

Opinion of the European Insurance and Occupational Pensions Authority on the group solvency calculation in the context of equivalence

Legal Basis

1. This opinion is issued under Article 29(1)(a) of Regulation (EU) No 1094/2010 of the European Parliament and of the Council (hereafter the 'Regulation')¹. As established in Article 29(1) of the Regulation, EIOPA shall play an active role in building a common Union supervisory culture and consistent supervisory practices, as well as in ensuring uniform procedures and consistent approaches throughout the Union.
2. Against this background, EIOPA has developed this opinion concerning the solvency calculation of an insurance or reinsurance undertaking, an insurance holding company or a mixed financial holding company which is a participating undertaking in a third-country insurance or reinsurance undertaking. This opinion applies to the case where the third-country in which that undertaking has its head office makes it subject to authorisation and imposes on it a solvency regime equivalent or provisionally equivalent to that laid down in Title I, Chapter VI of Directive 2009/138/EC², and where the relevant National Competent Authority ("NCA") has determined that method 2 laid down in Article 233 and 234 of Directive 2009/138/EC may be applied in respect of the related insurance or reinsurance undertaking.
3. The opinion consists of the following parts:
 - the third-country capital requirement to be taken into account in the group solvency calculation;
 - the assessment of the availability of eligible own funds at group level;
 - the monitoring of the solvency position over time;
 - an annex where examples are provided.
4. Pursuant to Article 227 of Directive 2009/138/EC, where the third-country in which a related insurance or reinsurance undertaking has its head office makes it subject to authorisation and imposes on it a solvency regime at least equivalent to that laid down in Title I, Chapter VI, Member States may provide that the calculation takes into account, as regards that undertaking, the Solvency Capital Requirement ("SCR") and the own funds eligible to satisfy that requirement as laid down by the concerned third-country. Up to date the European Commission has determined that the solvency regimes in force in Australia, Bermuda (with the

¹ OJ L 331, 15.12.2010, p. 48.

² OJ L 335, 17.12.2009, p.1.

exception of rules on captives), Brazil, Canada, Mexico and the United States shall be considered as provisionally equivalent (for a period of 10 years starting from 1 January 2016)³ and that the solvency regime in force in Switzerland shall be considered equivalent to that laid down in Title I, Chapter VI of Directive 2009/138/EC⁴.

5. This opinion is addressed to the National Competent Authorities (“NCAs”).

Context and scope

6. EIOPA is attentive to the convergence of practices concerning the supervision of the group solvency calculation. NCAs responsible for group supervision are required to assess the solvency position of the groups, including the availability at group level of the eligible own funds of related insurance and reinsurance undertakings.
7. EIOPA has identified potential obstacles in achieving convergent supervisory practices in relation to groups for which method 2 has been allowed to aggregate related insurance or reinsurance undertakings, head offices of which are in an equivalent or provisionally equivalent third-country. In this context, EIOPA has identified the risk of competitive disadvantage arising from diverging methods of assessing the solvency position of such groups, in particular as regards:
 - a. the SCR of the related third-country insurance or reinsurance undertaking to be aggregated in the group SCR;
 - b. the assessment of the availability at group level of the eligible own funds of that related undertaking; and
 - c. the monitoring of the group solvency position.
8. This opinion recommends to NCAs how to deal with this risk.
9. EIOPA has also analysed ways in which own funds can be transferred within a group from the non-EEA part to the EEA part. EIOPA is aware that this transfer can be restricted in particular situations by the third-country supervisory authority.
10. Taking the above into account, this opinion is prepared under three assumptions: (1) it refers to restrictions existing on a going-concern basis, (2) method 2 has been authorised by the group supervisor for a related third-country insurance or reinsurance undertaking with head office in an equivalent or provisionally equivalent third-country and (3) the Member State of the group has provided that the group solvency calculation takes into account the requirements as laid down by the third country concerned.

³ http://ec.europa.eu/finance/insurance/docs/solvency/international/delegated-act-c-2015-3740_en.pdf. At the moment of adoption of this opinion the Commission Delegated Decision was still subject to scrutiny by the European Parliament and the Council.

⁴ Commission Delegated Regulation (EU) 2015/1602 of 5 June 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 (OJ L 248, 24.09.2015, p. 95).

