

Directive 2005/68/EC of the European Parliament and of the Council of 16 November 2005 on reinsurance and amending Council Directives 73/239/EEC, 92/49/EEC as well as Directives 98/78/EC and 2002/83/EC (Text with EEA relevance) (repealed)

DIRECTIVE 2005/68/EC OF THE EUROPEAN
PARLIAMENT AND OF THE COUNCIL

of 16 November 2005

on reinsurance and amending Council Directives 73/239/EEC,
92/49/EEC as well as Directives 98/78/EC and 2002/83/EC

(Text with EEA relevance) (repealed)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 47(2) and 55 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social Committee⁽¹⁾,

After consulting the Committee of the Regions,

Acting in accordance with the procedure laid down in Article 251 of the Treaty⁽²⁾,

Whereas:

- (1) 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⁽³⁾, 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⁽⁴⁾ and Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance⁽⁵⁾ have laid down the provisions relating to the taking-up and pursuit of direct insurance in the Community.
- (2) Those Directives provide for the legal framework for insurance undertakings to conduct insurance business in the internal market, from the point of view both of the right of establishment and of the freedom to provide services, in order to make it easier for insurance undertakings with head offices in the Community to cover commitments situated within the Community and to make it possible for policy holders to have recourse not only to insurers established in their own country, but also to insurers which have their head office in the Community and are established in other Member States.
- (3) The regime laid down by those Directives applies to direct insurance undertakings in respect of their entire business carried on, both direct insurance activities as well as reinsurance activities by way of acceptances; however reinsurance activities conducted

by specialised reinsurance undertakings are neither subject to that regime nor any other regime provided for by Community law.

- (4) Reinsurance is a major financial activity as it allows direct insurance undertakings, by facilitating a wider distribution of risks at worldwide level, to have a higher underwriting capacity to engage in insurance business and provide insurance cover and also to reduce their capital costs; furthermore, reinsurance plays a fundamental role in financial stability, since it is an essential element in ensuring the financial soundness and the stability of direct insurance markets as well as the financial system as a whole, because it involves major financial intermediaries and institutional investors.
- (5) 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⁽⁶⁾ has removed the restrictions on the right of establishment and the freedom to provide services related to the nationality or residence of the provider of reinsurance. It has not however removed restrictions caused by divergences between national provisions as regards prudential regulation of reinsurance. This situation has resulted in significant differences in the level of supervision of reinsurance undertakings in the Community, which create barriers to the pursuit of reinsurance business, such as the obligation for the reinsurance undertaking to pledge assets in order to cover its part of the technical provisions of the direct insurance undertaking, as well as the compliance by reinsurance undertakings with different supervisory rules in the various Member States in which they conduct business or an indirect supervision of the various aspects of a reinsurance undertaking by the competent authorities of direct insurance undertakings.
- (6) The Action Plan for Financial Services has identified reinsurance as a sector which requires action at Community level in order to complete the internal market for financial services. Moreover, major financial fora, such as the International Monetary Fund and the International Association of Insurance Supervisors (IAIS) have highlighted the lack of harmonised reinsurance supervision rules at Community level as an important gap in the financial services regulatory framework that should be filled.
- (7) This Directive aims at establishing a prudential regulatory framework for reinsurance activities in the Community. It forms part of the body of Community legislation in the field of insurance aimed at establishing the Internal Market in the insurance sector.
- (8) This Directive is consistent with major international work carried out on reinsurance prudential rules, in particular the IAIS.
- (9) This Directive follows the approach of Community legislation adopted in respect of direct insurance by carrying out the harmonisation which is essential, necessary and sufficient to ensure the mutual recognition of authorisations and prudential control systems, thereby making it possible to grant a single authorisation valid throughout the Community and apply the principle of supervision by the home Member State.
- (10) As a result, the taking up and the pursuit of the business of reinsurance are subject to the grant of a single official authorisation issued by the competent authorities of the Member State in which a reinsurance undertaking has its head office. Such authorisation enables an undertaking to carry on business throughout the Community, under the right

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of establishment or the freedom to provide services. The Member State of the branch or of the provision of services may not require a reinsurance undertaking which wishes to carry on reinsurance business in its territory and which has already been authorised in its home Member State to seek fresh authorisation. Furthermore a reinsurance undertaking which has already been authorised in its home Member State should not be subject to additional supervision or checks related to its financial soundness performed by the competent authorities of an insurance undertaking which is reinsured by that reinsurance undertaking. In addition, Member States should not be allowed to require a reinsurance undertaking authorised in the Community to pledge assets in order to cover its part of the cedant's technical provisions. The conditions for the granting or withdrawal of such authorisation should be defined. The competent authorities should not authorise or continue the authorisation of a reinsurance undertaking which does not fulfil the conditions laid down in this Directive.

- (11) This Directive should apply to reinsurance undertakings which conduct exclusively reinsurance business and do not engage in direct insurance business; it should also apply to the so-called 'captive' reinsurance undertakings created or owned by either a financial undertaking other than an insurance or reinsurance undertaking or a group of insurance or reinsurance undertakings to which 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⁽⁷⁾ applies, or by one or several non-financial undertakings, the purpose of which is to provide reinsurance cover exclusively for the risks of the undertakings to which they belong. When in this Directive reference is made to reinsurance undertakings, it should include captive reinsurance undertakings, except where special provision is made for captive reinsurance undertakings. Captive reinsurance undertakings do not cover risks deriving from the external direct insurance or reinsurance business of an insurance or reinsurance undertaking belonging to the group. Furthermore, insurance or reinsurance undertakings belonging to a financial conglomerate may not own a captive undertaking.
- (12) This Directive should however not apply to insurance undertakings which are already subject to Directives 73/239/EEC or 2002/83/EC; however, in order to ensure the financial soundness of insurance undertakings which also carry on reinsurance business and that the specific characteristics of those activities is duly taken into account by the capital requirements of those insurance undertakings, the provisions relating to the solvency margin of reinsurance undertakings contained in this Directive should apply to reinsurance business of those insurance undertakings, if the volume of their reinsurance activities represents a significant part of their entire business.
- (13) This Directive should not apply to the provision of reinsurance cover carried out or fully guaranteed by a Member State for reasons of substantial public interest, in the capacity of reinsurer of last resort, in particular where because of a specific situation in a market, it is not feasible to obtain adequate commercial cover; in this regard, a lack of 'adequate commercial cover' should mainly mean a market failure which is characterised by an evident lack of a sufficient range of insurance offers, although excessive premiums should not per se imply inadequacy of that commercial cover. Article 1(2)(d) of this Directive also applies to arrangements between insurance undertakings to which

