

DECISIONS

COMMISSION DELEGATED DECISION (EU) 2016/309

of 26 November 2015

on the equivalence of the supervisory regime for insurance and reinsurance undertakings in force in Bermuda to the regime laid down in Directive 2009/138/EC of the European Parliament and of the Council and amending Commission Delegated Decision (EU) 2015/2290

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Directive 2009/138/EC of the European Parliament and the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) ⁽¹⁾, and in particular Articles 172(2), 227(4) and (5) and 260(3) thereof,

Whereas:

- (1) Directive 2009/138/EC establishes a risk-based prudential regime for insurance and reinsurance undertakings in the Union. Full application of Directive 2009/138/EC to insurers and reinsurers in the Union will commence on 1 January 2016.
- (2) In accordance with Article 311 of Directive 2009/138/EC the Commission may adopt delegated acts provided for in that Directive also prior to the date of its application.
- (3) Article 172 of Directive 2009/138/EC relates to equivalence of the solvency regime of a third country applied to reinsurance activities of undertakings with their head office in that third country. A positive equivalence determination allows reinsurance contracts concluded with undertakings having their head office in that third country to be treated in the same manner as reinsurance contracts concluded with undertakings authorised in accordance with that Directive.
- (4) Article 227 of Directive 2009/138/EC relates to equivalence for third-country insurers that are part of groups headquartered in the Union. A positive equivalence determination allows such groups, when deduction and aggregation is used as the consolidation method for their group reporting, to take into account the calculation of capital requirements and available capital (own funds) under the rules of the non-Union jurisdiction rather than calculating them on the basis of Directive 2009/138/EC, for the purposes of calculating the group solvency requirement and eligible own funds.
- (5) Article 260 of Directive 2009/138/EC relates to equivalence of insurance and reinsurance undertakings, the parent undertaking of which has its head office outside the Union. In accordance with Article 261(1) of Directive 2009/138/EC, in case of a positive equivalence determination, Member States rely on the equivalent group supervision exercised by the third-country group supervisory authorities.
- (6) A third country's legal regime is to be considered as fully equivalent to that established by Directive 2009/138/EC if it complies with requirements which provide a comparable level of policyholder and beneficiary protection.

⁽¹⁾ OJ L 335, 17.12.2009, p. 1.

- (7) On 11 March 2015, the European Insurance and Occupational Pensions Authority (EIOPA) provided advice in accordance with Article 33(2) of Regulation (EU) No 1094/2010 of the European Parliament and of the Council⁽¹⁾ to the Commission on the regulatory and supervisory system for reinsurance and insurance undertakings and groups in force in Bermuda. Following the adoption of amended insurance legislation by Bermuda in July 2015, EIOPA adopted an update of its advice on 31 July 2015. EIOPA's advice is based on the Bermudan relevant legislative framework, including the Insurance Amendment (No 2) Act 2015 (hereafter the 'Act'), adopted in July 2015 and entering into force on 1 January 2016, the Insurance Code of Conduct, which has been amended with effect from July 2015, and the revised insurance prudential rules adopted by the Bermuda Monetary Authority (the 'BMA' hereafter) and entering into force on 1 January 2016. The Commission has based its assessment on the information provided by EIOPA.
- (8) Taking into account the provisions of Commission Delegated Regulation (EU) 2015/35⁽²⁾, in particular Articles 378, 379 and 380, as well as EIOPA's advice, a number of criteria are to be applied to assess equivalence under Articles 172(2), 227(4) and 260(3) of Directive 2009/138/EC.
- (9) Those criteria include certain requirements which are common to two or more of Articles 378, 379 and 380 of Delegated Regulation (EU) 2015/35, which are valid at the level of solo insurance or reinsurance undertakings and at the level of insurance or reinsurance groups. We specify indeed in the current act whether we consider insurance undertakings at the individual ('solo') or group level, as solo undertakings may or may not be part of groups. The criteria cover the areas of powers, solvency, governance, transparency, cooperation between authorities and handling of confidential information, and impact of the decisions on financial stability.
- (10) Regarding the means, powers and responsibilities, the local supervisor, the BMA, has the power to effectively supervise insurance or reinsurance activities and impose sanctions or take enforcement action where necessary, such as revoking an undertaking's business licence or replacing all or part of its management. The BMA has the necessary financial and human means, expertise, capacities and mandate to effectively protect all policyholders and beneficiaries.
- (11) Regarding solvency, the Bermuda Solvency Capital Requirement (BSCR) assessment of the financial position of insurance or reinsurance undertakings or groups relies on sound economic principles, and solvency requirements are based on an economic valuation of all assets and liabilities called the Economic Balance Sheet. This ensures comparability between insurers. The BSCR requires insurance or reinsurance undertakings to hold adequate financial resources and lays down criteria on technical provisions, investments, capital requirements (including minimum level of capital) and own funds, requiring timely intervention by the BMA if capital requirements are not complied with or if policyholders' interests are threatened. The capital requirements are risk-based, aiming at capturing quantifiable risks. The main capital requirement, known as Enhanced Capital Requirement (ECR), is calculated to cover unexpected losses arising from existing business. In addition, the absolute minimum capital requirement, called Minimum Solvency Margin, is currently not risk-based, but the BMA will modify it and apply a floor of 25 % of the ECR to all life insurers with effect from 1 January 2017. The BMA will put in place these statutory capital and surplus requirements from the end of 2015 to all classes of insurers, except for captives and special purpose insurers. Regarding models, insurance undertakings may use a standard formula or an internal model.
- (12) In the area of governance, the Bermudan solvency regime requires insurance or reinsurance undertakings to have an effective system of governance in place, imposing on them in particular a clear organisational structure, fit and proper requirements for those effectively running the undertakings, effective process for transmission of information within the undertakings and to the BMA. In addition, the BMA effectively supervises outsourced functions and activities.

