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To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
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Subject:	COMMISSION DELEGATED DECISION (EU) .../... of 26.11.2015 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 Delegated Decision (EU) [.../... [C(2015) 3740]]

Delegations will find attached document C(2015) 8145 final.

Encl.: C(2015) 8145 final



EUROPEAN
COMMISSION

Brussels, 26.11.2015
C(2015) 8145 final

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

of 26.11.2015

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 Delegated Decision (EU) [.../... [C(2015) 3740]]

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 Bermuda 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 insurance and reinsurance undertakings and at the level of insurance and reinsurance 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 insurance and reinsurance contracts.

Second, insurance and reinsurance 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 insurance and reinsurance obligations, that assets are invested in the best interest of policyholders and beneficiaries, that own funds and the use of an internal model or standard formula are adequate, and that ultimately capital requirements adequately capture risks and protect policyholders in case of significant losses.

Third, insurance and reinsurance 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 insurance and reinsurance 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 published advice on 11 March 2015 to the European Commission on Solvency II full equivalence of Bermuda. Bermuda was granted provisional equivalence under Article 227 of Solvency II in June 2015. Following the adoption of new insurance legislation by Bermuda in July 2015, EIOPA adopted an update of its advice on 31 July 2015. Both the March 2015 advice and the July

2015 update have been published on EIOPA's website. 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 was necessary to amend for Bermuda the Commission Delegated Decision (EU) [.../... [C(2015) 3740]] of 5 June 2015¹, which granted provisional equivalence as regards the solvency regimes in force in Australia, Bermuda, Brazil, Canada, Mexico and the United States. 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 Bermudan relevant legislative framework, including the Insurance Amendment (No 2) Act 2015 amending the Insurance Act 1978. It was adopted in July 2015 and will enter into force on 1 January 2016. The framework also includes the Insurance Code of Conduct, which has been amended with effect from July 2015, and the revised insurance prudential rules adopted by the BMA and effective from 1 January 2016. They include the Insurance (Group Supervision) Amendment Rules 2015, the Insurance (Public Disclosure) Rules 2015, the Insurance (Eligible Capital) Amendment Rules 2015, the Insurance (Prudential Standards) (Insurance Group Solvency Requirement) Amendment Rules 2015, the Insurance (Prudential Standards) (Class 4 and 3B Solvency Requirement) Amendment Rules 2015, the Insurance (Prudential Standards) (Class 3A Solvency Requirement) Amendment Rules 2015; and the Insurance (Prudential Standards) (Class C, D, and E Solvency Requirement) Amendment Rules 2015. The Commission has based itself on information provided by EIOPA and further details on the assessment of the Bermudan supervisory regime can be found in the EIOPA advice.

The Commission will continue to monitor, with the technical assistance of EIOPA, the evolution of the regulatory regime for insurance and reinsurance in force in Bermuda and the fulfilment of the conditions on the basis of which this Decision has been adopted.

2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT

The Expert Group of Member States on Banking Insurance and Payments was consulted in its meeting of 14 July 2015 and again in writing on 10 September 2015 regarding the Commission's intention to adopt a positive equivalence determination for Bermuda 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.

¹ Commission Delegated Decision (EU) [.../... [C(2015) 3740]] 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.

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 26.11.2015

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 Delegated Decision (EU) [.../... [C(2015) 3740]]

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)², 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

² OJ L 335, 17.12.2009, p. 1.

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.
- (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 Council³ 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) 2015/35⁴, 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 Capital Solvency 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

³ 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).

⁴ 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).

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.
- (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 a 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 a 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) [.../... [C(2015) 3740]]⁵ 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.

⁵ Commission Delegated Decision (EU) [.../... [C(2015) 3740]] 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 [...]).

Article 4

Delegated Decision (EU) [.../... [C(2015) 3740]] 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) [.../...] 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, 26.11.2015

For the Commission
The President
Jean-Claude JUNCKER