



Council of the
European Union

Brussels, 10 June 2015
(OR. en)

9710/15

EF 107
ECOFIN 462
DELECT 64
SURE 13

COVER NOTE

From:	Secretary-General of the European Commission, signed by Mr Jordi AYET PUIGARNAU, Director
date of receipt:	5 June 2015
To:	Mr Uwe CORSEPIUS, Secretary-General of the Council of the European Union
No. Cion doc.:	C(2015) 3754 final
Subject:	COMMISSION DELEGATED DECISION (EU) .../... of 5.6.2015 on the equivalence of the solvency and prudential regime for insurance and reinsurance undertakings in force in Switzerland based on Articles 172 (2), 227(4) and 260(3) of Directive 2009/138/EC of the European Parliament and of the Council

Delegations will find attached document C(2015) 3754 final.

Encl.: C(2015) 3754 final



Brussels, 5.6.2015
C(2015) 3754 final

COMMISSION DELEGATED DECISION (EU) .../...

of 5.6.2015

on the equivalence of the solvency and prudential regime for insurance and reinsurance undertakings in force in Switzerland based on Articles 172 (2), 227(4) and 260(3) of Directive 2009/138/EC of the European Parliament and of the Council

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE DELEGATED ACT

The Solvency II Directive (Directive 2009/138/EC), as modified by the "Omnibus II" Directive (Directive 2014/51/EU), due to be fully applied from 1 January 2016, introduces a modernised risk-based prudential and supervisory regime for insurance and reinsurance undertakings in the European Union.

Solvency II Directive provides for equivalence determination of third countries in three areas:

- 1) A (re)insurer located in a third country enters into a reinsurance arrangement with a (re)insurer in the EEA (Article 172 Solvency II Directive);
- 2) A (re)insurer is headquartered within the EEA and has participations or subsidiaries (collectively known as related undertakings) located outside the EEA (Article 227 Solvency II Directive);
- 3) A (re)insurer is headquartered within a third country and has related undertakings located within the EEA (Article 260 Solvency II Directive).

For each of the three areas, equivalence can be determined for an unlimited period (if complete equivalence has been determined) or for a limited period (where progress is being made towards equivalence). In the latter case, the duration of the fixed-term equivalence is not discretionary, but laid down in the relevant Solvency II Article, 5 years (non-renewable) for reinsurance and third country groups operating in the EEA, and 10 years (renewable) for EEA groups operating in the third jurisdiction.

The present Delegated Decision covers equivalence for Switzerland for an unlimited period and for all three abovementioned equivalence areas: Articles 172, 227 and 260. If a solvency regime of a third country is deemed equivalent under Article 172, its reinsurers cannot be subject to a requirement to post collateral in the EU. If a solvency regime of a third country is deemed equivalent under Article 227, EU insurance groups can do their EU prudential reporting for a subsidiary in that third country under local rules instead of Solvency II, if deduction and aggregation is allowed as the method of consolidation of group accounts. If a prudential regime of a third country is deemed equivalent under Article 260, its insurance groups which are active in the EU are exempted from some aspects of group supervision in the EU.

The criteria related to the determination of equivalence under Article 172(2), 227(4) and 260(3) are specified respectively in Articles 378, 379 and 380 of the Commission Delegated Regulation 2015/35 of 10 October 2014 supplementing Directive 2009/138/EC (the "Delegated Act"). These criteria feature certain requirements which are common to two or more of Articles 378, 379 and 380 of the Delegated Act, which are valid at the level of solo (re)insurance undertakings and at the level of (re)insurance groups, and which cover the areas of powers, solvency, governance, transparency, cooperation between authorities and handling of confidential information, and impact of the decisions on financial stability.

First, supervisory authorities in the third country must have the necessary means, powers and responsibilities to effectively ensure the protection of policyholders and beneficiaries of (re)insurance contracts.

Second, (re)insurance undertakings in the third country must hold adequate financial resources, in line with the solvency requirements of Solvency II. This implies in particular that there is a market consistent valuation of all assets and liabilities, that technical provisions reflect all (re)insurance obligations, that assets are invested in the best interest of policyholders and beneficiaries, that own funds and the use of internal or standard models are adequate, and that ultimately capital requirements adequately capture risks and protect policyholders in case of significant losses.

Third, (re)insurance undertakings in the third country must have an effective system of governance in place, in particular with an effective risk management system and adequate functions and procedures as defined under Solvency II. The supervisory regime must also ensure that changes in business, management or qualifying holdings do not harm the sound management of (re)insurance undertakings.

Fourth, transparency of information both towards the supervisory authorities in the third country and to the public must be ensured.

Fifth, professional secrecy and exchange of information obligations between authorities must be complied with: all persons that are working or have worked for or on behalf of the supervisory authorities must respect professional secrecy rules. They must in particular not disclose any confidential information they have received except in summary form and for specific cases such as those covered by criminal law or in certain civil or commercial proceedings. The supervisory authorities of the third country shall also ask for the prior consent of the authority from which it received confidential information and respect the specific purposes for which information was obtained.

