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2013/0327 (COD)

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
amending Directive 2009/138/EC on the taking-up and pursuit of the business of
Insurance and Reinsurance (Solvency II) as regards the dates of transposition and
application and the date of repeal of certain Directives

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

1.1. Grounds for and objectives of the proposal

Directive 2009/138/EC (Solvency II) provides a modern, risk-based system for the supervision of European insurance and reinsurance undertakings. These new rules are essential in order to ensure a safe and solid insurance sector that can provide sustainable insurance products and support the real economy through long-term investments and additional stability.

Directive 2011/89/EU (Ficod1) amends certain directives including Solvency II as regards the supplementary supervision of financial entities in a financial conglomerate.

On 19 January 2011 the Commission adopted a proposal to amend Directive 2009/138/EC in order to take into account the new supervisory architecture for insurance and namely the setting up of the European Insurance and Occupational Pensions Agency (EIOPA) on 1 January 2011 (COM (2011) 8, COD 2011/0006)(Omnibus II) and the entry into force of the Lisbon Treaty which required the adjustment of empowerments for the Commission to adopt implementing measures to empowerments for the Commission to adopt implementing and delegated acts according to Article 290 of the Treaty on the Functioning of the European Union. The proposal also included provisions to extend the transposition, repeal and application dates in Directive 2009/138/EC. These rules are important in order to ensure a smooth transition to the new regime. In addition and in order to become fully operational, the Solvency II regime also requires a high number of delegated and implementing acts by the Commission, providing important details on different technical matters. Many of these so-called "level 2" rules are closely linked to Omnibus II and cannot be presented by the Commission before the publication of Omnibus II, which will also clarify the scope of many delegated and implementing act empowerments.

The deadline for transposition and application of Directive 2009/138/EC was initially 31 October 2012 and 1 November 2012 respectively, but pending the outcome of the on-going legislative negotiations on Omnibus II, Directive 2012/23/EU (Quick Fix) postponed these dates to 30 June 2013 and 1 January 2014 respectively.

Directive 2012/23/EU also postpones the date when the existing insurance and reinsurance directives (Directives 64/225/EEC, 73/239/EEC, 73/240/EEC, 76/580/EEC, 78/473/EEC, 84/641/EEC, 87/344/EEC, 88/357/EEC, 92/49/EEC, 98/78/EC, 2001/17/EC, 2002/83/EC and 2005/68/EC, as amended by the acts listed in Part A of Annex VI) that are collectively referred to as Solvency I will be repealed. Instead of 1 November 2012, those directives will now be repealed with effect from 1 January 2014.

The most controversial issue in the on-going legislative negotiations between the European Parliament, the Council and the Commission is the introduction of measures on the treatment of insurance products with long-term guarantees under the new Solvency II insurance regulatory regime ("Long-term guarantee package" or LTG package). Since no agreement on the LTG package could be achieved in September 2012, negotiations were suspended. The European Parliament, the Council and the Commission then mandated the European Insurance and

Occupational Pensions Authority (EIOPA) to carry out a technical assessment of the measures, in order to provide a technical basis for a political agreement on Omnibus II.

On 14 June 2013 EIOPA published its technical findings on the long-term guarantees assessment. These technical findings confirm firstly the importance of long term guarantee measures for many Member States in periods of financial stress such as those experienced in 2011 and secondly that a package of different measures is needed to cater for the different insurance products offered in Member States. The EIOPA findings propose a number of measures intended to facilitate the provision of insurance products with long-term guarantees against artificial financial market volatility.

These findings constitute the parameters for a political agreement on Omnibus II. According to the Commission report on 27 June 2013, it should be possible to find a compromise within the scope of the measures that EIOPA recommends. Although legislative negotiations between the European Parliament, the Council and the Commission resumed on 10 July 2013, it is very unlikely that the negotiations on Omnibus II will be concluded in time to publish the Omnibus II Directive in the Official Journal before the date of application of Directive 2009/138/EC, as amended by Directive 2012/23/EU. Leaving that date unchanged would result in Directive 2009/138/EC being implemented before the entry into force of the transitional rules and relevant adaptations provided for by the Omnibus II proposal.

