DECISION OF THE EEA JOINT COMMITTEE

No 78/2011

of 1 July 2011

amending Annex IX (Financial services) to the EEA Agreement

THE EEA JOINT COMMITTEE,

Having regard to the Agreement on the European Economic Area, as amended by the Protocol adjusting the Agreement on the European Economic Area, hereinafter referred to as 'the Agreement', and in particular Article 98 thereof,

Whereas:

(1) Annex IX to the Agreement was amended by Decision of the EEA Joint Committee No 120/2010 of 10 November 2010 [1].

(2) Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) [2] is to be incorporated into the Agreement.

(3) Directive 2009/138/EC repeals, with effect from 1 November 2012, Council Directives 64/225/EEC [3], 73/239/EEC [4], 73/240/EEC [5], 76/580/EEC [6], 78/473/EEC [7], 84/641/EEC [8], 87/344/EEC [9], 88/357/EEC [10] and 92/49/EEC [11] and Directives 98/78/EC [12], 2001/17/EC [13], 2002/83/EC [14] and 2005/68/EC [15] of the European Parliament and of the Council, which are incorporated into the Agreement and which are consequently to be repealed under the Agreement with effect from 1 November 2012.

(4) Directive 2009/138/EC recasts some of the repealed acts and therefore the current EEA adaptations to the latter are partly to be maintained,

HAS ADOPTED THIS DECISION:

Article 1

Annex IX to the Agreement shall be amended as follows:

(1) the heading '*(i) Non-life insurance*' in Chapter I (Insurance) shall be renamed '*(i) Non-life and life insurance*';

(2) point 1 (Council Directive 64/225/EEC) shall be renumbered as point 1a;

(3) the following point shall be inserted before new point 1a (Council Directive 64/225/EEC):

'1. **32009 L 0138**: Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (OJ L 335, 17.12.2009, p. 1).

The provisions of the Directive shall, for the purposes of this Agreement, be read with the following adaptations:

(a) the following shall be added in Article 8:

"(5) in Iceland, Viðlagatrygging Íslands.";

(b) Articles 57 to 63 regarding the prudential assessment of a proposed acquirer shall not apply where the proposed acquirer, as defined in the Directive, is situated or regulated outside the territory of the Contracting Parties;

(c) in Article 157(2), the words "and under Regulation (EC) No 593/2008" shall be deleted;

(d) Article 171 shall not apply. The following provision shall be applicable:

Each Contracting Party may, by means of agreements concluded with one or more third countries, agree to the application of provisions different from those provided for in Articles 162 to 170 of the Directive on the condition that its policy holders and insured persons are given adequate and equivalent protection. The Contracting Parties shall inform and consult each other prior to concluding such agreements. The Contracting Parties shall not apply to branches of insurance undertakings having their head of office outside the territory of the Contracting Parties provisions which result in more favourable treatment than that accorded to branches of insurance undertakings having their head of office within the territory of the Contracting Parties;

[1] OJ L 58, 3.3.2011, p. 77.
[2] OJ L 335, 17.12.2009, p. 1.
[3] OJ 56, 4.4.1964, p. 878/64.
[4] OJ L 228, 16.8.1973, p. 3.
[5] OJ L 228, 16.8.1973, p. 20.
[6] OJ L 189, 13.7.1976, p. 13.
[7] OJ L 151, 7.6.1978, p. 25.
[8] OJ L 339, 27.12.1984, p. 21.
[9] OJ L 185, 4.7.1987, p. 77.
[10] OJ L 172, 4.7.1988, p. 1.
[11] OJ L 228, 11.8.1992, p. 1.
[12] OJ L 330, 5.12.1998, p. 1.
[13] OJ L 110, 20.4.2001, p. 28.
[14] OJ L 345, 19.12.2002, p. 1.
[15] OJ L 323, 9.12.2005, p. 1.

(e) whenever the European Union negotiates with one or more third countries on the basis of Article 175, it shall endeavour to obtain equal treatment for the insurance and reinsurance undertakings of the EFTA States;

(f) as regards third-country treatment of insurance and reinsurance undertakings as described in Article 177, the following shall apply:

With a view to achieving a maximum degree of convergence in the application of a third-country regime for insurance and reinsurance undertakings, the Contracting Parties shall exchange information as described in Article 177(1) and consultations shall be held regarding matters referred to in Article 177(2) within the framework of the EEA Joint Committee and according to specific procedures to be agreed by the Contracting Parties;

(g) the text of Article 178 shall be replaced by the following:

"1. This Article shall apply to contracts referred to in paragraph 2, whether or not the risk covered is situated in the territory of a Contracting Party, and to all other insurance contracts covering risks situated inside the territory of the Contracting Parties. It shall not apply to reinsurance contracts.

