Council of the European Union

Brussels, 13 November 2020
(OR. en)

12963/20

Interinstitutional File: 2020/0326(NLE)

AELE 91
CH 29
MI 487
SOC 701
PREP-BXT 32

PROPOSAL

From:	Secretary-General of the European Commission, signed by Ms Martine DEPREZ, Director
date of receipt:	12 November 2020
To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
No. Cion doc.:	COM(2020) 735 final
Subject:	Proposal for a COUNCIL DECISION on the position to be taken by the European Union within the Joint Committee established under the Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons as regards the amendment of Annex II to that Agreement on the coordination of social security schemes

Delegations will find attached document COM(2020) 735 final.

Encl.: COM(2020) 735 final

EUROPEAN
COMMISSION

Brussels, 12.11.2020
COM(2020) 735 final

2020/0326 (NLE)

Proposal for a

COUNCIL DECISION

on the position to be taken by the European Union within the Joint Committee established under the Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons as regards the amendment of Annex II to that Agreement on the coordination of social security schemes

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

1. SUBJECT MATTER OF THE PROPOSAL

This proposal concerns the decision establishing the position to be taken on the Union's behalf in the Joint Committee in connection with the envisaged adoption of its Decision concerning amending Annex II (on the coordination of social security schemes) to the Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons.

2. CONTEXT OF THE PROPOSAL

2.1. The Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons

In 1999, the European Community and its Member States on the one part, and Switzerland, on the other part, concluded a bilateral Agreement on the free movement of persons, which entered into force on 1 June 2002 (see OJ L 114 of 30.4.2002, p. 6). The Agreement was concluded for an initial duration of seven years, which came to an end on 31 May 2009. Following the result of the Swiss referendum of 8 February 2009 it was renewed for an indefinite period.

The agreement establishes the principle of free movement of persons between the territory of the European Union and that of Switzerland. The agreement gives to the EU and Swiss citizens reciprocal rights of entry, residence, access to paid work and establishment on a self-employed basis, and the right to stay in each other's territory after their employment has finished.

Annex II to this agreement provides for the coordination of social security schemes.

2.2. The Joint Committee

Article 14 of the Agreement establishes a Joint Committee made up of representatives from the two parties with responsibility for the management and proper application of the Agreement. It is responsible for settling any disputes related to compliance with the agreement. It shall take decisions in the circumstances provided for in the Agreement. The Joint Committee shall reach its decisions by mutual agreement.

The Joint Committee decides on any amendments required concerning specific annexes to the agreement. Under Article 18 of the Agreement, the Joint Committee may amend Annex II to the Agreement.

Article 2 of Decision 2002/309/EC[1], provides that the Council, following a proposal from the Commission, will lay down the position to be taken by the Union on decisions by the Joint Committee. To this end, the Commission presents this proposal for a Council Decision on position that the Union should take in the Joint Committee.

[1] Decision 2002/309/EC, Euratom of the Council, and of the Commission as regards the Agreement on Scientific and Technological Cooperation

2.3. The envisaged act of the Joint Committee

The Joint Committee is to adopt a Decision regarding amending Annex II on the coordination of social security schemes to the Agreement ('the envisaged act').

Amendments to Annex II shall be adopted by decision of the Joint Committee and may enter into force immediately after that decision.

The purpose of the envisaged act is to provide reciprocal protection of social security rights for United Kingdom nationals, stateless persons and refugees, as well as their family members and survivors, who, by the end of the transition period, as defined in Article 126 of the Withdrawal Agreement, are or have been in a cross-border situation involving one or more of the Contracting Parties to the Agreement and the United Kingdom at the same time.

3. POSITION TO BE TAKEN ON THE UNION'S BEHALF

As a consequence of the withdrawal of the United Kingdom of Great Britain and Northern Ireland ("United Kingdom") from the European Union, the Agreement ceases to apply to the United Kingdom by the end of transitional period as defined in Article 126 of the Withdrawal Agreement concluded between the European Union and the European Atomic Energy Community and the United Kingdom ("Withdrawal Agreement").

Pursuing to Article 23 of the Agreement, rights acquired by private individuals shall not be affected in the event of termination of the Agreement and the Contracting Parties shall settle by mutual agreement what action is to be taken in respect of rights in the process of being acquired.

