

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) (recast) (Text with EEA relevance)

TITLE I

**GENERAL RULES ON THE TAKING-UP AND PURSUIT OF
DIRECT INSURANCE AND REINSURANCE ACTIVITIES**

CHAPTER IX

**Branches established within the community and belonging to insurance or
reinsurance undertakings with head offices situated outside the community**

Section 1

Taking-up of business

Article 162

Principle of authorisation and conditions

1 Member States shall make access to the business referred to in the first subparagraph of Article 2(1) by any undertaking with a head office outside the Community subject to an authorisation.

2 A Member State may grant an authorisation where the undertaking fulfils at least the following conditions:

- a it is entitled to pursue insurance business under its national law;
- b it establishes a branch in the territory of the Member State in which authorisation is sought;
- c it undertakes to set up at the place of management of the branch accounts specific to the business which it pursues there, and to keep there all the records relating to the business transacted;
- d it designates a general representative, to be approved by the supervisory authorities;
- e it possesses in the Member State in which authorisation is sought assets of an amount equal to at least one half of the absolute floor prescribed in Article 129(1)(d) in respect of the Minimum Capital Requirement and deposits one fourth of that absolute floor as security;
- f it undertakes to cover the Solvency Capital Requirement and the Minimum Capital Requirement in accordance with the requirements referred to in Articles 100 and 128;
- g it communicates the name and address of the claims representative appointed in each Member State other than the Member State in which the authorisation is sought where the risks to be covered are classified under class 10 of Part A of Annex I, other than carrier's liability;
- h it submits a scheme of operations in accordance with the provisions in Article 163;
- i it fulfils the governance requirements laid down in Chapter IV, Section 2.

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3 For the purposes of this Chapter, ‘branch’ means a permanent presence in the territory of a Member State of an undertaking referred to in paragraph 1, which receives authorisation in that Member State and which pursues insurance business.

Article 163

Scheme of operations of the branch

1 The scheme of operations of the branch referred to in Article 162(2)(h) shall set out the following:

- a the nature of the risks or commitments which the undertaking proposes to cover;
- b the guiding principles as to reinsurance;
- c estimates of the future Solvency Capital Requirement, as laid down in Chapter VI, Section 4, on the basis of a forecast balance sheet, as well as the calculation method used to derive those estimates;
- d estimates of the future Minimum Capital Requirement, as laid down in Chapter VI, Section 5, on the basis of a forecast balance sheet, as well as the calculation method used to derive those estimates;
- e the state of the eligible own funds and eligible basic own funds of the undertaking with respect to the Solvency Capital Requirement and Minimum Capital Requirement as referred to in Chapter VI, Sections 4 and 5;
- f estimates of the cost of setting up the administrative services and the organisation for securing business, the financial resources intended to meet those costs and, where the risks to be covered are classified under class 18 in Part A of Annex I, the resources available for the provision of the assistance;
- g information on the structure of the system of governance.

2 In addition to the requirements set out in paragraph 1, the scheme of operations shall include the following, for the first three financial years:

- a a forecast balance sheet;
- b estimates of the financial resources intended to cover technical provisions, the Minimum Capital Requirement and the Solvency Capital Requirement,
- c for non-life insurance:
 - (i) estimates of management expenses other than installation costs, in particular current general expenses and commissions;
 - (ii) estimates of premiums or contributions and claims;
- d for life insurance, a plan setting out detailed estimates of income and expenditure in respect of direct business, reinsurance acceptances and reinsurance cessions.

3 In regard to life insurance, Member States may require insurance undertakings to submit systematic notification of the technical bases used for calculating scales of premiums and technical provisions, without that requirement constituting a prior condition for a life insurance undertaking to pursue its business.

Article 164

Transfer of portfolio

1 Under the conditions laid down by national law, Member States shall authorise branches set up within their territory and covered by this Chapter to transfer all or part of their portfolios of contracts to an accepting undertaking established in the same Member State where the supervisory authorities of that Member State or, where appropriate, of the Member State referred to in Article 167, certify that after taking the transfer into account the accepting undertaking possesses the necessary eligible own funds to cover the Solvency Capital Requirement referred to in the first paragraph of Article 100.