In view of the fact that the negotiations on Omnibus II have not yet been finalised the date of transposition of 30 June 2013, which has already elapsed, should be extended one last time. Leaving the dates unchanged would imply that Solvency II needs to be implemented without the transitional rules and other important adaptations foreseen in Omnibus II. In order to avoid continued legal uncertainty and ensure the legal continuity of the current Solvency provisions (Solvency I) until the complete Solvency II package is in place, it is proposed that the relevant transposition date in Directive 2009/138/EC is extended one last time to 31 January 2015.

It is important to allow supervisors and insurance and reinsurance undertakings some time to prepare for the application of Solvency II. It is therefore proposed to extend the date for first application of Solvency II one last time to 1 January 2016. This will make it possible to start the supervisory approval procedures e.g. for internal models and undertaking specific parameters. The parties to the on-going legislative negotiations have agreed that there should be no further changes to either the transposition or application dates during the Omnibus II negotiations in order to ensure legal clarity for insurance and reinsurance undertakings supervisory authorities during their preparations.

It is evident from the chronological order of events that the postponed dates for transposition and application of Directive 2009/138/EC also apply to the amendments to Articles 212 to 216, 219, 226, 231, 233, 235, 243 to 247, 249, 256, 257, 258, 262 and 263 of that Directive which were made by Directive 2011/89/EC.

The date of repeal of Solvency I should be amended accordingly.

In view of the above and given the very short period of time left before 1 January 2014, this Directive should be adopted by the European Parliament and the Council as a matter of urgency and enter into force without delay.

This Directive is necessary in order to prevent a legal vacuum arising after 1 January 2014.

The absence of this Directive would result in a gap between the EU legal system (Solvency II) and that of Member States (where Solvency I as transposed would remain in force). This would lead to legal uncertainty for supervisory authorities, undertakings and Member States.

1.2. Directive 2009/138/EC (Solvency II)

This Directive establishes a new and modern solvency regime for insurers and reinsurers in the European Union. It provides for an economic, risk-based approach which provides incentives for insurance and reinsurance undertakings to properly measure and manage their risks.

1.3. Directive 2011/89/EC (Ficod1)

This Directive amends certain directives including Directive 2009/138/EC as regards the supplementary supervision of financial entities in a financial conglomerate. Article 4 of Directive 2011/89/EC amends the Articles 212 - 216, 219, 226, 231, 233, 235, 243 – 247, 249, 256, 257 258, 262 and 263 of Directive 2009/138/EC and Article 6 of Directive 2011/89/EC prescribes that Member States shall be in compliance with these new provisions from 10 June 2013.

1.4. Directive 2012/23/EU (Quick Fix)

This Directive amends Directive 2009/138/EC and postpones the date for its transposition from 31 October 2012 to 30 June 2013, inserts the date of its application from 1 January 2014 and postpones the date of repeal of Solvency I from 1 November 2012 to 1 January 2014.

1.5. Proposal COM (2011) 8 (the Omnibus II Directive)

This proposal aims to amend Directive 2009/138/EC in order to adapt Solvency II to the new supervisory architecture for insurance and namely the setting-up of the European Insurance and Occupational Pensions Authority (EIOPA) on 1 January 2011 (COM (2011) 8, COD 2011/0006). It proposes to postpone the transposition deadline of Solvency II to 31 December 2012.

2. RESULTS OF CONSULTATIONS WITH THE INTERESTED PARTIES AND IMPACT ASSESSMENTS

2.1. Transmission of this proposal to the national parliaments

Draft legislative acts, including proposals from the Commission, sent to the European Parliament and to the Council must be forwarded to national parliaments in accordance with the Protocol (No 1) on the role of national Parliaments in the European Union, annexed to the Treaties.

According to Article 4 of the Protocol, an eight-week period must elapse between a draft legislative act being made available to national parliaments and the date when it is placed on a provisional agenda for the Council for its adoption or for adoption of a position under a legislative procedure.