1) The third-country capital requirement to be taken into account in the group solvency calculation

11. Where the solvency regime of a third-country is equivalent or provisionally equivalent and where this solvency regime provides different levels of capital requirements, one of those levels needs to be selected to be aggregated in the group SCR.
12. Against this background, Directive 2009/138/EC provides a minimum capital requirement (MCR) and a SCR, where the latter is the highest capital requirement of Directive 2009/138/EC⁵.
13. Group supervisors should require groups to calculate their group solvency using the highest level of capital requirement, as laid down in prudential regulations or stipulated by the supervisory authority of the equivalent or provisionally equivalent third-country.

2) The assessment of the availability of eligible own funds at group level

14. Pursuant to Article 222 of Directive 2009/138/EC, the group supervisor should assess whether the own funds eligible for the SCR of a related insurance or reinsurance undertaking can effectively be made available to cover the group SCR. Article 330(1) of the Commission Delegated Regulation (EU) 2015/35⁶ provides a list of elements which shall be considered in this regard.
15. The eligible own funds of the related third-country insurance or reinsurance undertaking should be assessed for their availability to cover the group SCR by the group supervisor. The own funds covering the capital requirement to be used when calculating the group solvency, as referred to in paragraph 13 of this opinion, should be considered available to cover the group SCR. Where some or all eligible own funds exceeding the capital requirement referred to in paragraph 13 are assessed as not being available to cover the group SCR, then they should be excluded from the group own funds.
16. The group supervisor should identify all legal or regulatory requirements of the third-country that would restrict the ability of eligible own fund items of a third-country insurance or reinsurance undertaking to absorb losses arising in the group or the transferability of that undertaking's assets to another insurance or reinsurance undertaking.
17. The group supervisor should understand the material aspects of the system and the nature of the supervisory actions which may be taken by the third-country supervisory authority. Where the group supervisor comes to the conclusion that in practice intervention is triggered when the eligible own funds decrease below a threshold, which is above the highest capital requirement as laid down in the

⁵ Excluding capital add-ons.

⁶ 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, 17.01.2015, p. 1).

equivalent third-country, then the eligible own funds needed to cover that threshold should not be considered available.

18. The group supervisor may require the group to carry out relevant stress tests in order to demonstrate whether and what amount of assets could be transferred in different circumstances.
19. Article 330(2) of Commission Delegated Regulation (EU) 2015/35 provides that the assessment of the availability of eligible own funds should be carried out on a going-concern basis. Any stress tests used as part of the assessment should therefore be such that the undertaking being assessed would remain a going-concern in the scenario used. Where actions, which would be taken by the group to transfer own funds in response to such a scenario, extend beyond standard transfers carried out in normal circumstances, such as the payment of a dividend, then those actions should be presented to the group supervisor, for instance in a recovery or resolution planning, and should be considered credible and achievable by the group supervisor for them to be taken into account.
20. Possible restrictions on the payment of dividends should be analysed in particular. For this purpose, the group supervisor should analyse the history of dividend payments, where this history exists, considering the distribution in various circumstances (e.g. a positive or negative financial result of the related third-country insurance or reinsurance undertaking, a beneficial or adverse macro-economic financial environment). An absence of dividend payments in the past does not necessarily indicate that own funds cannot be made available to the group by the payment of future dividends, but the previous intervention by a third-country authority to prevent the payment of dividends would tend to indicate that similar restrictions would be applied in the future.
21. If a prudential regime of an equivalent or provisionally equivalent third-country does not categorise own funds into tiers or defines tiers of own funds which are significantly different from the tiers established under Directive 2009/138/EC, then the own funds brought in by method 2 should be allocated to tiers according to the principles laid down in Articles 87 to 99 of Directive 2009/138/EC, applied in a proportionate manner.

3) The monitoring of the solvency position over time

22. The group supervisor should require groups operating in an equivalent or provisionally equivalent third-country to include the related third-country insurance and reinsurance undertakings in their risk appetite definition in order to form an economic view of the risks inherent in the business conducted in the third-country. If relevant, this should be part of the group own risk and solvency assessment (ORSA). It should constitute the basis for a discussion between the group supervisor and the group itself on how the business conducted in the third-country fits into the risk profile of the entire group.
23. According to Article 328(2) of Commission Delegated Regulation (EU) 2015/35, the group supervisor shall require the group to revert to method 1 in relation to any related undertaking where the use of method 2 or a combination of methods 1

and 2 is no longer justified, considering the elements referred to in Article 328(1) of that Regulation. In the context of third-country undertakings, volume and value of intra-group transactions between third-country undertakings and the EEA part of the group and the volume and value of intra-group transactions between the third-country undertakings should be monitored in particular.

