

REGULATIONS

COMMISSION DELEGATED REGULATION (EU) 2017/1542

of 8 June 2017

amending Delegated Regulation (EU) 2015/35 concerning the calculation of regulatory capital requirements for certain categories of assets held by insurance and reinsurance undertakings (infrastructure corporates)

(Text with EEA relevance)

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 of 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 Article 50(1)(a) and 111(1)(b), (c) and (m) thereof,

Whereas:

- (1) The Investment Plan for Europe focuses on removing obstacles to investment, providing visibility and technical assistance to investment projects and making smarter use of new and existing financial resources. In particular, the third pillar of the Investment Plan is based on removing barriers to investment and providing greater regulatory predictability in order to keep Europe attractive for investments.
- (2) One of the objectives of the Capital Markets Union is to mobilise capital in Europe and channel it to, among others, infrastructure projects that need it to expand and create jobs. Insurance companies, in particular life insurers, are among the largest institutional investors in Europe, with the ability to provide equity as well as debt funding to long term infrastructure.
- (3) On 2 April 2016, Commission Delegated Regulation (EU) 2016/467 ⁽²⁾, amending Commission Delegated Regulation (EU) 2015/35 ⁽³⁾, entered into force which created a distinct asset class for infrastructure projects for the purpose of risk calibrations.
- (4) The Commission requested and received further technical advice from the European Insurance and Occupational Pensions Authority (EIOPA) as regards the criteria and calibration of a new asset class for infrastructure corporates. That technical advice also recommended some changes to the criteria for qualifying infrastructure projects investments as introduced by Delegated Regulation (EU) 2016/467.
- (5) In order to cover structured project finance situations involving multiple legal entities of a corporate group, the definition of infrastructure project entity should be replaced and expanded to cover both individual entities and corporate groups. To cover entities that earn a substantial portion of their revenues through infrastructure activities, the wording of the revenue criteria should be amended. To assess the sources of revenues of an infrastructure entity the most recent financial year where available or a financing proposal such as a bonds prospectus or financial projections in a loan application should be used. The definition of infrastructure assets should include physical assets so that the relevant infrastructure entities may qualify.

⁽¹⁾ OJ L 335, 17.12.2009, p. 1.

⁽²⁾ Commission Delegated Regulation (EU) 2016/467 of 30 September 2015 amending Commission Delegated Regulation (EU) 2015/35 concerning the calculation of regulatory capital requirements for several categories of assets held by insurance and reinsurance undertakings (OJ L 85, 1.4.2016, p. 6).

⁽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).

- (6) To avoid an outright exclusion of infrastructure entities that are unable to provide security to lenders on all assets for legal or ownership reasons, mechanisms should be captured that allow other security arrangements in favour of debt providers.
- (7) Taking into account situations where the pledge prior to default may not be permissible under the national law, the requirement that equity is pledged to debt providers should be included in other security arrangements.
- (8) Where the consent by the existing debt providers is implicit in the terms of the relevant document such as maximum indebtedness limit, further debt issuance by an existing infrastructure entity or corporate group should be allowed for qualifying infrastructure investments.
- (9) Calibrations in Delegated Regulation (EU) 2015/35 should be proportionate to the risk involved.
- (10) Based on EIOPA's technical advice to amend the existing treatment of qualifying infrastructure project investments the existing provisions for infrastructure projects should be amended.
- (11) EIOPA's technical advice as well as complementary evidence confirms that qualifying infrastructure corporate investments can be safer than non-infrastructure investments. Delegated Regulation (EU) 2015/35 should be amended to include the new risk calibrations for debt investment in qualifying infrastructure corporates to distinguish these investments from non-infrastructure investments.
- (12) Appropriate definitions and qualifying criteria should ensure prudent investment behaviour by insurance undertakings. Those definitions and criteria should ensure that only safer investments will benefit from lower calibrations.
- (13) The diversification of revenues may not always be possible for infrastructure entities that provide core infrastructure assets or services to other infrastructure businesses. In such situations take-or-pay contracts should be allowed in the assessment of the predictability of revenues.
- (14) Stress testing as a part of investment risk management should consider risks arising from non-infrastructure activities. However, in order to make a prudent assessment of the investment risk the revenues generated by such activities should not be taken into account when determining whether the financial obligations can be met.
- (15) Following the introducing of the new qualifying infrastructure corporate asset class, other provisions of Delegated Regulation (EU) 2015/35 should be aligned accordingly, such as the formula for the solvency capital requirement and the due diligence requirements which are essential for prudent investment decisions by insurance companies.
- (16) Delegated Regulation (EU) 2015/35 should therefore be amended accordingly.
- (17) To allow for immediate investments in this long-term infrastructure asset class, it is important to ensure this Regulation enters into force as soon as possible, on the day following that of its publication in the *Official Journal of the European Union*,