However, exceptions are possible under Article 4 in cases of urgency, the reasons for which must be stated in the act or position of the Council. The Commission invites the European Parliament and the Council to consider this proposal as a case of absolute urgency for the reasons explained above.

2.2. Impact assessment

This proposal is not accompanied by a separate Impact Assessment as an impact assessment for the Solvency II Directive has already been undertaken and this proposal only aims at addressing the fact that the publication of Omnibus II in the Official Journal of the European Union will be later than the application date of 1 January 2014.

Doing nothing at this stage would create a very uncertain legal situation after 1 January 2014. A gap would exist between the EU legal system (Solvency II) and that of Member States (where Solvency I as transposed would remain in force). This would lead to legal uncertainty for supervisory authorities, undertakings and Member States.

The Framework Directive would need to be implemented without the transitional rules and other important adaptations foreseen in Omnibus II. Consequently, supervisory authorities, undertakings and Member States would have to proceed with implementing a regime that would need to be revised again in the very near future, which would not be efficient.

The proposed amendment affects only the obligation on Member States to transpose by the Directive by 30 June 2013, extending it to 31 December 2014. It also foresees the extension of the application of the Solvency II Directive from 1 January 2014 to 1 January 2016 (and the same extension for the date of repeal of Solvency I). It does not alter the substance of the Directive in question and does not therefore impose any additional obligations on businesses.

3. LEGAL ELEMENTS OF THE PROPOSAL

3.1. Summary of the proposed measures

The proposal amends Article 309(1) of Directive 2009/138/EC by setting up later dates for its transposition (31 January 2015) and its application (1 January 2016). It also amends Articles 310 and 311 accordingly by setting-up a new date for the repeal of Solvency I (1 January 2016).

3.2. Legal basis

Articles 53 (1) and 62 of the Treaty on the Functioning of the European Union.

3.3. Subsidiarity principle

The subsidiarity principle applies as the proposal concerns a field which does not fall within the exclusive competence of the European Union.

The objectives of the proposal cannot be achieved sufficiently by the Member States, as the provisions of directives cannot be amended or repealed at national level.

The objectives of the proposal can be achieved only by EU action, as this proposal amends an act of EU law which is in force, and this is something which cannot be done by the Member States themselves.

The principle of subsidiarity is complied with in that the proposal amends existing EU legislation.

3.4. Proportionality principle

The proposal complies with the proportionality principle for the following reason.

It does not alter the substance of the current EU legislation: it is restricted to postponing the date of transposition of Directive 2009/138/EC until 31 January 2015; in order to avoid continued legal uncertainty now that the current deadline for transposition (30 June 2013) has expired. It also provides for a new, later application date for Solvency II and consequent repeal of Solvency I (1 January 2016).

3.5. Choice of instruments

Proposed instrument(s): directive.

No other instrument would have been suitable. As this is an amended directive, the only way forward is to adopt another directive.

4. BUDGETARY IMPLICATION

The proposal has no implication for the EU budget.

5. OPTIONAL ELEMENTS

- Simplification

The new proposal as such contains no simplification elements. It is aimed solely at postponing the date for transposition of Directive 2009/138/EC to 31 January 2015 and providing for a new application date of 1 January 2016.

- **Repeal of existing legislation**

The adoption of the proposal will not in itself entail the repeal of existing legislation; it merely adjusts the date of the repeal already foreseen in Directive 2009/138/EC.

- **European Economic Area**

This draft instrument is concerned with a subject covered by the EEA Agreement and must therefore be extended to cover the European Economic Area.

- **Detailed explanation of the proposal by chapter or by article**

This proposal postpones the date of transposition of Directive 2009/138/EC to 31 January 2015.

Article 1(1) of the proposal amends Article 309(1) of Directive 2009/138/EC accordingly. It also provides for a new, later date of application of Solvency II (1 January 2016).