Article 33 of the Withdrawal Agreement states that Title III of the Withdrawal Agreement shall apply also to nationals of Switzerland provided that Switzerland has concluded and applies corresponding agreements with the United Kingdom, which apply to Union citizens, as well as with the European Union which apply to the United Kingdom nationals.

Article 26(b) of the Agreement between the United Kingdom and Switzerland on citizens' rights ("Citizens' Rights Agreement") following the withdrawal of the United Kingdom from the European Union and the Free Movement of Persons Agreement states that the provisions of Part III of that agreement shall apply to Union citizens, provided that the Union has concluded and applies corresponding agreements with the United Kingdom which apply to Swiss nationals, as well as with Switzerland which applies to United Kingdom nationals.

It is therefore necessary to provide reciprocal protection of social security rights for United Kingdom nationals, stateless persons and refugees, as well as their family members and survivors, who, by the end of the transition period, as defined in Article 126 of the Withdrawal Agreement, are or have been in a cross-border situation involving one or more of the Contracting Parties to the Agreement and the United Kingdom at the same time.

Against this background, the proposed amendments to Annex II (on coordination of social security schemes) to the Agreement, described in the annexed draft Joint Committee Decision, address the above explained matter.

The annexed draft Joint Committee Decision shall enter into force on the date of its adoption by the Joint Committee and apply from the end of the transition period as defined in Article 126 of the Withdrawal Agreement.

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*'[2].

4.1.2. Application to the present case

The Joint Committee is a body set up by an agreement, namely the Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons.

The act which the 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 14 and 18 of the 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.

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 taken on the Union's behalf. 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.

With regard to an envisaged act that simultaneously pursues a number of objectives, or that has several components, which are inseparably linked without one being incidental to the other, the substantive legal basis of a decision under Article 218(9) TFEU will have to include, exceptionally, the various corresponding legal bases.

---

[2] 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

The envisaged act pursues objectives and has components in the area of social security and provision of power. These elements of the envisaged act are inseparably linked without one being incidental to the other.

Therefore, the substantive legal basis of the proposed decision comprises the following provisions: Article 48 and Article 352 of the Treaty on the Functioning of the European Union.

4.3. Conclusion

The legal basis of the proposed decision should be Article 48 and Article 352, in conjunction with Article 218(9) TFEU.

5. PUBLICATION OF THE ENVISAGED ACT

As the act of the Joint committee will amend Annex II to the Agreement it is appropriate to publish it in the *Official Journal of the European Union* after its adoption.

2020/0326 (NLE)

Proposal for a

COUNCIL DECISION

on the position to be taken by the European Union within the Joint Committee established under the Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons as regards the amendment of Annex II to that Agreement on the coordination of social security schemes

(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(s) 48 and 352, in conjunction with Article 218(9) thereof,

Having regard to Decision 2002/309/EC, Euratom of the Council and of the Commission as regards the Agreement on Scientific and Technological Cooperation, of 4 April 2002 on the conclusion of seven agreements with the Swiss Confederation[3], and in particular Article 2 thereof,

Having regard to the proposal from the European Commission,

Whereas:

(1) The Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the Free Movement of Persons (hereinafter referred to as 'the Agreement') entered into force on 1 June 2002.

(2) Pursuant to Article 18 of the Agreement, the Joint Committee may decide to amend, inter alia, Annex II to the Agreement.

(3) The Agreement ceases to apply to the United Kingdom of Great Britain and Northern Ireland ("United Kingdom") as a consequence of the United Kingdom's withdrawal from the European Union.

(4) Pursuant to Article 23 of the Agreement, rights acquired by private individuals shall not be affected in the event of termination of the Agreement and the Contracting Parties shall settle by mutual agreement what action is to be taken in respect of rights in the process of being acquired.

[3] OJ L 114, 30.4.2002, p. 1.

(5) It is therefore necessary to provide reciprocal protection of social security rights for United Kingdom nationals, as well as their family members and survivors, who, by the end of the transition period, as defined in Article 126 of the Withdrawal Agreement, are or have been in a cross-border situation involving one or more of the Contracting Parties to the Agreement and the United Kingdom at the same time.

(6) The position of the Union in the Joint Committee should therefore be based on the draft decision set out in the Annex to this Decision.

HAS ADOPTED THIS DECISION:

Article 1

The position to be taken on the Union's behalf in the Joint Committee on the proposed amendment of Annex II to the Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons, on the coordination of social security schemes, shall be based on the draft decision of the 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