⁽¹⁾ Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC (OJ L 331, 15.12.2010, p. 48).

⁽²⁾ Commission Delegated Regulation (EU) 2015/35 of 10 October 2014 supplementing Directive 2009/138/EC of the European Parliament and of the Council on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (OJ L 12, 17.1.2015, p. 1).

- (13) The BSCR also requires insurance or reinsurance undertakings and groups to maintain risk-management, compliance, internal audit and actuarial functions. The BSCR imposes a risk-management system capable of identifying, measuring, monitoring, managing and reporting risks, and an effective internal control system.
- (14) The regime in force in Bermuda requires that changes to the business policy or management of insurance or reinsurance undertakings or groups or qualifying holdings in such undertakings or groups must be consistent with sound and prudent management. In particular, acquisitions, changes in the business plan or in qualifying holdings of insurance or reinsurance undertakings or insurance groups are notified to the BMA, which may take appropriate sanctions if justified, such as prohibiting an acquisition. In particular, the Act includes rules extending the requirements for shareholders to notify the disposal of shares in public and private companies.
- (15) Concerning transparency, insurance or reinsurance undertakings and groups are required to provide the BMA with any information necessary to supervision, and publish, at least annually, a report on their solvency and financial condition. The types of qualitative and quantitative information to be disclosed are in line with Directive 2009/138/EC. The requirements on insurers and groups to publish a report mirrors to a large extent the provisions in Directive 2009/138/EC. Exemptions can be granted if disclosure would result in a competitive disadvantage for the undertakings. However, even in this case, the essential information on the solvency and financial condition would be published under the Bermudan rules.
- (16) Regarding professional secrecy and cooperation and exchange of information, the regime in force in Bermuda has professional secrecy obligations in place for all persons who work or have worked for the BMA, including auditors and experts acting on behalf of the BMA. Those obligations also stipulate that confidential information may not be divulged except in aggregate or summary form, without prejudice to cases covered by criminal law. Furthermore, the BMA will only use confidential information received from other supervisory authorities to perform its duties and for the purposes provided for by the law. The regime in force in Bermuda also requires that in case an insurance or reinsurance undertaking is declared bankrupt or compulsorily wound up, confidential information may be disclosed if it does not concern third parties involved in rescuing that undertaking. The BMA may share confidential information received from another supervisory authority with authorities, bodies or persons covered by professional secrecy obligations in Bermuda only after the express agreement of that supervisory authority. It has signed Memoranda of Understanding with the International Association of Insurance Supervisors and with all Member States of the Union to coordinate international cooperation, in particular on exchange of confidential information.
- (17) Regarding the impact of its decisions, the BMA and the other Bermudan authorities which have the mandate to ensure the proper functioning of financial markets are equipped to appreciate how decisions will affect the stability of financial systems globally, in particular during emergency situations, and to take into account their potential procyclical effects where exceptional movements in the financial markets occur. Under the regime in force in Bermuda, regular meetings take place between the abovementioned authorities to exchange information on financial stability risks and coordinate action. The same takes place at international level, where Bermudian authorities exchange for instance with the supervisory colleges of the Member States of the Union and EIOPA on financial stability matters.
- (18) Articles 378 and 380 of Delegated Regulation (EU) 2015/35 also set out specific criteria regarding equivalence for reinsurance activities and for group supervision.
- (19) Regarding the specific criteria for reinsurance activities under Article 378 of Delegated Regulation (EU) 2015/35, the taking-up of business of reinsurance is subject to prior authorisation by the BMA.
- (20) Regarding the specific criteria for group supervision under Article 380 of Delegated Regulation (EU) 2015/35, the BMA has the power to determine which undertakings fall under the scope of supervision at group level and supervise insurance or reinsurance undertakings which are part of a group. The BMA supervises all insurance or reinsurance undertakings over which a participating undertaking, as defined in Article 212(1)(a) of Directive 2009/138/EC, exercises a dominant or significant influence.
- (21) The BMA is capable of assessing the risk profile, financial position and solvency of insurance or reinsurance undertakings that are part of a group and the business strategy of that group.