HAS ADOPTED THIS REGULATION:

Article 1

Delegated Regulation (EU) 2015/35 is amended as follows:

- (1) in Article 1, points 55a and 55b are replaced by the following:

- 55a. "infrastructure assets" means physical assets, structures or facilities, systems and networks that provide or support essential public services;
- 55b. "infrastructure entity" means an entity or corporate group which, during the most recent financial year of that entity or group for which figures are available or in a financing proposal, derives the substantial majority of its revenues from owning, financing, developing or operating infrastructure assets;;

(2) in Article 164a, paragraph 1 is replaced by the following:

‘1. For the purposes of this Regulation, qualifying infrastructure investment shall include investment in an infrastructure entity that meets the following criteria:

- (a) the cash flows generated by the infrastructure assets allow for all financial obligations to be met under sustained stresses that are relevant for the risks of the project;
- (b) the cash flows that the infrastructure entity generates for debt providers and equity investors are predictable;
- (c) the infrastructure assets and infrastructure entity are governed by a regulatory or contractual framework that provides debt providers and equity investors with a high degree of protection including the following:
 - (a) the contractual framework shall include provisions that effectively protect debt providers and equity investors against losses resulting from the termination of the project by the party which agrees to purchase the goods or services provided by the infrastructure project, unless one of the following conditions is met:
 - (i) the revenues of the infrastructure entity are funded by payments from a large number of users; or
 - (ii) the revenues are subject to a rate-of-return regulation;
 - (b) the infrastructure entity has sufficient reserve funds or other financial arrangements to cover the contingency funding and working capital requirements of the project;

Where investments are in bonds or loans, this contractual framework shall also include the following:

- (i) debt providers have security or the benefit of security to the extent permitted by applicable law in all assets and contracts that are critical to the operation of the project;
- (ii) the use of net operating cash flows after mandatory payments from the project for purposes other than servicing debt obligations is restricted;
- (iii) restrictions on activities that may be detrimental to debt providers, including that new debt cannot be issued without the consent of existing debt providers in the form agreed with them, unless such new debt issuance is permitted under the documentation for the existing debt;

Notwithstanding point (i) of the second subparagraph, for investments in bonds or loans, where undertakings can demonstrate that security in all assets and contracts is not essential for debt providers to effectively protect or recover the vast majority of their investment, other security mechanisms may be used. In that case, the other security mechanisms shall comprise at least one of the following:

- (i) pledge of shares;
 - (ii) step-in rights;
 - (iii) lien over bank accounts;
 - (iv) control over cash flows;
 - (v) provisions for assignment of contracts;
- (d) where investments are in bonds or loans, the insurance or reinsurance undertaking can demonstrate to the supervisor that it is able to hold the investment to maturity;
 - (e) where investments are in bonds or loans for which a credit assessment by a nominated ECAI is not available, the investment instrument and other *pari passu* instruments are senior to all other claims other than statutory claims and claims from liquidity facility providers, trustees and derivatives counterparties;
 - (f) where investments are in equities, or bonds or loans for which a credit assessment by a nominated ECAI is not available, the following criteria are met:
 - (i) the infrastructure assets and infrastructure entity are located in the EEA or in the OECD;

