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) (Text with EEA relevance)

TITLE I

[X1VALUATION AND RISK-BASED CAPITAL REQUIREMENTS (PILLAR I), ENHANCED GOVERNANCE (PILLAR II) AND INCREASED TRANSPARENCY (PILLAR III)]

CHAPTER V

SOLVENCY CAPITAL REQUIREMENT STANDARD FORMULA

SECTION 10

Risk mitigation techniques

Article 208

Methods and Assumptions

1 Where insurance or reinsurance undertakings transfer underwriting risks using reinsurance contracts or special purpose vehicles that meet the requirements set out in Articles 209, 211 and 213, and where these arrangement provide for protection in several of the scenario-based calculations set out in Title I, Chapter V, Sections 2, 3 and 4, the risk-mitigating effects of these contractual arrangements shall be allocated to the scenario-based calculations in a manner that, without double-counting, captures the economic effect of the protections provided. In particular, the economic effect of the protections provided shall be captured in determining the loss in basic own funds in the scenario-based calculations.

[F12 Where insurance or reinsurance undertakings transfer underwriting risks using finite reinsurance contracts, as defined in Article 210(3) of Directive 2009/138/EC, that meet the requirements set out in Articles 209, 211 and 213 of this Regulation, those contracts shall be recognised in the scenario based calculations set out in Title I, Chapter V, Sections 2, 3 and 4 of this Regulation only to the extent underwriting risk is transferred to the counterparty of the contract. Notwithstanding the previous sentence, finite reinsurance, or similar arrangements where the effective risk transfer is comparable to that of finite reinsurance, shall not be taken into account for the purposes of determining the volume measures for premium and reserve risk in accordance with in Articles 116 and 147 of this Regulation, or for the purposes of calculating undertaking-specific parameters in accordance with Section 13 of this Chapter.**]**

Textual Amendments

F1 Substituted by Commission Delegated Regulation (EU) 2019/981 of 8 March 2019 amending Delegated Regulation (EU) 2015/35 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) (Text with EEA relevance).

Article 209

Qualitative Criteria

1 When calculating the Basic Solvency Capital Requirement, insurance or reinsurance undertakings shall only take into account risk-mitigation techniques as referred to in Article 101(5) of Directive 2009/138/EC where all of the following qualitative criteria are met:

a the contractual arrangements and transfer of risk are legally effective and enforceable in all relevant jurisdictions;

b the insurance or reinsurance undertaking has taken all appropriate steps to ensure the effectiveness of the arrangement and to address the risks related to that arrangement;

c the insurance or reinsurance undertaking is able to monitor the effectiveness of the arrangement and the related risks on an ongoing basis;

d the insurance or reinsurance undertaking has, in the event of a default, insolvency or bankruptcy of a counterparty or other credit event set out in the transaction documentation for the arrangement, a direct claim on that counterparty;

e there is no double counting of risk-mitigation effects in own funds and in the calculation of the Solvency Capital Requirement or within the calculation of the Solvency Capital Requirement.

2 Only risk-mitigation techniques that are in force for at least the next 12 months and which meet the qualitative criteria set out in this Section shall be fully taken into account in the Basic Solvency Capital Requirement. In all other cases, the risk-mitigation effect of risk-mitigation techniques that are in force for a period shorter than 12 months and which meet the qualitative criteria set out in this Section shall be taken into account in the Basic Solvency Capital Requirement in proportion to the length of time involved for the shorter of the full term of the risk exposure or the period that the risk-mitigation technique is in force.

[F1 3 Where contractual arrangements governing the risk-mitigation techniques will be in force for a period shorter than the next 12 months and the insurance or reinsurance undertaking intends to replace that risk-mitigation technique at the time of its expiry with a similar arrangement or where that risk-mitigation technique is subject to an adjustment to reflect changes in the exposure that it covers, the risk-mitigation technique shall be fully taken into account in the Basic Solvency Capital Requirement provided all of the following qualitative criteria are met:

a the insurance or reinsurance undertaking has a written policy on the replacement or adjustment of that risk-mitigation technique, covering situations including the situation where the insurance or reinsurance undertaking uses several contractual arrangements in combination to transfer risk as referred to in Article 210(5);

b the replacement or adjustment of the risk-mitigation technique takes place more often than once per week only in cases where, without the replacement or adjustment, an event would have a material adverse impact on the solvency position of the insurance or reinsurance undertaking;