2. An insurance contract covering a large risk as defined in Article 13(27) shall be governed by the law chosen by the parties.

To the extent that the applicable law has not been chosen by the parties, the insurance contract shall be governed by the law of the country where the insurer has his habitual residence. Where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with another country, the law of that other country shall apply.

3. The law governing a contract shall be chosen by the parties in accordance with the following provisions:

(a) the choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or to part only of the contract;

(b) the parties may at any time agree to subject the contract to a law other than that which previously governed it. Any change in the law to be applied that is made after the conclusion of the contract shall not prejudice its formal validity or adversely affect the rights of third parties;

(c) where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement;

(d) where all other elements relevant to the situation at the time of the choice are located in one or more Contracting Parties, the parties' choice of applicable law other than that of a Contracting Party shall not prejudice the application of provisions of EEA law, where appropriate as implemented in the Contracting Party of the forum, which cannot be derogated from by agreement.

4. The existence and validity of the consent of the parties as to the choice of the applicable law shall be determined in accordance with the following provisions:

(a) the existence and validity of a contract, or of any term of a contract, shall be determined by the law which would govern it under this Article if the contract or term were valid.

Nevertheless, a party, in order to establish that he did not consent, may relay upon the law of the country in which he has his habitual residence if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law specified in subparagraph 1 of this letter;

(b) a contract concluded between persons who, or whose agents, are in the same country at the time of its conclusion is formally valid if it satisfies the formal requirements of the law which governs it in substance under the law of this Article or of the law of the country where it is concluded.

A contract concluded between persons who, or whose agents, are in different countries at the time of its conclusion is formally valid if it satisfies the formal requirements of the law which governs it in substance under this Article, or of the law of either of the countries where either of the parties or their agent is present at the time of conclusion, or of the law of the country where either of the parties had his habitual residence at that time.

A unilateral act intended to have legal effect relating to an existing or contemplated contract is formally valid if it satisfies the formal requirements of the law which governs or would govern the contract in substance under this Article, or of the law of the country where the act was done, or of the law of the country where the person by whom it was done had his habitual residence at that time.

Notwithstanding subparagraphs 1 to 3 of this letter, a contract the subject matter of which is a right *in rem* in immovable property or a tenancy of immovable property shall be subject to the requirements of form of the law of the country where the property is situated if by that law:

(i) those requirements are imposed irrespective of the country where the contract is concluded and irrespective of the law governing the contract; and

(ii) those requirements cannot be derogated from by agreement.

(c) In a contract concluded between persons who are in the same country, a natural person who would have capacity under the law of that country may invoke his incapacity resulting from the law of another country, only if the other party to the contract was aware of that incapacity at the time of the conclusion of the contract or was not aware thereof as a result of negligence.

5. In the case of an insurance contract other than a contract falling within paragraph 2, only the following laws may be chosen by the parties in accordance with paragraph 3:

(a) the law of any Contracting Party where the risk is situated at the time of conclusion of the contract;

(b) the law of the country where the policy holder has his habitual residence;

(c) in the case of life assurance, the law of the Contracting Party of which the policy holder is a national;

(d) for insurance contracts covering risks limited to events occurring in one Contracting Party other than the Contracting Party where the risk is situated, the law of that Contracting Party;

(e) where the policy holder of a contract falling under this paragraph pursues a commercial or industrial activity or a liberal profession and the insurance contract covers two or more risks which relate to those activities and are situated in different Contracting Parties, the law of any of the Contracting Parties concerned or the law of the country of habitual residence of the policy holder.

Where, in the cases set out in points (a), (b) or (e) of this paragraph, the Contracting Party referred to grant greater freedom of choice of the law applicable to the insurance contract, the parties may take advantage of that freedom.

To the extent that the law applicable has not been chosen by the parties in accordance with this paragraph, such a contract shall be governed by the law of the Contracting Party in which the risk is situated at the time of conclusion of the contract.

6. The following additional rules shall apply to insurance contracts covering the risk for which a Contracting Party imposes an obligation to take out insurance:

(a) the insurance contract shall not satisfy the obligation to take out insurance unless it complies with the specific provisions relating to that insurance laid down by the Contracting Party that imposes the obligation. Where the law of the Contracting Party in which the risk is situated and the law of the Contracting Party imposing the obligation to take out insurance contradict each other, the latter shall prevail;

(b) by way of derogation from paragraphs 2 and 4, a Contracting Party may lay down that the insurance contract shall be governed by the law of the Contracting Party that imposes the obligation to take out insurance.