- (ii) where the infrastructure project is in the construction phase the following criteria shall be fulfilled by the equity investor, or where there is more than one equity investor, the following criteria shall be fulfilled by a group of equity investors as a whole:
 - the equity investors have a history of successfully overseeing infrastructure projects and the relevant expertise,
 - the equity investors have a low risk of default, or there is a low risk of material losses for the infrastructure entity as a result of the their default,
 - the equity investors are incentivised to protect the interests of investors;
- (iii) where there are construction risks, safeguards to ensure completion of the project according to the agreed specification, budget or completion date;
- (iv) where operating risks are material, they are properly managed;
- (v) the infrastructure entity uses tested technology and design;
- (vi) the capital structure of the infrastructure entity allows it to service its debt;
- (vii) the refinancing risk for the infrastructure entity is low;
- (viii) the infrastructure entity uses derivatives only for risk-mitigation purposes.;

(3) the following Article 164b is inserted:

'Article 164b

Qualifying infrastructure corporate investments

For the purpose of this Regulation, qualifying infrastructure corporate investment shall include investment in an infrastructure entity that meets the following criteria:

- (1) The substantial majority of the infrastructure entity's revenues is derived from owning, financing, developing or operating infrastructure assets located in the EEA or the OECD;
- (2) The revenues generated by the infrastructure assets satisfy one of the criteria set out in Article 164a(2)(a);
- (3) Where the revenues of the infrastructure entity are not funded by payments from a large number of users, the party which agrees to purchase the goods or services provided by the infrastructure entity shall be one of the entities listed in Article 164a(2)(b);
- (4) The revenues shall be diversified in terms of activities, location, or payers, unless the revenues are subject to a rate-of-return regulation in accordance with Article 164a(1)(c)(a)(ii) or a take-or-pay contract or the revenues are availability based;
- (5) Where investments are in bonds or loans, the insurance or reinsurance undertaking can demonstrate to the supervisor that it is able to hold the investment to maturity;
- (6) Where no credit assessment from a nominated ECAI is available for the infrastructure entity:
 - (a) the capital structure of the infrastructure corporate shall allow it to service all its debt under conservative assumptions based on an analysis of the relevant financial ratios;
 - (b) the infrastructure entity shall have been active for at least three years or, in the case of an acquired business, it shall have been in operation for at least three years;
- (7) Where a credit assessment from a nominated ECAI is available for the infrastructure entity, such credit assessment has a credit quality step between 0 and 3.;

(4) Article 168 is amended as follows:

(a) paragraph 1 is replaced by the following:

'1. The equity risk sub-module referred to in point (b) of the second subparagraph of Article 105(5) of Directive 2009/138/EC shall include a risk sub-module for type 1 equities, a risk sub-module for type 2 equities, a risk sub-module for qualifying infrastructure equities and a risk sub-module for qualifying infrastructure corporate equities.;

(b) the following paragraph 3b is inserted:

'3b. Qualifying infrastructure corporate equities shall comprise equity investments in infrastructure entities that meet the criteria set out in Article 164b.;

(c) paragraph 4 is replaced by the following:

'4. The capital requirement for equity risk shall be equal to the following:

$$SCR_{equity} = \sqrt{SCR_{equ1}^2 + 2 \cdot 0,75 \cdot (SCR_{equ2} + SCR_{quinf} + SCR_{quinf_c}) + (SCR_{equ2} + SCR_{quinf} + SCR_{quinf_c})^2}$$

where:

(a) SCR_{equ1} denotes the capital requirement for type 1 equities;

(b) SCR_{equ2} denotes the capital requirement for type 2 equities;

(c) SCR_{quinf} denotes the capital requirement for qualifying infrastructure equities;

(d) SCR_{quinf_c} denotes the capital requirement for qualifying infrastructure corporate equities.;

(d) paragraph 6 is amended as follows:

(i) points (a) and (b) are replaced by the following:

'(a) equities, other than qualifying infrastructure equities or qualifying infrastructure corporate equities, held within collective investment undertakings which are qualifying social entrepreneurship funds as referred to in Article 3(b) of Regulation (EU) No 346/2013 of the European Parliament and of the Council (*) where the look-through approach set out in Article 84 of this Regulation is possible for all exposures within the collective investment undertaking, or units or shares of those funds where the look through approach is not possible for all exposures within the collective investment undertaking;