c the replacement or adjustment of the risk-mitigation technique is not conditional on any future event which is outside of the control of the insurance or reinsurance undertaking and where the replacement or adjustment of the risk-mitigation technique is conditional on any future event that is within the control of the insurance or reinsurance undertaking, the conditions for such replacement or adjustment are clearly documented in the written policy referred to in point (a);

d the replacement or adjustment of the risk-mitigation technique is realistically based on replacements and adjustments undertaken previously by the insurance or reinsurance undertaking and consistent with the undertaking's current business practice and business strategy;

e there is no material risk that the risk-mitigation technique cannot be replaced or adjusted due to an absence of liquidity in the market;

f the risk that the cost of replacing or adjusting the risk-mitigation technique increases during the following 12 months is reflected in the Solvency Capital Requirement;

g the replacement or adjustment of the risk-mitigation technique would not be contrary to requirements that apply to future management actions set out in Article 23(5);

h the initial contractual maturity is not shorter than one month in cases where the insurance or reinsurance undertaking transfers risks through the purchase or issuance of financial instruments;

i the initial contractual maturity is not shorter than three months where the insurance or reinsurance undertaking transfers underwriting risks using reinsurance contracts or special purpose vehicles.**]**

Textual Amendments

F1 Substituted by Commission Delegated Regulation (EU) 2019/981 of 8 March 2019 amending Delegated Regulation (EU) 2015/35 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) (Text with EEA relevance).

Article 210

Effective Transfer of Risk

1 The contractual arrangements governing the risk-mitigation technique shall ensure that the extent of the cover provided by the risk-mitigation technique and the transfer of risk is clearly defined and incontrovertible.

2 The contractual arrangement shall not result in material basis risk or in the creation of other risks, unless this is reflected in the calculation of the Solvency Capital requirement.

3 Basis risk is material if it leads to a misstatement of the risk-mitigating effect on the insurance or reinsurance undertaking's Basic Solvency Capital Requirement that could influence the decision-making or judgement of the intended user of that information, including the supervisory authorities.

4 The determination that the contractual arrangements and transfer of risk is legally effective and enforceable in all relevant jurisdictions in accordance with Article 209(1)(a) shall be based on the following:

a whether the contractual arrangement is subject to any condition which could undermine the effective transfer of risk, the fulfilment of which is outside the direct control of the insurance or reinsurance undertaking;

b whether there are any connected transactions which could undermine the effective transfer of risk.

[F2 5 Where an insurance or reinsurance undertaking combines several contractual arrangements to transfer risk, each of the contractual arrangements shall meet the requirements set out in paragraphs 1 and 4 and the contractual arrangements in combination shall meet the requirements set out in paragraphs 2 and 3.]

Textual Amendments

F2 Inserted by Commission Delegated Regulation (EU) 2019/981 of 8 March 2019 amending Delegated Regulation (EU) 2015/35 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) (Text with EEA relevance).

Article 211

Risk-Mitigation techniques using reinsurance contracts or special purpose vehicles

1 Where insurance or reinsurance undertakings transfer underwriting risks using reinsurance contracts or special purpose vehicles, in order for them to take into account the risk-mitigation technique in the Basic Solvency Capital Requirement, the qualitative criteria set out in Articles 209 and 210 and those set out in paragraphs 2 to 6 shall be met.

2 In the case of reinsurance contracts the counterparty shall be any of the following:

a an insurance or reinsurance undertaking which complies with the Solvency Capital Requirement;

b a third-country insurance or reinsurance undertaking, situated in a country whose solvency regime is deemed equivalent or temporarily equivalent to that laid down in Directive 2009/138/EC in accordance with Article 172 of that Directive and which complies with the solvency requirements of that third-country;

[F1 c a third country insurance or reinsurance undertaking that is not situated in a country whose solvency regime is deemed equivalent or temporarily equivalent in accordance with Article 172 of Directive 2009/138/EC that has been assigned to credit quality step 3 or better in accordance with Section 2 of Chapter I of this Title.]

