopting an adequacy decision in accordance with the procedure referred to in Article 93(3). As ensured by Article 100 of the EEA Agreement, the EFTA States participate fully in the Committee established pursuant to Article 93, except for the right to vote.

The adaptation also specifies that in cases where the third country or the international organisation undertakes specific obligations regarding the processing of personal data from the Member States, the EU shall take into account the situation of EEA EFTA States and discuss with third countries or international organisations possible mechanisms for subsequent possible application by the EEA EFTA States.

Article 45(1) - Transfer of data to third countries and international organisations (adaptation (e))

A transfer of personal data from an EEA EFTA State to a third country or an international organisation can take place on the basis of an implementing act (adequacy decision) adopted by the Commission which has been incorporated into the EEA Agreement pursuant to the normal procedures described in the EEA Agreement. The purpose of adaptation (e) is to allow for a transfer of data also where the adequacy decision is applied by an EEA EFTA State, pending a decision by the EEA Joint Committee to incorporate that adequacy decision. Adaptation (e) also foresees that before the entry into force of an adequacy decision, each EEA EFTA State shall decide and inform the Commission and the EFTA Surveillance Authority whether it will apply such adequacy decision at the same time as the EU Member States or not. If an EFTA State does not inform the Commission and the EFTA Surveillance Authority, it shall apply the measures at the same time as the EU Member States.

If an agreement on the incorporation of an adequacy decision into the EEA Agreement cannot be reached in the EEA Joint Committee within twelve months of the entry into force of the adequacy decision, any EEA EFTA State may discontinue the application of such measures, until the adequacy decision has been incorporated into the EEA Agreement, and shall inform the Commission and the EFTA Surveillance Authority thereof without delay. This adaptation does not exclude the use of Article 102 of the EEA Agreement, as specified in the adaptation.

If an EEA EFTA State decides to discontinue applying measures adopted pursuant to Article 45(5) (measures regarding a third country, a territory or one or more specified sectors within a third country, or an international organisation, which no longer ensures an adequate level of protection) the other Contracting Parties to the EEA Agreement shall prohibit free flow of personal data to that EEA EFTA State.

Article 46(2) – Application of implementing acts regarding standard data protection clauses (adaptation (h))

This adaptation is built on the same principle as adaptation (e) (see above). The adaptation makes it possible for EFTA controllers or EFTA processors to use standard data protection clauses at the same time as it enters into force in the EU, unless an EFTA State decides not to apply the measure at the same time as the EU Member States.

Disapplying the reference to the “Charter” (adaptation (i))

In line with Article 7 EEA, only acts that have been incorporated into the EEA Agreement are binding upon the EFTA States. The Charter of Fundamental Rights of the European Union is an instrument of the EU’s primary law which is not binding upon non-Member States and is not relevant in an EEA context. Therefore, adaptation (i) to the GDPR disapplies the reference to the Charter contained in Article 58(4).

Articles 63, 64(2), 65(1)(c) and 70(1)(e) – EFTA Surveillance Authority’s requests for advice or opinion from the Board (adaptation (l))

According to adaptation (l) the EFTA Surveillance Authority shall have the right to request advice or opinions from, and to communicate matters to the Board pursuant to Article 63, 64(2), 65(1)(c) and 70(1)(e). Articles where such rights and obligations should apply, and are relevant to the exercise of the EFTA Surveillance Authority’s functions under Article 109 of the Agreement, are defined in the adaptation.

Proposal for a

COUNCIL DECISION

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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**

(General Data Protection Regulation)

(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 Articles 16 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) 2016/679 of the European Parliament and of the Council⁵ is to be incorporated into the EEA Agreement.
- (4) Regulation (EU) 2016/679 repeals[, with effect from 25 May 2018,] Directive 95/46/EC of the European Parliament and of the Council⁶, which is incorporated into

³ OJ L 305, 30.11.1994, p. 6.

⁴ OJ L 1, 3.1.1994, p. 3.

⁵ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, (OJ L 119, 4.5.2016, p. 1).

the EEA Agreement and which is consequently to be repealed under the EEA Agreement [with effect from 25 May 2018].

- (5) Annex XI and Protocol 37 to the EEA Agreement should therefore be amended accordingly.
- (6) 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 XI and Protocol 37 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*

⁶ OJ L 281, 23.11.1995, p. 31.