7. For the purposes of paragraph 4, third subparagraph, and paragraph 5, where the contract covers risks situated in more than one Contracting Party, the contract shall be considered as constituting several contracts each relating to only one Contracting Party.

8. For the purposes of this Article, the country in which the risk is situated shall be determined in accordance with Article 13(13) and, in the case of life insurance, the country in which the risk is situated shall be the country of the commitment within the meaning of Article 13(14).";

(h) the following shall be added in Annex III(A):

"(29) in the case of the Republic of Iceland: 'Hlutafélag';

(30) in the case of the Principality of Liechtenstein: 'Aktiengesellschaft', 'Europäische Gesellschaft (SE)', 'Genossenschaft', 'Europäische Genossenschaft (SCE)';

(31) in the case of the Kingdom of Norway: 'Aksjeselskaper', 'Gjensidige selskaper'.";

(i) the following shall be added in Annex III(B):

"(29) in the case of the Republic of Iceland: 'Hlutafélag';

(30) in the case of the Principality of Liechtenstein: 'Aktiengesellschaft', 'Europäische Gesellschaft (SE)', 'Genossenschaft', 'Europäische Genossenschaft (SCE)';

(31) in the case of the Kingdom of Norway: 'Aksjeselskaper', 'Gjensidige selskaper'.";

(j) the following shall be added in Annex III(C):

"(29) in the case of the Republic of Iceland: 'Hlutafélög';

(30) in the case of the Principality of Liechtenstein: 'Aktiengesellschaft', 'Europäische Gesellschaft (SE)', 'Genossenschaft', 'Europäische Genossenschaft (SCE)';

(31) in the case of the Kingdom of Norway: 'Aksjeselskaper', 'Allmennaksjeselskaper', 'Gjensidige selskaper'." ';

(4) the following shall be added in point 31d (Directive 2003/41/EC of the European Parliament and of the Council):

', as amended by:

— **32009 L 0138**: Directive 2009/138/EC of the European Parliament and of the Council (OJ L 335, 17.12.2009, p. 1).';

(5) the text of points 1a (Council Directive 64/225/EEC), 2 (First Council Directive 73/239/EEC), 3 (Council Directive 73/240/EEC), 4 (Council Directive 78/473/EEC), 5 (Council Directive 84/641/EEC), 6 (Council Directive 87/344/EEC), 7 (Second Council Directive 88/357/EEC), 7a (Council Directive 92/49/EEC), 7b (Directive 2005/68/EC of the European Parliament and of the Council), 12c (Directive 98/78/EC of the European Parliament and of the Council) and 13a (Directive 2001/17/EC of the European Parliament and of the Council) shall be deleted with effect from 1 November 2012;

(6) the text of, and heading related to, point 11 (Directive 2002/83/EC of the European Parliament and of the Council) shall be deleted with effect from 1 November 2012;

(7) the headings '*(iv) Supervision and accounts*' and '*(v) Other issues*' in Chapter I (Insurance) shall be renumbered as headings '*(iii) Supervision and accounts*' and '*(iv) Other issues*' with effect from 1 November 2012.

Article 2

The text of Directive 2009/138/EC in the Icelandic and Norwegian languages, to be published in the EEA Supplement to the *Official Journal of the European Union*, shall be authentic.

Article 3

This Decision shall enter into force on 2 July 2011, provided that all the notifications pursuant to Article 103(1) of the Agreement have been made to the EEA Joint Committee (*).

Article 4

This Decision shall be published in the EEA Section of, and in the EEA Supplement to, the *Official Journal of the European Union*.

Done at Brussels, 1 July 2011.

For the EEA Joint Committee
The President
Kurt JÄGER

(*) Constitutional requirements indicated.

Unilateral Declaration by Liechtenstein to Decision No 78/2011 incorporating Directive 2009/138/EC into the Agreement

'The Principality of Liechtenstein has concluded a bilateral agreement with Switzerland in 1996 concerning direct insurance. On the basis of reciprocity, the Agreement aims at governing the conditions that are necessary and sufficient to enable insurance undertakings whose head office is in the territory of a Contracting Party to benefit from the freedom of establishment and services with respect to direct insurance in the territory of the other Contracting Party.'