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)

COMMISSION DELEGATED REGULATION (EU) 2017/1542

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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.

(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;