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Proposal for a

COUNCIL DECISION

**on the conclusion, on behalf of the European Union, of the Bilateral Agreement between
the European Union and the United States of America on prudential measures
regarding insurance and reinsurance**

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

• **Reasons for and objectives of the proposal**

This proposal derives from a Council decision of 21 April 2015¹ pursuant to which the Commission was authorised to start negotiations with the United States of America (US) for the conclusion of an Agreement on insurance and reinsurance. Pursuant to this decision and the negotiating directives, the European Commission negotiated a Bilateral Agreement with the US on prudential measures regarding insurance and reinsurance in the course of 2016.

This Bilateral Agreement covers three areas, group supervision, reinsurance and exchange of information between supervisors:

- It sets out the conditions for group supervision in both Parties of their respective insurance and reinsurance groups. EU and US insurance and reinsurance groups active in both jurisdictions will not be subject to certain requirements with respect to group supervision for their worldwide activities, but supervisors retain the ability to request and obtain information about worldwide activities which could harm policyholders or financial stability.

- It lays down the prudential conditions to be applied for the removal of local presence and collateral requirements for reinsurers regulated and supervised in the other Party.

- It contains provisions and, in an annex, a model memorandum of understanding for the exchange of information between supervisory authorities in the EU and the US. Supervisory authorities will be encouraged to use these provisions to ensure a high standard of professional secrecy in any exchange of confidential information necessary for carrying out their general supervisory activities.

The Agreement thereby lays down an appropriate prudential framework to be applied to insurers and reinsurers from both Parties.

This proposal for a Council Decision constitutes the legal instrument for the conclusion of this Bilateral Agreement with the US on behalf of the EU.

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

EU legislation in the area of insurance lays down a prudential framework for the protection of policyholders and for financial stability. This Agreement further contributes to ensuring a high level of policyholder protection in the EU, notably via increased cooperation and exchange of information between supervisors, whilst also ensuring that both Parties' duly regulated and supervised insurance and reinsurance undertakings are not subject to undue burden.

¹ Council Decision authorising the opening of negotiations on behalf of the European Union with the United States of America for the conclusion of an agreement on reinsurance, 31 March 2015, ST 7320 2015 INIT.

- **Consistency with other Union policies**

In line with the objectives of the Investment Plan for Europe and the Capital Markets Union, this Agreement will facilitate investment by reinsurers².

This Agreement is without prejudice to negotiations on a Transatlantic Trade Investment Partnership with the US.

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

- **Legal basis**

The legal basis for the Union to act is Article 207 TFEU read in conjunction with Article 218(6)(a) TFEU.

- **Subsidiarity (for non-exclusive competence)**

This initiative falls under the exclusive competence of the Union. The subsidiarity principle therefore does not apply.

- **Proportionality**

This EU action, laying down prudential rules for insurers and reinsurers, is in line with the principles of Directive 2009/138/EC of the European Parliament and of the Council³ ("Solvency II") and does not go beyond than what is necessary to achieve its aims.

3. STAKEHOLDER CONSULTATIONS

- **Stakeholder consultations**

The negotiations were conducted in consultation with Member States through the relevant Council special committee (the Council Working Party on Financial Services)⁴ and Member States were regularly informed about the progress of the negotiations. The European Parliament has also been informed about the progress of the negotiations⁵.

Industry stakeholders on both sides have voiced their support for this Agreement and in particular with respect to the supervision of cross-border insurance and reinsurance groups and for the removal of reinsurance collateral requirements.

- **Collection and use of expertise**

Prior to the start of this negotiation, the EU and the US have been closely following developments in each other's jurisdictions, exchanging information on regulatory developments, and have identified specific aspects of each other's regulatory systems as potentially problematic for insurers or reinsurers operating in the other jurisdiction.

² EU reinsurers estimate that they have about \$40 billion of collateral posted in the USA, which could be used more effectively in other investments. The opportunity cost is estimated at around \$400 million per year.

³ OJ L 335, 17/12/2009, p. 1.

⁴ The Council Special Committee was consulted on 14 March, 13 June, 29 June, 7 September, 30 September, 18 October, 9 November, 29 November, 9 December, 16 December and 19 December 2016 as well as on 10 January 2017.

⁵ The Chair and Members of the European Parliament's ECON Committee were debriefed *in camera* on 29 June, 11 October, 16 November and 30 November 2016.

This was in particular conducted through the EU-US Dialogue project, which brought together EU and US officials as well as EU and US supervisory authorities.

The European Insurance and Occupational Pensions Authority participated as an observer to these negotiations.

4. BUDGETARY IMPLICATIONS

No impact on the EU budget.

5. OTHER ELEMENTS

- **Implementation plans and monitoring, evaluation and reporting arrangements**

The Agreement provides for a Joint Committee, which provides a forum for the EU and the US to consult and to exchange information on the administration of the Agreement and its proper implementation.

