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Proposal for a

COUNCIL DECISION

on the signing, on behalf of the European Union, of the Amending Protocol to the Agreement between the European Community and the Swiss Confederation providing for measures equivalent to those laid down in Council Directive 2003/48/EC on taxation of savings income in the form of interest payments

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

Following the adoption of Council Directive 2003/48/EC, the Savings Directive, and in order to preserve the level playing field of economic operators, the EU signed Agreements with Switzerland, Andorra, Liechtenstein, Monaco and San Marino providing for measures equivalent to those laid down in the Directive. Member States also signed agreements with the dependent territories of the United Kingdom and the Netherlands.

More recently, the importance of automatic exchange of information as a means to combat cross-border tax fraud and tax evasion by ensuring full tax transparency and cooperation between tax administrations worldwide has also been recognised at the international level. The Organisation for Economic Cooperation and Development (OECD) was mandated by the G20 to develop a single global standard for automatic exchange of financial account information. The Global Standard was released by the OECD Council in July 2014.

Following the adoption of a proposal to update the Savings Directive, the Commission adopted on 17 June 2011 a recommendation for a mandate to initiate negotiations with Switzerland, Liechtenstein, Andorra, Monaco and San Marino, in order to upgrade the EU's Agreements with those countries in line with international developments and to ensure that those countries continue to apply measures equivalent to those in the EU. On 14 May 2013, the Council reached an agreement on the Negotiating Mandate by concluding that negotiations should be aligned with the recent developments at global level where it was agreed to promote automatic exchange of information as an international standard.

In its communication of 6 December 2012 containing an Action Plan to strengthen the fight against tax fraud and tax evasion, the Commission highlighted the need to promote vigorously the automatic exchange of information as the future European and international standard for transparency and exchange of information in tax matters.

On the basis of a proposal presented by the Commission in June 2013, the Council on 9 December 2014 adopted Directive 2014/107/EU amending Directive 2011/16/EU and extending the mandatory automatic exchange of information between EU tax authorities to a full range of financial items in accordance with the Global Standard. The amendment ensures a coherent, consistent and comprehensive Union-wide approach to the automatic exchange of financial account information in the Internal Market.

As Directive 2014/107/EU is generally broader in scope than Directive 2003/48/EC and provides that in cases of overlap of scope, Directive 2014/107/EU prevails, on 18 March 2015 the Commission adopted a proposal to repeal Directive 2003/48/EC.

In order to minimise costs and administrative burdens both for tax administrations and for economic operators, it is crucial to ensure that the amendment of the existing Savings Agreement with Switzerland is in line with EU and international developments. This will increase tax transparency in Europe and will be the legal basis for implementing the OCDE Global Standard on automatic exchange of information between Switzerland and the EU.

Given the Swiss constitutional requirements for ratification, for Switzerland to be able to commence due diligence procedures in January 2017, with first exchanges under the Global Standard by September 2018, the Amending Protocol would need to be signed by May 2015. This would grant to all Member States the earliest possible cooperation to which Switzerland is committed at international level.

2. RESULTS OF CONSULTATIONS WITH THE INTERESTED PARTIES AND IMPACT ASSESSMENTS

The Amending Protocol implements the Global Standard between EU Member States and Switzerland. The different stakeholders were already consulted on various occasions during the development of the OECD Global Standard.

EU Member States have also been consulted and informed during the negotiations between the Commission and Switzerland. The Commission reported to the European Council at its meetings in March and December 2014 on the state of play of the negotiations with Switzerland.

The Commission has also consulted the new Expert Group on automatic exchange of financial account information that provides advice to ensure that EU legislation on automatic exchange of information in direct taxation is effectively aligned and fully compatible with the OECD Global Standard. The Expert Group includes representatives from organisations representing the financial sector and organisations campaigning against tax evasion and tax avoidance.

3. LEGAL ELEMENTS OF THE PROPOSAL

The legal basis for this proposal is provided by Article 115 of the Treaty on the Functioning of the European Union, in conjunction with Article 218(5) and (8) second subparagraph. The substantive legal basis is provided by Article 115 TFEU.

Article 1 of the Amending Protocol annexed to this Proposal for Council Decision changes the title of the existing Agreement in order to better reflect the contents of the Agreement, as amended by that Amending Protocol.

Article 2 replaces the existing articles and Annexes with a new set of provisions comprising 11 Articles, an Annex I that reflects the OECD Common Reporting Standard which is part of the Global Standard, an Annex II that reflects important parts of the OECD Commentaries to the Global Standard and an Annex III that lists the Competent Authorities of Switzerland and of each Member State.

The new Articles reflect the articles of the OECD Model Competent Authority agreement for the implementation of the Global Standard, with minor adaptations to reflect the particular legal context of an EU Agreement. In Article 1 there is no definition of Tax Identification Number (TIN), since there is already a definition of TIN in Section VIII(E)(5) of Annex I. Article 5 includes a full set of provisions on exchange of information upon request that follows the latest text of the OECD Model Tax Convention. Article 6 includes a more detailed set of provisions on data protection. Article 7 provides for an additional stage of consultation before any Member State or Switzerland undertakes to suspend the Agreement. Article 8 features provisions on amendments to the Agreement, including a quick mechanism for provisional application by one of the Contracting Parties of amendments to the Global Standard, on the condition of consent by the other Party. Article 9 takes over the full set of provisions of Article 15 of the Agreement before its amendment by the

Amending Protocol, because the negotiators of the Contracting Parties agreed not to make any change to these provisions which relate to business taxation and are not influenced by the Global Standard. Article 11 defines the territorial scope.