- (22) Reporting and accounting rules allow monitoring of intra-group transactions and risk concentrations, which insurance or reinsurance groups must report at least on an annual basis.
- (23) The BMA restricts the use of own funds of an insurance or reinsurance undertaking if they cannot effectively be made available to cover the capital requirement of the participating undertaking for which group solvency is calculated. The calculation of group solvency leads to results at least equivalent to the results of the methods set in Articles 230 and 233 of Directive 2009/138/EC, without double counting of own funds and after eliminating the intra-group creation of capital through reciprocal financing.
- (24) Accordingly, as it fulfils all the criteria laid down in Articles 378, 379 and 380 of Delegated Regulation (EU) 2015/35, the regulatory and supervisory regime in force in Bermuda for insurance or reinsurance undertakings and groups should be considered to meet the criteria for full equivalence laid down in Articles 172(2), 227(4) and 260(3) of Directive 2009/138/EC, with the exception of rules on captives and special purpose insurers, which are subject to a different regulatory regime.
- (25) Directive 2009/138/EC applies from 1 January 2016. This Decision should therefore also grant equivalence as of that date to the solvency and prudential regime in force in Bermuda.
- (26) Commission Delegated Decision (EU) 2015/2290 ⁽¹⁾ of 5 June 2015 granted provisional equivalence as regards the solvency regimes in force in Australia, Bermuda, Brazil, Canada, Mexico and the United States. For reasons of legal certainty and given that the solvency regime in force in Bermuda for insurance or reinsurance undertakings and groups meets the criteria for full equivalence, with the exception of rules on captives and special purpose insurers, it is necessary to amend that Decision,

HAS ADOPTED THIS DECISION:

Article 1

The solvency regime in force in Bermuda that applies to the reinsurance activities of undertakings with their head offices in Bermuda shall be considered as equivalent to the regime laid down in Title I of Directive 2009/138/EC, with the exception of rules on captives and special purpose insurers.

Article 2

The supervisory regime in force in Bermuda that applies to the insurance activities of undertakings with their head offices in Bermuda shall be considered as equivalent to the regime laid down in Chapter VI of Title I of Directive 2009/138/EC, with the exception of rules on captives and special purpose insurers.

Article 3

The prudential regime in force in Bermuda that applies to the supervision of insurance or reinsurance undertakings in a group shall be considered as equivalent to the regime laid down in Title III of Directive 2009/138/EC, with the exception of rules on captives and special purpose insurers.

⁽¹⁾ Commission Delegated Decision (EU) 2015/2290 of 5 June 2015 on the provisional equivalence of the solvency regimes in force in Australia, Bermuda, Brazil, Canada, Mexico and the United States and applicable to insurance and reinsurance undertakings with head offices in those countries (OJ L 323, 9.12.2015, p. 22).

Article 4

Delegated Decision (EU) 2015/2290 of 5 June 2015 on the provisional equivalence of the solvency regimes in force in Australia, Bermuda, Brazil, Canada, Mexico and the United States and applicable to insurance and reinsurance undertakings with head offices in those countries, is amended as follows:

(1) the title is replaced by the following:

‘Commission Delegated Decision (EU) 2015/2290 of 5 June 2015 on the provisional equivalence of the solvency regimes in force in Australia, Brazil, Canada, Mexico and the United States and applicable to insurance and reinsurance undertakings with head offices in those countries’;

(2) Article 1 is replaced by the following:

‘Article 1

The solvency regimes in force in Australia, Brazil, Canada, Mexico and the United States and applicable to insurance and reinsurance undertakings with head offices in those countries shall be considered as provisionally equivalent to the regime laid down in Chapter VI of Title I of Directive 2009/138/EC.’

Article 5

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

It shall apply from 1 January 2016.

Done at Brussels, 26 November 2015.

For the Commission
The President
Jean-Claude JUNCKER
