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PROPOSAL

From:	Secretary-General of the European Commission, signed by Mr Jordi AYET PUIGARNAU, Director
date of receipt:	17 November 2017
To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
No. Cion doc.:	COM(2017) 666 final
Subject:	Proposal for a COUNCIL DECISION on the position to be taken on behalf of the European Union, in the EU-Switzerland Joint Committee concerning a technical revision of the Agreement on direct insurance other than life insurance

Delegations will find attached document COM(2017) 666 final.

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Proposal for a

COUNCIL DECISION

on the position to be taken on behalf of the European Union, in the EU-Switzerland Joint Committee concerning a technical revision of the Agreement on direct insurance other than life insurance

EXPLANATORY MEMORANDUM

1. SUBJECT-MATTER OF THE PROPOSAL

The present proposal concerns the decision establishing the position to be adopted on behalf of the Union in the EU-Switzerland Joint Committee in connection with the envisaged adoption of Decision concerning a technical revision of the Agreement on direct insurance other than life insurance (the 'envisaged act').

2. CONTEXT OF THE PROPOSAL

2.1. The Agreement

The Agreement between the European Economic Community and the Swiss Confederation on direct insurance other than life assurance ('the Agreement') aims to offer specific conditions for Swiss branches of insurers operating in the EU and conversely. In particular, under the Agreement, a Swiss branch in the EU will still be subject to Swiss solvency requirements, thus placing these activities on the same footing as those in Switzerland. The agreement entered into force on 1 January 1993.

2.2. The EU-Switzerland Joint Committee

The Agreement establishes a Joint Committee composed of representatives of Switzerland and representatives of the European Union ('the EU-Switzerland Joint Committee'). Its decisions are taken by mutual agreement (Article 37). Pursuant to Articles 39 and 40(3) of the Agreement, the EU-Switzerland Joint Committee may amend the annexes and protocols to the Agreement.

2.3. The envisaged act of the of the EU-Switzerland Joint Committee

The EU-Switzerland Joint Committee is to adopt the envisaged act, annexed to the proposed Council Decision. The Commission would hope to be able to present it in the Joint Committee at the earliest possible opportunity.

The purpose of the envisaged act is to amend the annexes and protocols to the Agreement in order to incorporate the following revisions:

- Adapt to the new risk-based solvency regimes in the EU (Directive 2009/138/EC Solvency II) and Switzerland (Swiss Solvency Test or SST). Solvency II entered into application on 1 January 2016, and the SST entered into force after the Agreement. Updating the Agreement on this point would ensure that Swiss and EU supervisors apply these modernised frameworks within the Agreement, as they do for insurers outside the Agreement. This is the main reason for this technical revision;
- Update the list of acceptable legal forms of Member States in Annex III. This is relevant in particular for those which joined the EU after the previous revision. The Commission intends to use the list of legal forms of non-life insurance undertakings contained in Annex III of Solvency II;
- Update the Euro-Swiss Franc conversion rate to reflect the current conversion rate.

3. POSITION TO BE ADOPTED ON BEHALF OF THE UNION

It is appropriate to establish the position to be taken on the Union's behalf in the EU-Switzerland Joint Committee concerning the envisaged act, as it will be binding on the Union.

The envisaged act limits itself to a technical revision of the existing Agreement. It is consistent with existing provisions on the treatment of branches under Directive 2009/138/EC. It aims to avoid duplication of regulatory supervision of branches by host and home countries. In addition, the Commission has assessed the supervisory regime of Switzerland as equivalent to the EU regime under Directive 2009/138/EC.

The reasons for supporting the technical revision of the Agreement are as follows:

- Both jurisdictions will be able to use their modernised solvency frameworks within the Agreement. The solvency regimes in the Union and Switzerland have indeed been amended since 2001. The revision will result in supervision based on the same modernised, risk-based solvency framework within and outside of the Agreement for the benefit of insurers in both jurisdictions;
- The list of acceptable legal forms for Member States set out in the Agreement will be updated to incorporate in particular the acceptable legal forms for those Member States that have joined the Union since 2001;
- The Euro-Swiss Franc conversion rate will reflect the current conversion rate.