Annex I follows both the OECD Common Reporting Standard and Annex I to the Directive on Administrative Cooperation. Annex II implements key parts of the CRS Commentaries and corresponds to Annex II to the Directive on Administrative Cooperation. The minor deviations from Annex I or II to the Directive on Administrative Cooperation are justified by the re-alignment of the text to the OECD Common Reporting Standard (CRS) requested by the Swiss negotiators. Those include the following:

1. In Section I(D) the reference to the reporting of place of birth is realigned to the CRS.
2. Section I(A) on insurances that are effectively prevented by law from being sold to residents of a Reportable Jurisdiction is reintroduced. In order to avoid risks of abuse of that exemption, a corresponding Joint Declaration is included at the end of the Amending Protocol.
3. All the relevant options provided for in the OECD CRS Commentaries and in the Directive on Administrative Cooperation have been left at the discretion of each Member State and Switzerland and are not exercised directly in the Agreement. There is instead an obligation on Member States and Switzerland to notify each other and the Commission whether they have exercised any particular option. This is meant as a safeguard for the correct application of the alternative definition of “Related Entity” in connection with the option on new accounts of current customers.
4. The definitions of “International Organisation” and “Central Bank” in Section VIII(B)(3) and (4) have been realigned to the CRS in order to enable them to apply also in the context of the exemption from the look-through for Passive non-financial entities (NFEs) in Section VIII(D)(9)(c).
5. In Annex II the definition of “Residence of a Financial Institution” is aligned to the CRS Commentaries in order to cover cases where the residence of another Financial Institution should be determined, e.g. for the look-through for Passive NFEs.

Article 3 of the Amending Protocol includes provisions on the entry into force and application. It deals with issues on the transition from the existing Agreement to the amended Agreement, with regard to requests for information, credits available to beneficial owners for withholding tax, final payments of withholding tax by Switzerland to Member States and final exchanges of information under the voluntary disclosure mechanism.

Article 4 includes a Protocol on additional safeguards related to the exchange of information on request, which Switzerland includes in its tax treaties. The text specifies that exchanges on the basis of a group request are not prevented. The Protocol on additional safeguards is in line with the Global Forum's Terms of Reference for exchange of information on request.

Article 5 lists the languages in which the Amending Protocol is signed.

The revised Agreement is supplemented by four Joint Declarations of the contracting parties and one Unilateral Declaration by Switzerland.

The first Joint Declaration concerns the expected date of entry into force of the revised Agreement. The second and third Declarations make a link respectively to the Commentaries to the Global Standard and Article 26 of the OECD Model Tax Convention on Income and on Capital. The fourth Declaration aims at preventing misinterpretation of Section III(A) of Annex I and establishes a mechanism of mutual notification of the cases where that exemption would have grounds to apply. The fifth Declaration is a unilateral one from the Swiss side.

4. BUDGETARY IMPLICATION

The proposal does not entail have any budgetary implications.

5. OPTIONAL ELEMENTS

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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 115 in conjunction with Article 218(5) and the second paragraph of Article 218(8) thereof,

Having regard to the proposal from the European Commission,

Whereas:

- (1) On 14 May 2013 the Council authorised the Commission to open negotiations with the Swiss Confederation to amend the Agreement between the European Community and the Swiss Confederation providing for measures equivalent to those laid down in Council Directive 2003/48/EC on taxation of savings income in the form of interest payments, in order to align that Agreement with the recent developments at global level where it was agreed to promote automatic exchange of information as an international standard.
- (2) The text of the Amending Protocol which is the result of the negotiations duly reflects the negotiating directives issued by the Council as it aligns the Agreement with the latest developments at international level concerning automatic exchange of information, namely the Global Standard for automatic exchange of financial account information in tax matters developed by the Organisation for Economic Cooperation and Development (OECD). The Union, its Member States and the Swiss Confederation have actively participated in the work of the OECD. The text of the Agreement, as amended by the Amending Protocol, is the legal basis for implementing the Global Standard in the relations between the Union and the Swiss Confederation.
- (3) Therefore, the Amending Protocol should be signed on behalf of the Union, subject to its conclusion at a later date,

HAS ADOPTED THIS DECISION:

Article 1

The signing of the Amending Protocol to the Agreement between the European Union and the Swiss Confederation providing for measures equivalent to those laid down in Council Directive 2003/48/EC on taxation of savings income in the form of interest payments is hereby authorised on behalf of the Union, subject to the conclusion of that Amending Protocol.

The text of the Amending Protocol to be signed is attached to this Decision.

Article 2

The Council Secretariat General shall establish the instrument of full powers to sign the Amending Protocol, subject to its conclusion, for the person(s) indicated by the negotiator of the Amending Protocol.

Article 3

This Decision shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

Done at Brussels,

*For the Council
The President*