Sixth, the supervisory authorities of the third country must consider the impact of their decisions on global financial stability and take into account potential procyclical effects.

Some other equivalence criteria are specific for equivalence for group supervision or for reinsurance. For instance, for group supervision, supervisors must have the power by law to determine which undertakings fall under the scope of supervision at group level; for reinsurance, the taking-up of business of reinsurance must be subject to prior authorisation by the supervisor.

The European Insurance and Occupational Pensions Authority (EIOPA) has provided advice to the European Commission on Solvency II full equivalence of Switzerland; this advice has been published on EIOPA's website. The Commission has taken full account of the information provided by EIOPA in making the present determination under the procedure set out in Articles 172(2), 227(4) and 260(3). EIOPA advice is based on the Swiss relevant legislative framework, including the Swiss Financial Market Supervisory Act of 22 June 2007 ("FINMASA"), which entered into force on 1 January 2009, the Insurance Supervision Act ("ISA") of 17 December 2004 and the Insurance Supervision Ordinance ("ISO"). The ISO

was adopted by the Swiss Federal Council on 25 March 2015 and enters into force on 1 July 2015. The Commission has based itself on information provided by EIOPA and further details on the assessment of the Swiss supervisory regime can be found in the EIOPA advice.

2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT

The Expert Group of member States on Banking Insurance and Payments was consulted on 5 March 2015 regarding the Commission's intention to adopt a positive equivalence determination for Switzerland under Articles 172(2), 227(4) and 260(3) of Solvency II. The Expert Group agreed with the Commission's intentions in this area.

3. LEGAL ELEMENTS OF THE DELEGATED ACT

The legal basis for the present Commission Delegated Decision consists of Articles 172(2), 227(4) and 260(3) of the Solvency II Directive.

Even though the Solvency II Directive will be fully applied from 1 January 2016, the Commission may already adopt the present Delegated Decision as indicated under Article 311 of the Solvency II Directive.

COMMISSION DELEGATED DECISION (EU) .../...

of 5.6.2015

on the equivalence of the solvency and prudential regime for insurance and reinsurance undertakings in force in Switzerland based on Articles 172 (2), 227(4) and 260(3) of Directive 2009/138/EC of the European Parliament and of the Council

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 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) Even though the Solvency II Directive will be fully applied from 1 January 2016, the Commission may already adopt the present Delegated Decision as indicated under Article 311 of the Solvency II Directive.
- (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

¹ OJ L 335, 17.12.2009, p. 1–155

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. Full equivalence determinations under Articles 172(2), 227(4) and 260(3) are of unlimited duration unless repealed.
- (7) On 9 March 2015, the European Insurance and Occupational Pensions Authority (EIOPA) provided advice according to Article 33(2) of Regulation (EU) No 1094/2010 to the Commission on the regulatory and supervisory system for (re)insurance undertakings and groups in force in Switzerland. EIOPA's advice is based on the Swiss relevant legislative framework, including the Swiss Financial Market Supervisory Act of 22 June 2007 (FINMASA), which entered into force on 1 January 2009, the Insurance Supervision Act (ISA) of 17 December 2004 and the Insurance Supervision Ordinance (ISO)². The Commission has based its assessment on the information provided by EIOPA.
- (8) Taking into account the provisions of Commission Delegated Regulation (EU) 2015/35³, 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 Article 172(2), 227(4) and 260(3) of Directive 2009/138/EC, respectively.
- (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 solo⁴ (re)insurance undertakings and at the level of (re)insurance groups, and which 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) First, regarding the means, powers and responsibilities, the Swiss financial market supervisor (FINMA) has the power to effectively supervise (re)insurance activities and impose sanctions or take enforcement action where necessary, such as revoking an undertaking's business licence or replace all or part of its management. FINMA has the necessary financial and human means, expertise, capacities and mandate to effectively protect all policyholders and beneficiaries.
- (11) Second, regarding solvency, the Swiss Solvency Test (SST) assessment of the financial position of (re)insurance undertakings or groups relies on sound economic principles, and solvency requirements are based on an economic valuation of all assets and liabilities. The SST requires (re)insurance 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

² The ISO was adopted by the Swiss Federal Council on 25 March 2015 and enters into force on 1 July 2015.

³ 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).

⁴ We specify in the current act whether we consider insurance undertakings at the individual ("solo") or group level. Solo undertakings may or may not be part of groups.

intervention by FINMA if capital requirements are not complied with or if policyholders' interests are threatened. The capital requirements are risk-based, aiming at capturing quantifiable risks. Where a risk is not quantified, it is addressed through other measures: for instance operational risks are addressed qualitatively through the Swiss Quality Assessment (SQA). The main capital requirement, known as the target capital under the SST, is calculated to cover unexpected losses arising from the existing business. In addition, the absolute minimum capital requirement (minimum capital) for insurers varies under the SST depending on the insurance business line. Both requirements are at least as strong as the corresponding Directive 2009/138/EC requirements for all current Swiss insurers' combinations of business lines. Regarding models, insurance undertakings may use a standard model or, if required by FINMA or upon their own initiative, an internal model.