2 Under the conditions laid down by national law, Member States shall authorise branches set up within their territory and covered by this Chapter to transfer all or part of their portfolios of contracts to an insurance undertaking with a head office in another Member State where the supervisory authorities of that Member State certify that after taking the transfer into account the accepting undertaking possesses the necessary eligible own funds to cover the Solvency Capital Requirement referred to in the first paragraph of Article 100.

3 Where under the conditions laid down by national law, a Member State authorises branches set up within its territory and covered by this Chapter to transfer all or part of their portfolios of contracts to a branch covered by this Chapter and set up within the territory of another Member State, it shall ensure that the supervisory authorities of the Member State of the accepting undertaking or, if appropriate, of the Member State referred to in Article 167 certify that:

- a after taking the transfer into account the accepting undertaking possesses the necessary eligible own funds to cover the Solvency Capital Requirement;
- b the law of the Member State of the accepting undertaking permits such a transfer; and
- c that Member State has agreed to the transfer.

4 In the circumstances referred to in paragraphs 1 to 3, the Member State in which the transferring branch is situated shall authorise the transfer after obtaining the agreement of the supervisory authorities of the Member State in which the risks are situated, or the Member State of the commitment, where different from the Member State in which the transferring branch is situated.

5 The supervisory authorities of the Member States consulted shall give their opinion or consent to the supervisory authorities of the home Member State of the transferring branch within three months of receiving a request. The absence of any response from the authorities consulted within that period shall be considered equivalent to a favourable opinion or tacit consent.

6 A transfer authorised in accordance with paragraphs 1 to 5 shall be published as laid down by national law in the Member State in which the risk is situated or the Member State of the commitment.

Such transfers shall automatically be valid against policy holders, insured persons and any other persons having rights or obligations arising out of the contracts transferred.

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Article 165

Technical provisions

Member States shall require undertakings to establish adequate technical provisions to cover the insurance and reinsurance obligations assumed in their territories calculated in accordance with Chapter VI, Section 2. Member States shall require undertakings to value assets and liabilities in accordance with Chapter VI, Section 1 and determine own funds in accordance with Chapter VI, Section 3.

Article 166

Solvency Capital Requirement and Minimum Capital Requirement

1 Each Member State shall require for branches which are set up in its territory an amount of eligible own funds consisting of the items referred to in Article 98(3).

The Solvency Capital Requirement and the Minimum Capital Requirement shall be calculated in accordance with the provisions of Chapter VI, Sections 4 and 5.

However, for the purpose of calculating the Solvency Capital Requirement and the Minimum Capital Requirement, both for life and non-life insurance, account shall be taken only of the operations effected by the branch concerned.

2 The eligible amount of basic own funds required to cover the Minimum Capital Requirement and the absolute floor of that Minimum Capital Requirement shall be constituted in accordance with Article 98(4).

3 The eligible amount of basic own funds shall not be less than half of the absolute floor required under Article 129(1)(d).

The deposit lodged in accordance with Article 162(2)(e) shall be counted towards such eligible basic own funds to cover the Minimum Capital Requirement.

4 The assets representing the Solvency Capital Requirement must be kept within the Member State where the activities are pursued up to the amount of the Minimum Capital Requirement and the excess within the Community.

Article 167

Advantages to undertakings authorised in more than one Member State

1 Any undertaking which has requested or obtained authorisation from more than one Member State may apply for the following advantages which may be granted only jointly:

- a the Solvency Capital Requirement referred to in Article 166 shall be calculated in relation to the entire business which it pursues within the Community;
- b the deposit required under Article 162(2)(e) shall be lodged in only one of those Member States;
- c the assets representing the Minimum Capital Requirement shall be localised, in accordance with Article 134, in any one of the Member States in which it pursues its activities.

In the cases referred to in point (a) of the first subparagraph, account shall be taken only of the operations effected by all the branches established within the Community for the purposes of this calculation.

2 Application to benefit from the advantages provided for in paragraph 1 shall be made to the supervisory authorities of the Member States concerned. The application shall state the authority of the Member State which in future is to supervise the solvency of the entire business of the branches established within the Community. Reasons must be given for the choice of authority made by the undertaking.

The deposit referred to in Article 162(2)(e) shall be lodged with that Member State.

3 The advantages provided for in paragraph 1 may be granted only where the supervisory authorities of all Member States in which an application has been made agree to them.

Those advantages shall take effect from the time when the selected supervisory authority informs the other supervisory authorities that it will supervise the state of solvency of the entire business of the branches within the Community.