[F1 3 Where a counterparty to a reinsurance contract is an insurance or reinsurance undertaking which ceases to comply with the Solvency Capital Requirement after the reinsurance contract has been entered into, the protection offered by the insurance risk-mitigation technique may be partially recognised for a period of no longer than six months after the counterparty ceases to comply with the Solvency Capital Requirement. In that case, the effect of the risk-mitigation technique shall be reduced by the percentage by which the Solvency Capital Requirement is breached. As soon as the counterparty has restored compliance with the Solvency Capital Requirement, the effect of the risk-mitigation technique shall no longer be reduced. Where the counterparty fails to restore compliance with the Solvency Capital Requirement within that period of six months, the effect of the risk-mitigation technique shall no longer be recognised. Where, before the end of the period of six months, the insurance or reinsurance undertaking becomes aware that it is unlikely that the counterparty will be able to restore compliance with the Solvency Capital Requirement within that period, the insurance or reinsurance undertaking shall no longer recognise the effect of the risk-mitigation technique in the Basic Solvency Capital Requirement.]

[F2 3a Notwithstanding paragraph 3, where a counterparty to a reinsurance contract is an insurance or reinsurance undertaking which ceases to comply with the Minimum Capital

Requirement after the reinsurance contract has been entered into, the effect of the risk-mitigation technique shall no longer be recognised in the Basic Solvency Capital Requirement.**]**

4 Where risk is transferred to a special purpose vehicle the requirements referred to in Article 211(2) of Directive 2009/138/EC shall be met for the risk-mitigation technique to be taken into account in the Basic Solvency Capital Requirement; where the requirements for a special purpose vehicle to be fully-funded cease to be fully met after the arrangement has been entered into, the protection offered by the insurance risk-mitigation technique may be partially recognised, provided that the insurance or reinsurance undertaking can demonstrate that compliance with the fully-funded requirement will be restored within three months; for this purpose, the effect of the risk-mitigation technique shall be reduced by the percentage of the aggregated maximum risk exposure of the special purpose vehicle, referred to in Article 326 of this Regulation not covered by the assets of the special purpose vehicle or by an equivalent amount where Article 211(3) of Directive 2009/138/EC is applicable.

5 Where risk is transferred to a special purpose vehicle referred to in Article 211(3) of Directive 2009/138/EC, the risk-mitigation technique shall only be taken into account in the Basic Solvency Capital Requirement where the law of the Member State is equivalent to that set out in Article 211(2) of that Directive and that law is complied with by the special purpose vehicle.

6 Where risk is transferred to a special purpose vehicle that is regulated by a third country supervisory authority, the risk-mitigation technique shall only be taken into account in the Basic Solvency Capital Requirement where requirements equivalent to those set out in Article 211(2) of Directive 2009/138/EC are met by the special purpose vehicle.

Textual Amendments

F1 Substituted by Commission Delegated Regulation (EU) 2019/981 of 8 March 2019 amending Delegated Regulation (EU) 2015/35 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) (Text with EEA relevance).

F2 Inserted by Commission Delegated Regulation (EU) 2019/981 of 8 March 2019 amending Delegated Regulation (EU) 2015/35 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) (Text with EEA relevance).

Article 212

Financial Risk-Mitigation techniques

[[F1]1 Where insurance or reinsurance undertakings transfer risk, in order for the risk-mitigation technique to be taken into account in the Basic Solvency Capital Requirement, in other cases than in the cases referred to in Article 211(1), including transfers through the purchase or issuance of financial instruments, the qualitative criteria provided in paragraphs 2 to 5 shall be met, in addition to the qualitative criteria set out in Articles 209 and 210.**]**

2 The risk-mitigation technique shall be consistent with the insurance or reinsurance undertaking's written policy on risk management, as referred to in Article 44(2) of Directive 2009/138/EC.

3 The insurance or reinsurance undertaking shall be able to value the assets, liabilities that are subject to the risk mitigation technique and, where the risk-mitigation technique includes

the use of financial instruments, the financial instruments, reliably in accordance with Article 75 of Directive 2009/138/EC.

4 Where the risk-mitigation technique includes the use of financial instruments, the financial instruments shall have a credit quality which has been assigned to credit quality step 3 or better in accordance with Section 2, Chapter I of this Title.

5 Where the risk-mitigation technique is not a financial instrument, the counterparties to the risk-mitigation technique shall have a credit quality which has been assigned to credit quality step 3 or better in accordance with Section 2, Chapter I of this Title.

Textual Amendments

F1 Substituted by Commission Delegated Regulation (EU) 2019/981 of 8 March 2019 amending Delegated Regulation (EU) 2015/35 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) (Text with EEA relevance).