- (12) Third, regarding governance, the Swiss solvency regime requires (re)insurance 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 FINMA. In addition, FINMA effectively supervises outsourced functions and activities.
- (13) The SST also requires (re)insurance undertakings and groups to maintain risk-management, compliance, internal audit and actuarial functions. The SST imposes a risk management system capable of identifying, measuring, monitoring, managing and reporting risks, and an effective internal control system. The requirements of Directive 2009/138/EC regarding internal audit and compliance for solo undertakings are satisfactorily addressed by the ISO, since it reinforces risk management requirements and in particular the obligation to have a compliance function.
- (14) The regime in force in Switzerland requires that changes to the business policy or management of (re)insurance 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 (re)insurance undertakings or insurance groups are notified to FINMA, which may take appropriate sanctions if justified, such as prohibiting an acquisition.
- (15) Fourth, regarding transparency, (re)insurance undertakings and groups are required to provide FINMA with any information necessary to supervision, and publish, at least annually, a report on their solvency and financial condition. The requirements of Directive 2009/138/EC regarding public disclosure are satisfactorily addressed by the ISO, since the types of qualitative and quantitative information to be disclosed are in line with Directive 2009/138/EC. Under the ISO, (re)insurance undertakings and groups have to disclose their business activities, performance, risk management, risk profile, methods used for assessment regarding in particular provisions, capital management and solvency.
- (16) Fifth, regarding professional secrecy and cooperation and exchange of information, the regime in force in Switzerland has professional secrecy obligations in place for all persons who work or have worked for FINMA, including auditors and experts acting on behalf of FINMA. 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, FINMA 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 Switzerland also requires that in case a (re)insurance 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. FINMA may share confidential information received from another supervisory authority with authorities, bodies or persons covered by professional secrecy obligations in Switzerland only after the express agreement of that supervisory authority. It has signed Memoranda of Understanding with all Member States of the Union to coordinate international cooperation, in particular on exchange of confidential information.

- (17) Sixth, regarding the impact of its decisions, FINMA and the other Swiss authorities which have the mandate to ensure the proper functioning of financial markets, such as the Swiss National Bank and the Ministry of Finance 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 Switzerland, 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 Swiss 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 FINMA conditional on detailed standards set in law. Reinsurance captive companies are covered by the solvency regime in force in Switzerland under the ISO.
- (20) Regarding the specific criteria for group supervision under Article 380 of Delegated Regulation (EU) 2015/35, FINMA has the power to determine which undertakings fall under the scope of supervision at group level and supervise insurance and reinsurance undertakings which are part of a group. FINMA supervises all (re)insurance 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) FINMA is capable of assessing the risk profile, financial position and solvency of (re)insurance undertakings that are part of a group and the business strategy of that group.
- (22) Under the regime in force in Switzerland, reporting and accounting rules allow monitoring of intra-group transactions and risk concentrations, which (re)insurance groups must report at least on an annual basis.
- (23) Under the regime in force in Switzerland, FINMA restricts the use of own funds of a (re)insurance 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. More in detail, even if there is no group solvency ratio as under Articles 230 and 233 of Directive 2009/138/EC but a series of solvency ratios per entity within a group, that series captures all interactions between entities of the group and is thus taking the group structure into account.

- (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 Switzerland for (re)insurance undertakings and groups is considered to meet the criteria for full equivalence laid down in Articles 172(2), 227(4) and 260(3) of Directive 2009/138/EC.
- (25) The Commission may undertake a specific review relating to an individual third country or territory at any time outside the general review, where relevant developments make it necessary for the Commission to re-assess the recognition granted by this decision. The Commission should continue to monitor, with the technical assistance of EIOPA, the evolution of the regime in force in Switzerland and the fulfilment of the conditions on the basis of which this Decision has been taken,
- (26) 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 Switzerland,

HAS ADOPTED THIS DECISION:

Article 1

From 1 January 2016, the solvency regime in force in Switzerland that applies to the reinsurance activities of undertakings with their head office in Switzerland shall be considered equivalent to the requirements of Title I of Directive 2009/138/EU.

Article 2

From 1 January 2016, the solvency regime in force in Switzerland that applies to insurance and reinsurance undertakings with head offices in Switzerland shall be considered equivalent to the requirements of Title I of, Chapter VI of Directive 2009/138/EU.

Article 3

From 1 January 2016, the prudential regime in force in Switzerland that applies to the supervision of insurance and reinsurance undertakings in a group shall be considered equivalent to the requirements of Title III of Directive 2009/138/EU.

Article 4

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, 5.6.2015

For the Commission
The President
Jean-Claude JUNCKER