Member States will also need to undertake the necessary actions to ensure implementation of this Agreement.

- **Detailed explanation of the specific provisions of the proposal**

Article 1 sets out the objectives of this prudential Agreement between the EU and the US, in the areas covered by the Agreement. Article 2 sets out the definitions that apply for this Agreement.

Articles 3 and 4 concern respectively reinsurance and group supervision. After full application of this Agreement, reinsurers of one Party operating in the other Party will not be subjected to any requirement to post collateral or to establish a branch or subsidiary, if they meet the prudential conditions laid down in the Agreement, and insurance groups of one Party operating in the other Party which meet the conditions will not be subjected to a requirement to carry out a group solvency calculation for their worldwide activities nor to other aspects of group supervision for their worldwide activities. Supervisors can exercise group supervision on groups established within the territory of their Party, and can require information to be provided about worldwide activities which risk seriously harming policyholders in their jurisdiction or threatening financial stability, or seriously harm the capacity to pay claims.

Articles 5 and 6, and the Annex, concern exchange of information between supervisors and established the commitment for both Parties to encourage supervisors to cooperate in exchanging information for purposes directly related to the fulfilment of their supervisory functions.

Furthermore, the Agreement provides for the setting up of a Joint Committee to discuss the application and implementation of the Agreement under Article 7, and Articles 11 and 12 provide that the Parties can amend or terminate the Agreement, provided the conditions and procedures set out in those Articles are fulfilled, including mandatory consultation for termination of the Agreement.

Articles 8, 9 and 10 set out when the Agreement will enter into force and become applicable, and they also provide for the provisional application of certain Articles of the Agreement.

The Agreement essentially provides for three modes of application between the Parties:

1. Full application of every Article of the Agreement, which starts on either the date 60 months following the date of signature of the Agreement, or the date of entry into force of the Agreement, whichever is later, and – for Articles 3, 4 and 9 – provided the conditions set forth in Article 10(2)(b) are fulfilled.

The Agreement remains in full application unless it is terminated in accordance with Article 11.

2. Where entry into force of the Agreement is prior to the date 60 months following signature of the Agreement, certain parts of the Agreement start to apply on earlier dates:

Article 7 [Joint Committee], Article 11 [Termination and Mandatory Consultation] and Article 12 [Amendment], apply as from the date of entry into force of the Agreement. Article 4 is also to be applied from that date, in accordance with Article 10(2)(a) by the EU, and on a best efforts basis for the US side.

Article 3(1) and (2) apply with respect to EU reinsurers in a U.S. State as from the date of either the adoption by the US State of a measure consistent with those provisions, or the date at which any pre-emption determination becomes applicable, pursuant to Article 10(2)(d).

Finally, Article 3(3) shall be implemented and applicable in the EU as from 24 months after the date of signature, pursuant to Article 10(2)(g).

3. Prior to the entry into force of the Agreement, certain parts of the Agreement will also be provisionally applied. This provisional application concerns the following Articles:

- Article 4, in accordance with Article 10(2)(a), and
- Article 7.

Provisional application starts on the seventh day of the month following the date on which the Parties have notified each other that their internal requirements and procedures necessary for provisional application have been completed. It lasts until the date of entry into force of the Agreement (or until one Party notifies the other Party of its intention not to complete its internal requirements for the entry into force of the Agreement).

Annex I of the Agreement contains detailed provisions for a Memorandum of Understanding for the exchange of information between supervisors, which the Parties shall encourage supervisors on both sides to follow pursuant to Article 6 of the Agreement.

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on the conclusion, on behalf of the European Union, of the Bilateral Agreement between the European Union and the United States of America on prudential measures regarding insurance and reinsurance

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 207 read in conjunction with Article 218(6) thereof,

Having regard to the proposal from the European Commission,

Having regard to the consent of the European Parliament,

Whereas:

- (1) In accordance with Council Decision [XXX] of ⁶, the Bilateral Agreement between the European Union and the United States of America on prudential measures regarding insurance and reinsurance was signed on , subject to its conclusion at a later date.
- (2) The conclusion of the Agreement will lead to enhanced regulatory certainty in the application of insurance and reinsurance regulatory frameworks for insurers and reinsurers operating in the European Union and the United States of America and improved policyholders and other consumers' protection through cooperation between supervisors on the exchange of information.
- (3) The Agreement should be approved on behalf of the European Union,

HAS ADOPTED THIS DECISION:

Article 1

The Bilateral Agreement between the European Union and the United States of America on prudential measures regarding insurance and reinsurance is hereby approved on behalf of the Union.

The text of the Agreement is attached to this Decision.

Article 2

The President of the Council shall designate the person empowered to proceed, on behalf of the European Union, to the notification provided for in Article 8 of the Agreement, in order to express the consent of the European Union to be bound by the Agreement.

⁶ OJ L , , p. .

Article 3

This Decision shall enter into force on the day of its adoption.

Done at Brussels,

*For the Council
The President*