The supervisory authority selected shall obtain from the other Member States the information necessary for the supervision of the overall solvency of the branches established in their territory.

4 At the request of one or more of the Member States concerned, the advantages granted under paragraphs 1, 2 and 3 shall be withdrawn simultaneously by all Member States concerned.

Article 168

Accounting, prudential and statistical information and undertakings in difficulty

For the purposes of this Section, Article 34, Article 139(3) and Articles 140 and 141 shall apply.

As regards the application of Articles 137 to 139, where an undertaking qualifies for the advantages provided for in Article 167(1), (2) and (3), the supervisory authority responsible for verifying the solvency of branches established within the Community with respect to their entire business shall be treated in the same way as the supervisory authority of the Member State in the territory of which the head office of an undertaking established in the Community.

Article 169

Separation of non-life and life business

1 Branches referred to in this Section shall not simultaneously pursue life and non-life insurance activities in the same Member State.

2 By way of derogation from paragraph 1 Member States may provide that branches referred to in this Section which, on the relevant date referred to in the first subparagraph of Article 73(5), pursued both activities simultaneously in a Member State may continue to do so there provided that each activity is separately managed in accordance with Article 74.

3 Any Member State which under the second subparagraph of Article 73(5) requires undertakings established in its territory to cease the simultaneous pursuit of the activities in which they were engaged on the relevant date referred to in the first subparagraph of Article

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73(5) must also impose this requirement on branches referred to in this Section which are established in its territory and simultaneously pursue both activities there.

Member States may provide that branches referred to in this Section whose head office simultaneously pursues both activities and which on the dates referred to in the first subparagraph of Article 73(5) pursued in the territory of a Member State solely life insurance activity may continue their activity there. Where the undertaking wishes to pursue non-life insurance activity in that territory it may only pursue life insurance activity through a subsidiary.

Article 170

Withdrawal of authorisation for undertakings authorised in more than one Member State

In the case of a withdrawal of authorisation by the authority referred to in Article 167(2) that authority shall notify the supervisory authorities of the other Member States where the undertaking operates and those authorities shall take the appropriate measures.

Where the reason for that withdrawal is the inadequacy of the overall state of solvency as fixed by the Member States which agreed to the request referred to in Article 167, the Member States which gave their approval shall also withdraw their authorisations.

Article 171

Agreements with third countries

The Community may, by means of agreements concluded pursuant to the Treaty with one or more third countries, agree to the application of provisions different to those provided for in this Section, for the purpose of ensuring, under conditions of reciprocity, adequate protection for policy holders and insured persons in the Member States.

Section 2

Reinsurance

[^{F1}Article 172

Equivalence in relation to reinsurance undertakings

1 The Commission shall adopt delegated acts in accordance with Article 301a specifying the criteria for assessing whether the solvency regime of a third country that applies to reinsurance activities of undertakings with their head office in that third country is equivalent to that laid down in Title I.

2 If the criteria adopted in accordance with paragraph 1 have been fulfilled by a third country, the Commission may, in accordance with Article 301a, and assisted by EIOPA in accordance with Article 33(2) of Regulation (EU) No 1094/2010, adopt delegated acts determining that the solvency regime of that third country that applies to reinsurance activities of undertakings with the head office in that third country is equivalent to that laid down in Title I of this Directive.

Those delegated acts shall be regularly reviewed, to take into account any significant changes to the supervisory regime laid down in Title I, and to the supervisory regime in the third country.

EIOPA shall publish and keep up to date on its website a list of all third countries referred to in the first subparagraph.

3 Where, in accordance with paragraph 2, the solvency regime of a third country has been deemed to be equivalent to that laid down in this Directive, reinsurance contracts concluded with undertakings having their head office in that third country shall be treated in the same manner as reinsurance contracts concluded with undertakings authorised in accordance with this Directive.