Article 1(2) amends the date of repeal of Solvency I (from 1 January 2016) in Article 310 and Article 1(3) provides for the same date as date of application of the provisions of Solvency I re-casted by Solvency II in Article 311.

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

amending Directive 2009/138/EC on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) as regards the dates of transposition and application and the date of repeal of certain Directives

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 53(1) and Article 62 thereof,

Having regard to the proposal from the European Commission,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) Directive 2009/138/EC of the European Parliament and of the Council¹ provides a modern, risk-based system for the regulation and supervision of European insurance and reinsurance undertakings. These new rules are essential in order to ensure a safe and solid insurance sector that can provide sustainable insurance products and support the real economy through long-term investments and additional stability.
- (2) Directive 2011/89/EU of the European Parliament and of the Council² introduces some changes to Articles 212 to 262 of Directive 2009/138/EC to be introduced from 10 June 2013.
- (3) Directive 2012/23/EU of the European Parliament and of the Council³ postpones the date for transposition of Directive 2009/138/EC from 31 October 2012 to 30 June 2013, the date of application from 1 November 2012 to 1 January 2014 and the date of repeal of the existing insurance and reinsurance Directives, namely Council Directive 64/225/EEC⁴, First Council Directive 73/239/EEC⁵, Council Directive 73/240/EEC⁶,

¹ 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) (OJ, L 335, 17.12.2009, p.1).

² Directive 2011/89/EU of the European Parliament and of the Council of 16 November 2011 amending Directives 98/78/EC, 2002/87/EC, 2006/48/EC and 2009/138/EC regarding the supplementary supervision of financial entities in a financial conglomerate (OJ L 326, 8.12.2011, p. 113).

³ Directive 2012/23/EU of the European Parliament and of the Council of 12 September 2012 amending Directive 2009/138/EC as regards the date for its transposition and the date of its application, and the date of repeal of certain Directives (OJ L 249, 14.9.2012, p. 1).

⁴ Council Directive 64/225/EEC of 25 February 1964 on the abolition of restrictions on freedom of establishment and freedom to provide services in respect of reinsurance and retrocession (OJ 56, 4.4.1964, p. 878/64).

⁵ First Council Directive 73/239/EEC of 24 July 1973 on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance (OJ L 228, 16.8.1973, p. 3).

Council Directive 76/580/EEC⁷, Council Directive 78/473/EEC⁸, Council Directive 84/641/EEC⁹, Council Directive 87/344/EEC¹⁰, Second Council Directive 88/357/EEC¹¹, Council Directive 92/49/EEC¹², Directive 98/78/EC of the European Parliament and of the Council¹³, Directive 2001/17/EC of the European Parliament and of the Council¹⁴, Directive 2002/83/EC of the European Parliament and of the Council¹⁵ and Directive 2005/68/EC of the European Parliament and of the Council¹⁶ (collectively referred to as 'Solvency I') from 1 November 2012 to 1 January 2014.

- (4) On 19 January 2011 the Commission adopted a proposal for a Directive of the European Parliament and of the Council amending Directives 2003/71/EC and 2009/138/EC (hereinafter referred to as the 'Omnibus II proposal')¹⁷ in order to take into account the new supervisory architecture for insurance and namely the setting-up of the European Supervisory Authority (European Insurance and Occupational Pensions Authority (EIOPA)). The Omnibus II proposal also serves as a means to adapt Directive 2009/138/EC to the entry into force of the Treaty on the Functioning of the European Union by adjusting the empowerments for the Commission to adopt implementing measures to empowerments for the Commission to adopt implementing and delegated acts.
- (5) There is a clear risk that there is not enough time to adopt the Omnibus II proposal and publish it in the *Official Journal of the European Union* before the relevant Articles of Directive 2009/138/EC are to apply. Leaving the dates for transposition, application and repeal unchanged would result in Directive 2009/138/EC being implemented before the entry into force of the transitional rules and of relevant adaptations, including further clarification of delegated and implementing act empowerments, provided for by the Omnibus II proposal.
- (6) In order to avoid overly burdensome legislative obligations for Member States under Directive 2009/138/EC and later on under the new framework envisaged by the Omnibus II proposal, it is appropriate to postpone the dates for transposition and

⁶ Council Directive 73/240/EEC of 24 July 1973 abolishing restrictions on freedom of establishment in the business of direct insurance other than life assurance (OJ L 228, 16.8.1973, p. 20).