24. EIOPA will monitor development of the issues related to the group solvency calculation in the context of equivalence, addressed in this opinion.
25. This opinion will be published on EIOPA's website.

Done in Frankfurt am Main, 25 September 2015

[signed]

Gabriel Bernardino

EIOPA Chairperson

For the Board of Supervisors

ANNEX

Example: Capital requirements in the United States (U.S.)

26. The solvency regime of the U.S. includes a ladder of intervention with several levels of capital requirements, according to the Risk-Based Capital (RBC) Model Law. These levels are defined, with respect to any insurance or reinsurance undertaking, as follows:
- Company Action Level RBC means the product of 2.0 and its Authorized Control Level RBC;
 - Regulatory Action Level RBC means the product of 1.5 and its Authorized Control Level RBC;
 - Authorized Control Level RBC means the number determined under the risk-based capital formula in accordance with the RBC instructions; and
 - Mandatory Control Level RBC means the product of 0.7 and its Authorized Control Level RBC.
27. The RBC Model Law also defines which events above the 2.0 threshold should be identified as "Company Action Level Event"⁷. In particular, such an event is defined when an insurance or reinsurance undertaking has a total adjusted capital which is greater or equal to its Company Action Level but less than the product of 3.0 and its Authorised Control Level and has a negative trend, as determined in accordance with the "Trend Test Calculation" applicable to the relevant type of insurer.
28. Unless a higher requirement is laid down for a particular U.S. based insurance or reinsurance undertaking, NCAs responsible for group supervision should require groups to use the product of 3.0 and the Authorised Control Level RBC to calculate their solvency as referred to in Article 233(3)(b) of Directive 2009/138/EC. For example, where the related third-country insurance or reinsurance undertaking is subject to a capital requirement higher than the product of 3.0 and the Authorised Control Level RBC, then this higher capital requirement should be used to calculate the group solvency.

Example: Assessment of the availability of eligible own funds at group level for US based insurance or reinsurance undertaking

29. US regulation distinguishes ordinary and extraordinary dividends and distributions to shareholders. These qualify as extraordinary ones if the market value of the dividend or other distribution together with other dividends or distributions made within the period of 12 consecutive months exceeds the lesser of: 10% of the insurer's surplus as regards policyholders as of the end of the year; or the net gain from operations of the insurer. An extraordinary dividend or other extraordinary distribution can be paid when regulatory approval is granted or if the payment is not disapproved within a specified period of time⁸. The applicable

⁷ Section 3, RBC Model Law (ML #312).

⁸ Section 5B of the Insurance Holding Company System Regulatory Act adopted by NAIC in 2010 (Model #440).

requirements in particular States are based on the Model Law, however, the States have a certain flexibility in applying these requirements⁹.

30. Against this background, in the case of a US related insurance undertaking, as a starting point, the amount of the dividend which could be paid without prior approval by the relevant US regulatory authority may be considered as available at the group level. From that starting point, any other specific state restrictions, the history of the dividend payments and the other criteria in Article 330 of the Delegated Regulation (EU) 2015/35 should be assessed.

Example: Capital requirement in Brazil

31. In Brazil the capital requirement of an insurance or reinsurance undertaking, called "Minimum Capital Required" is the higher of the fixed Base Capital and Risk Capital.
32. Base Capital, which is a fixed amount of capital, comprises a fixed component linked to the type of entity and another variable component which depends on the regions in which it has been authorized to operate. Risk Capital is a variable amount of capital that the insurer shall maintain, at any time, to cover the inherent risks associated with its business, which comprise: underwriting, credit, operational and market risks. The capital requirement of each of these four sub-risks is calculated according to a standard formula. When the Risk Capital is less than the Base Capital, the insurer must maintain the Base Capital as minimum capital required.
33. NCAs responsible for group supervision should require groups to use the higher of the fixed Base Capital and Risk Capital to calculate the group solvency.

Example: Assessment of the availability of eligible own funds at group level for insurance or reinsurance undertaking based in Brazil

34. As regards the dividend payment, it is not subject to approval of the relevant supervisory authority – Superintendent of Private Insurance (SUSEP). Brazilian law prohibits a dividend payment if the distribution may affect the minimum capital requirement and technical provisions, as required by law.

⁹ For example, some states require all stockholder dividends to be approved by a relevant state regulator. See NAIC, The United States Insurance Financial Solvency Framework, p. 19, http://www.naic.org/documents/committees_e_us_solvency_framework.pdf