4 By way of derogation from paragraph 2, and even if the criteria specified in accordance with paragraph 1 have not been fulfilled, the Commission may, for a limited period, in accordance with Article 301a, and assisted by EIOPA in accordance with Article 33(2) of Regulation (EU) No 1094/2010, adopt delegated acts determining that the solvency regime of a third country applied to reinsurance activities of undertakings with the head office in that third country is temporarily equivalent to that laid down in Title I, if that third country has complied with at least the following criteria:

- a it has given a commitment to the Union to adopt and apply a solvency regime that is capable of being assessed equivalent in accordance with paragraph 2, before the end of that limited period and to engage in the equivalence assessment process;
- b it has established a work programme to fulfil the commitment referred to in point (a);
- c it has allocated sufficient resources to fulfil the commitment referred to in point (a);
- d it has a solvency regime that is risk based and establishes quantitative and qualitative solvency requirements and requirements relating to supervisory reporting and transparency;
- e it has entered into written arrangements to cooperate and exchange confidential supervisory information with EIOPA and supervisory authorities;
- f it has an independent system of supervision; and
- g it has established obligations on professional secrecy for all persons acting on behalf of its supervisory authorities, in particular on the exchange of information with EIOPA and supervisory authorities.

Any delegated acts on temporary equivalence shall take into account the reports by the Commission in accordance with Article 177(2). Those delegated acts shall be regularly reviewed on the basis of progress reports by the relevant third country, which are presented to and assessed by the Commission annually. EIOPA shall assist the Commission in the assessment of those progress reports.

EIOPA shall publish and keep up to date on its website a list of all third countries referred to in the first subparagraph.

The Commission may adopt delegated acts in accordance with Article 301a further specifying the conditions laid down in the first subparagraph.

5 The limited period referred to in the first subparagraph of paragraph 4 shall end on 31 December 2020 or on the date on which, in accordance with paragraph 2, the supervisory regime of that third country has been deemed to be equivalent to that laid down in Title I, whichever is the earlier.

That period may be extended by up to one year where necessary for EIOPA and the Commission to carry out the assessment of equivalence for the purposes of paragraph 2.

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6 Reinsurance contracts concluded with undertakings having their head office in a third country, the supervisory regime of which has been deemed to be temporarily equivalent in accordance with paragraph 4, shall be accorded the same treatment as that set out in paragraph 3. Article 173 shall also apply to reinsurance undertakings having their head office in a third country, the supervisory regime of which has been deemed temporarily equivalent in accordance with paragraph 4.]

Textual Amendments

- F1** Substituted by [Directive 2014/51/EU of the European Parliament and of the Council of 16 April 2014 amending Directives 2003/71/EC and 2009/138/EC and Regulations \(EC\) No 1060/2009, \(EU\) No 1094/2010 and \(EU\) No 1095/2010 in respect of the powers of the European Supervisory Authority \(European Insurance and Occupational Pensions Authority\) and the European Supervisory Authority \(European Securities and Markets Authority\).](#)

Article 173

Prohibition of pledging of assets

Member States shall not retain or introduce for the establishment of technical provisions a system with gross reserving which requires pledging of assets to cover unearned premiums and outstanding claims provisions where the reinsurer is a third-country insurance or reinsurance undertaking, situated in a country whose solvency regime is deemed to be equivalent to that laid down in this Directive in accordance with Article 172.

Article 174

Principle and conditions for conducting reinsurance activity

A Member State shall not apply to third-country reinsurance undertakings taking-up or pursuing reinsurance activity in its territory provisions which result in a more favourable treatment than that granted to reinsurance undertakings which have their head office in that Member State.

Article 175

Agreements with third countries

1 The Commission may submit proposals to the Council for the negotiation of agreements with one or more third countries regarding the means of exercising supervision over the following:

- a third-country reinsurance undertakings which conduct reinsurance business in the Community;
- b Community reinsurance undertakings which conduct reinsurance business in the territory of a third country.

2 The agreements referred to in paragraph 1 shall in particular seek to ensure, under conditions of equivalence of prudential regulation, effective market access for reinsurance

undertakings in the territory of each contracting party and provide for mutual recognition of supervisory rules and practices on reinsurance. They shall also seek to ensure the following:

- a that the supervisory authorities of the Member States are able to obtain the information necessary for the supervision of reinsurance undertakings which have their head offices situated in the Community and conduct business in the territory of third countries concerned;
- b that the supervisory authorities of third countries are able to obtain the information necessary for the supervision of reinsurance undertakings which have their head offices situated within their territories and conduct business in the Community.

3 Without prejudice to Article 300(1) and (2) of the Treaty, the Commission shall with the assistance of the European Insurance and Occupational Pensions Committee examine the outcome of the negotiations referred to in paragraph 1 of this Article and the resulting situation.