Article 213

Status of the counterparties

[F1 1 In the event that the qualitative criteria in Article 211(1), or Article 212(4) or (5) are not met, insurance and reinsurance undertakings shall only take into account the risk-mitigation techniques when calculating the Basic Solvency Capital Requirement where one of the following criteria is met:

a the risk-mitigation technique meets the qualitative criteria set out in Articles 209, 210 and Article 212(2) and (3) and collateral arrangements exist that meet the criteria provided in Article 214;

b the risk-mitigation technique is accompanied by another risk-mitigation technique that, when viewed in combination with the first technique, meets the qualitative criteria set out in Articles 209 and 210 and Article 212(2) and (3), with the counterparties to that other technique meeting the criteria provided in Articles 211(1) and Article 212(4) and (5).]

2 For the purposes of point (a) of paragraph 1 of this Article, where the value, in accordance with Article 75 of Directive 2009/138/EC of the collateral is less than the total risk exposure, the collateral arrangement shall only be taken into account to the extent that the collateral covers the risk exposure.

Textual Amendments

F1 Substituted by Commission Delegated Regulation (EU) 2019/981 of 8 March 2019 amending Delegated Regulation (EU) 2015/35 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) (Text with EEA relevance).

Article 214

Collateral Arrangements

1 In the calculation of the Basic Solvency Capital Requirement, collateral arrangements shall only be recognised where, in addition to the qualitative criteria in Articles 209 and 210, the following criteria are met:

a the insurance or reinsurance undertaking transferring the risk shall have the right to liquidate or retain, in a timely manner, the collateral in the event of a default, insolvency or bankruptcy or other credit event of the counterparty;

b there is sufficient certainty as to the protection achieved by the collateral because of either of the following:

(i) it is of sufficient credit quality, is of sufficient liquidity and is sufficiently stable in value;

(ii) it is guaranteed by a counterparty, other than a counterparty referred to in Article 187(5) and 184(2) who has been assigned a risk factor for concentration risk of 0 %;

c there is no material positive correlation between the credit quality of the counterparty and the value of the collateral;

d the collateral is not securities issued by the counterparty or a related undertaking of that counterparty.

2 Where a collateral arrangement meets the definition in Article 1(26)(b) and involves collateral being held by a custodian or other third party, the insurance or reinsurance undertaking shall ensure that all of the following criteria are met:

a the relevant custodian or other third party segregates the assets held as collateral from its own assets;

b the segregated assets are held by a deposit-taking institution that has a credit quality which has been assigned to credit quality step 3 or better in accordance with Section 2, Chapter I of this Title;

c the segregated assets are individually identifiable and can only be changed or substituted with the consent of the insurance or reinsurance undertaking or a person acting as a trustee in relation to the insurance or reinsurance undertaking's interest in such assets;

d the insurance or reinsurance undertaking has (or is a beneficiary under a trust where the trustee has) the right to liquidate or retain, in a timely manner, the segregated assets in the event of a default, insolvency or bankruptcy or other credit event relating to the custodian or other third party holding the collateral on behalf of the counterparty;

e the segregated assets shall not be used to pay, or to provide collateral in favour of, any person other than the insurance or reinsurance undertaking or as directed by the insurance or reinsurance undertaking.

Article 215

Guarantees

In the calculation of the Basic Solvency Capital Requirement, guarantees shall only be recognised where explicitly referred to in this Chapter, and where in addition to the qualitative criteria in Articles 209 and 210, all of the following criteria are met:

(a) the credit protection provided by the guarantee is direct;

(b) the extent of the credit protection is clearly defined and incontrovertible;

(c) the guarantee does not contain any clause, the fulfilment of which is outside the direct control of the lender, that:

- (i) would allow the protection provider to cancel the protection unilaterally;
- (ii) would increase the effective cost of protection as a result of a deterioration in the credit quality of the protected exposure;
- (iii) could prevent the protection provider from being obliged to pay out in a timely manner in the event that the original obligor fails to make any payments due;
- (iv) could allow the maturity of the credit protection to be reduced by the protection provider;

(d) on the default, insolvency or bankruptcy or other credit event of the counterparty, the insurance or reinsurance undertaking has the right to pursue, in a timely manner, the guarantor for any monies due under the claim in respect of which the protection is provided and the payment by the guarantor shall not be subject to the insurance or reinsurance undertaking first having to pursue the obligor;

(e) the guarantee is an explicitly documented obligation assumed by the guarantor;

(f) the guarantee fully covers all types of regular payments the obligor is expected to make in respect of the claim.