⁷ Council Directive 76/580/EEC of 29 June 1976 amending Directive 73/239/EEC (OJ L 189, 13.7.1976, p. 13).

⁸ Council Directive 78/473/EEC of 30 May 1978 on the coordination of laws, regulations and administrative provisions relating to Community co-insurance (OJ L 151, 7.6.1978, p. 25).

⁹ Council Directive 84/641/EEC of 10 December 1984 amending, particularly as regards tourist assistance, the First Directive (73/239/EEC) (OJ L 339, 27.12.1984, p. 21).

¹⁰ Council Directive 87/344/EEC of 22 June 1987 on the coordination of laws, regulations and administrative provisions relating to legal expenses insurance (OJ L 185, 4.7.1987, p. 77).

¹¹ Second Council Directive 88/357/EEC of 22 June 1988 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and laying down provisions to facilitate the effective exercise of freedom to provide services (OJ L 172, 4.7.1988, p. 1).

¹² Council Directive 92/49/EEC of 18 June 1992 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance (third non-life insurance Directive) (OJ L 228, 11.8.1992, p. 1).

¹³ Directive 98/78/EC of the European Parliament and of the Council of 27 October 1998 on the supplementary supervision of insurance undertakings in an insurance group (OJ L 330, 5.12.1998, p. 1).

¹⁴ Directive 2001/17/EC of the European Parliament and of the Council of 19 March 2001 on the reorganisation and winding-up of insurance undertakings (OJ L 110, 20.4.2001, p. 28).

¹⁵ Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance (OJ L 345, 19.12.2002, p. 1).

¹⁶ Directive 2005/68/EC of the European Parliament and of the Council of 16 November 2005 on reinsurance (OJ L 323, 9.12.2005, p. 1).

¹⁷ COM (2011) 8.

application of Directive 2009/138/EC and allowing supervisors and insurance and reinsurance undertakings sufficient time for the introduction of the new architecture.

- (7) It is evident from the chronological order of events that the postponed dates for transposition and application of Directive 2009/138/EC also apply to the amendments to Articles 212 to 216, 219, 226, 231, 233, 235, 243 to 247, 249, 256, 257, 258, 262 and 263 of that Directive which were made by Directive 2011/89/EC.
- (8) For reasons of legal certainty, the date of repeal of Directives 64/225/EEC, 73/239/EEC, 73/240/EEC, 76/580/EEC, 78/473/EEC, 84/641/EEC, 87/344/EEC, 88/357/EEC, 92/49/EEC, 98/78/EC, 2001/17/EC, 2002/83/EC and 2005/68/EC should be postponed accordingly.
- (9) Given the very short period of time left before the expiry of the deadlines laid down in Directive 2009/138/EC, this Directive should enter into force without delay.
- (10) Consequently, it is also justified to apply the exception for urgent cases provided for in Article 4 of Protocol (No 1) on the role of national Parliaments in the European Union in this case as regards the transmission to national Parliaments of the proposal for this Directive,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Directive 2009/138/EC is amended as follows:

1. Article 309(1) is amended as follows:
2. (a) in the first subparagraph, the date of “30 June 2013” is replaced by that of “31 January 2015”
(b) in the second subparagraph, the date of “1 January 2014” is replaced by that of “1 January 2016”.
3. In the first paragraph of Article 310, the date “1 January 2014” is replaced by that of “1 January 2016”.
4. In the second paragraph of Article 311, the date “1 January 2014” is replaced by that of “1 January 2016”.

Article 2

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

Article 3

This Directive is addressed to the Member States.

Done at Brussels,

For the European Parliament
The President

For the Council
The President