(b) equities, other than qualifying infrastructure equities or qualifying infrastructure corporate equities, held within collective investment undertakings which are qualifying venture capital funds as referred to in Article 3(b) of Regulation (EU) No 345/2013 of the European Parliament and of the Council (**) where the look-through approach set out in Article 84 of this Regulation is possible for all exposures within the collective investment undertaking, or units or shares of those funds where the look through approach is not possible for all exposures within the collective investment undertaking;

(*) Regulation (EU) No 346/2013 of the European Parliament and of the Council of 17 April 2013 on European social entrepreneurship funds (OJ L 115, 25.4.2013, p. 18).

(**) Regulation (EU) No 345/2013 of the European Parliament and of the Council of 17 April 2013 on European venture capital funds (OJ L 115, 25.4.2013, p. 1).;

(ii) in point (c), point (i) is replaced by the following:

'(i) equities, other than qualifying infrastructure equities or qualifying infrastructure corporate equities, held within such funds where the look-through approach set out in Article 84 of this Regulation is possible for all exposures within the alternative investment fund.;

(iii) point (d) is replaced by the following:

'(d) equities, other than qualifying infrastructure equities or qualifying infrastructure corporate equities, held within collective investment undertakings which are authorised as European long-term investment funds pursuant to Regulation (EU) 2015/760 where the look through approach set out in Article 84 of this Regulation is possible for all exposures within the collective investment undertaking, or units or shares of those funds where the look through approach is not possible for all exposures within the collective investment undertaking.;

(5) in Article 169, the following paragraph 4 is added:

‘4. The capital requirement for qualifying infrastructure corporate equities referred to in Article 168 of this Regulation shall be equal to the loss in the basic own funds that would result from the following instantaneous decreases:

- (a) an instantaneous decrease equal to 22 % in the value of qualifying infrastructure corporate equity investments in related undertakings within the meaning of Article 212(1)(b) and 212(2) of Directive 2009/138/EC where these investments are of a strategic nature;
- (b) an instantaneous decrease equal to the sum of 36 % and 92 % of the symmetric adjustment as referred to in Article 172 of this Regulation in the value of qualifying infrastructure corporate equities other than those referred to in point (a).’;

(6) in Article 170, the following paragraph 4 is added:

‘4. Where an insurance or reinsurance undertaking has received supervisory approval to apply the provisions set out in Article 304 of Directive 2009/138/EC, the capital requirement for qualifying infrastructure corporate equities shall be equal to the loss in the basic own funds that would result from an instantaneous decrease:

- (a) equal to 22 % in the value of the qualifying infrastructure corporate equity corresponding to the business referred to in point (i) of Article 304(1)(b) of Directive 2009/138/EC;
- (b) equal to 22 % in the value of qualifying infrastructure corporate equity investments in related undertakings within the meaning of Article 212(1)(b) and (2) of Directive 2009/138/EC, where these investments are of a strategic nature;
- (c) equal to the sum of 36 % and 92 % of the symmetric adjustment as referred to in Article 172 of this Regulation in the value of qualifying infrastructure corporate equities other than those referred to in points (a) or (b).’;

(7) in Article 171, the introductory sentence is replaced by the following:

‘For the purposes of Article 169(1)(a), (2)(a), (3)(a) and (4)(a) and of Article 170(1)(b), (2)(b), (3)(b) and (4)(b), equity investments of a strategic nature shall mean equity investments for which the participating insurance or reinsurance undertaking demonstrates the following’;

(8) in Article 180, the following paragraphs 14, 15 and 16 are added:

‘14. Exposures in the form of bonds and loans that fulfil the criteria set out in paragraph 15 shall be assigned a risk factor $stress_i$ depending on the credit quality step and the duration of the exposure according to the following table:

Credit quality step		0		1		2		3	
Duration (dur_i)	$stress_i$	a_i	b_i	a_i	b_i	a_i	b_i	a_i	b_i
up to 5	$b_i \cdot dur_i$	—	0,68 %	—	0,83 %	—	1,05 %	—	1,88 %
More than 5 and up to 10	$a_i + b_i \cdot (dur_i - 5)$	3,38 %	0,38 %	4,13 %	0,45 %	5,25 %	0,53 %	9,38 %	1,13 %
More than 10 and up to 15	$a_i + b_i \cdot (dur_i - 10)$	5,25 %	0,38 %	6,38 %	0,38 %	7,88 %	0,38 %	15,0 %	0,75 %
More than 15 and up to 20	$a_i + b_i \cdot (dur_i - 15)$	7,13 %	0,38 %	8,25 %	0,38 %	9,75 %	0,38 %	18,75 %	0,75 %
More than 20	$\min[a_i + b_i \cdot (dur_i - 20); 1]$	9,0 %	0,38 %	10,13 %	0,38 %	11,63 %	0,38 %	22,50 %	0,38 %

15. The criteria for exposures that are assigned a risk factor in accordance with paragraph 14 shall be:

- (a) the exposure relates to a qualifying infrastructure corporate investment that meets the criteria set out in Article 164b;
- (b) the exposure is not an asset that fulfils the following conditions:
 - it is assigned to a matching adjustment portfolio in accordance with Article 77b(2) of Directive 2009/138/EC,
 - it has been assigned a credit quality step between 0 and 2;
- (c) a credit assessment by a nominated ECAI is available for the infrastructure entity.
- (d) the exposure has been assigned a credit quality step between 0 and 3.

16. Exposures in the form of bonds and loans that meet the criteria set out in paragraph 15(a) and (b), but do not meet the criteria set out in paragraph 15(c), shall be assigned a risk factor *stress*, equivalent to credit quality step 3 and the duration of the exposure in accordance with the table set out in paragraph 14.;

(9) in Article 181, the second paragraph of point (b) is replaced by the following:

‘For assets in the assigned portfolio for which no credit assessment by a nominated ECAI is available, and for qualifying infrastructure assets and for qualifying infrastructure corporate assets that have been assigned credit quality step 3, the reduction factor shall be 100 %.’;

(10) Article 261a is replaced by the following:

Article 261a

Risk management for qualifying infrastructure investments or qualifying infrastructure corporate investments

1. Insurance and reinsurance undertakings shall conduct adequate due diligence prior to making a qualifying infrastructure investment or a qualifying infrastructure corporate investment, including all of the following:

- (a) a documented assessment of how the infrastructure entity satisfies the criteria set out in Article 164a or Article 164b, which has been subject to a validation process, carried out by persons that are free from influence from those persons responsible for the assessment of the criteria, and have no potential conflicts of interest with those persons;
- (b) a confirmation that any financial model for the cash flows of the infrastructure entity has been subject to a validation process carried out by persons that are free from influence from those persons responsible for the development of the financial model, and have no potential conflicts of interest with those persons.

2. Insurance and reinsurance undertakings with a qualifying infrastructure investment or a qualifying infrastructure corporate investment shall regularly monitor and perform stress tests on the cash flows and collateral values supporting the infrastructure entity. Any stress tests shall be commensurate with the nature, scale and complexity of the risk inherent in the infrastructure project.

3. The stress testing shall consider risks arising from non-infrastructure activities, but the revenues generated by such activities shall not be taken into account when determining whether the infrastructure entity is able to meet its financial obligations.

4. Where insurance or reinsurance undertakings hold material qualifying infrastructure investments or qualifying infrastructure corporate investments, they shall, when establishing the written procedures referred to in Article 41(3) of Directive 2009/138/EC, include provisions for an active monitoring of these investments during the construction phase, and for a maximisation of the amount covered from these investments in case of a work-out scenario.

5. Insurance or reinsurance undertakings with a qualifying infrastructure investment or a qualifying infrastructure corporate investment in bonds or loans shall set up their asset-liability management to ensure that, on an ongoing basis, they are able to hold the investment to maturity.’.

Article 2

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

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 8 June 2017.

For the Commission
The President
Jean-Claude JUNCKER