The EU and Swiss authorities have conducted a quantitative study, also based on data from the European Insurance and Occupational Pension Authority (EIOPA), examining which insurers currently use the Agreement on both sides, and for which volumes of business. The study concludes that sufficient numbers of insurers in the EU and Switzerland make use of the Agreement to a sufficient degree for it to be considered as mutually beneficial and worth maintaining.

The Commission consulted Member States, which did not oppose the proposed revisions.

4. LEGAL BASIS

4.1. Procedural legal basis

4.1.1. Principles

Article 218(9) 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 notion 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*'.[1]

4.1.2. Application to the present case

The EU-Switzerland Joint Committee is a body set up by an agreement.

The act which the EU-Switzerland 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 Article 39 of the Agreement. The envisaged act does not supplement or amend the institutional framework of the agreement.

The procedural legal basis for the proposed decision, therefore, is Article 218(9) TFEU.

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[1] Case C-399/12 Germany v Council (OIV), ECLI:EU:C:2014:2258, paragraphs 61-64.

4.2. Substantive legal basis

4.2.1. Principles

The substantive legal basis for a decision under Article 218(9) TFEU depends primarily on the objective and content of the envisaged act in respect of which a position is adopted on behalf of the Union. 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

The main objective and content of the envisaged act relate to update the annexes and protocols to the Agreement and to establish that the domestic legislation of the Contracting Parties is compatible with that Agreement, which removes double supervisory burdens. On this basis, the envisaged act will support the bilateral provision of non-life insurance services between both jurisdictions.

The substantive legal basis of the proposed decision, therefore, is Article 207 TFEU.

4.3. Conclusion

The legal basis of the proposed decision should be Article 207 in conjunction with Article 218(9) TFEU.

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 207, in conjunction with Article 218(9) thereof,

Having regard to the proposal from the European Commission,

Whereas:

(1) The Agreement between the European Economic Community and the Swiss Confederation on direct insurance other than life assurance ('the Agreement') was concluded by the Union by Council Decision 91/370/EEC[2] and entered into force on 1 January 1993.

(2) Pursuant to Article Articles 39 and 40.3 of the Agreement, the EU-Switzerland Joint Committee may amend the annexes and protocols to the Agreement.

(3) The EU-Switzerland Joint Committee adopted on 18 July 2001 Decision No 1/2001[3] amending the annexes and protocols to the Agreement and finding that the domestic legislation of the Contracting Parties is compatible with that Agreement.

(4) The EU-Switzerland Joint Committee, during its next meeting, is to adopt a decision on a technical revision of the Agreement.

(5) It is appropriate to establish the position to be adopted on behalf of the Union in the EU-Switzerland Joint Committee concerning amendments to the annexes and protocols to the Agreement and the compatibility of domestic legislation with the Agreement, as the decision will be binding on the Union.

(6) The solvency regimes in the Union and Switzerland have been amended since 2001. It is therefore necessary to update the solvency regime referred to in the Agreement to bring it in line with the regimes currently in place in the Union and Switzerland.

(7) The Euro-Swiss Franc conversion rate should be amended to reflect the current conversion rate.

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2 Council Decision 91/370/EEC of 20 June 1991 on the conclusion of the Agreement between the European Economic Community and the Swiss Confederation concerning direct insurance other than life assurance (OJ L 205, 27.7.1991, p. 2)

3 Decision No 1/2001 of the EC-Switzerland Joint Committee of 18 July 2001 amending the Annexes and Protocols to the Agreement between the European Economic Community and the Swiss Confederation on direct insurance other than life assurance and finding that the domestic legislation of the Contracting Parties is compatible with that Agreement (OJ L 291, 8.11.2001, p. 52).

HAS ADOPTED THIS DECISION:

Article 1

The position to be adopted, on behalf of the Union, in the EU-Switzerland Joint Committee on the proposed technical revision of the Agreement on direct insurance other than life insurance shall be based on the draft Decision of the EU-Switzerland Joint Committee attached to this Decision.

Article 2

This Decision is addressed to the Commission.

Done at Brussels,

For the Council
The President