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Directives 73/239/EEC or 2002/83/EC apply and which aim to pool financial claims ensuing from major risks such as terrorism.

- (14) Reinsurance undertakings are to limit their objects to the business of reinsurance and related operations. This requirement may allow a reinsurance undertaking to carry on, for instance, activities, such as provision of statistical or actuarial advice, risk analysis or research for its clients. It may also include a holding company function and activities with respect to financial sector activities within the meaning of Article 2, point 8, of Directive 2002/87/EC of the European Parliament and of the Council of 16 December 2002 on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate⁽⁸⁾. In any case, this requirement does not allow the carrying on of unrelated banking and financial activities.
- (15) This Directive should clarify the powers and means of supervision vested in the competent authorities. The competent authorities of the reinsurance undertaking's home Member State should be responsible for monitoring the financial health of reinsurance undertakings, including their state of solvency, the establishment of adequate technical provisions and equalisation reserves and the covering of those provisions and reserves by quality assets.
- (16) The competent authorities of the Member States should have at their disposal such means of supervision as are necessary to ensure the orderly pursuit of business by reinsurance undertakings throughout the Community whether carried on under the right of establishment or the freedom to provide services. In particular, they should be able to introduce appropriate safeguards or impose penalties aimed at preventing irregularities and infringements of the provisions on reinsurance supervision.
- (17) The provisions governing transfers of portfolios should be in line with the single authorisation provided for in this Directive. They should apply to the various kinds of transfers of portfolios between reinsurance undertakings, such as transfers of portfolios resulting from mergers between reinsurance undertakings or other instruments of company law or transfers of portfolios of outstanding losses in run-off to another reinsurance undertaking. Moreover, the provisions governing transfers of portfolios should include provisions specifically concerning the transfer to another reinsurance undertaking of the portfolio of contracts concluded under the right of establishment or the freedom to provide services.
- (18) Provision should be made for the exchange of information between the competent authorities and authorities or bodies which, by virtue of their function, help to strengthen the stability of the financial system. In order to preserve the confidential nature of the information forwarded, the list of addressees should remain within strict limits. It is therefore necessary to specify the conditions under which the abovementioned exchanges of information are authorised; moreover, where it is laid down that information may be disclosed only with the express agreement of the competent authorities, these may, where appropriate, make their agreement subject to compliance with strict conditions. In this regard, and with a view to ensuring the proper supervision of reinsurance undertakings by the competent authorities, this Directive should provide for rules enabling Member States to conclude agreements on exchange of information

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with third countries provided that the information disclosed is subject to appropriate guarantees of professional secrecy.

- (19) For the purposes of strengthening the prudential supervision of reinsurance undertakings, it should be laid down that an auditor has a duty to report promptly to the competent authorities, wherever, as provided for by this Directive, he/she becomes aware, while carrying out his/her tasks, of certain facts which are liable to have a serious effect on the financial situation or the administrative and accounting organisation of a reinsurance undertaking. Having regard to the aim in view, it is desirable for Member States to provide that such a duty should apply in all circumstances where such facts are discovered by an auditor during the performance of his/her tasks in an undertaking which has close links with a reinsurance undertaking. The duty of auditors to communicate, where appropriate, to the competent authorities certain facts and decisions concerning a reinsurance undertaking which they discover during the performance of their tasks in a non-reinsurance undertaking does not in itself change the nature of their tasks in that undertaking nor the manner in which they must perform those tasks in that undertaking.
- (20) Provision should be made to define the application of this Directive to existing reinsurance undertakings which were already authorised or entitled to conduct reinsurance business in accordance with the provisions of the Member States before the application of this Directive.
- (21) In order to allow a reinsurance undertaking to meet its commitments, the home Member State should require a reinsurance undertaking to establish adequate technical provisions. The amount of such technical provisions should be determined in accordance with Council Directive 91/674/EEC of 19 December 1991 on the annual accounts and consolidated accounts of insurance undertakings⁽⁹⁾ and, in respect of life reinsurance activities, the home Member State should also be allowed to lay down more specific rules in accordance with Directive 2002/83/EC.
- (22) A reinsurance undertaking conducting reinsurance business in respect of credit insurance, whose credit reinsurance business amounts to more than a small proportion of its total business, should be required to set up an equalisation reserve which does not form part of the solvency margin; that reserve should be calculated according to one of the methods laid down in Directive 73/239/EEC and which are recognised as equivalent; furthermore, this Directive should allow the home Member State also to require reinsurance undertakings whose head office is situated within its territory to set up equalisation reserves for classes of risks other than credit reinsurance, following the rules laid down by that home Member State. Following the introduction of the International Financial Reporting Standards (IFRS 4), this Directive should clarify the prudential treatment of equalisation reserves established in accordance with this Directive. However, since supervision of reinsurance needs to be reassessed under the Solvency II project, this Directive does not pre-empt any future reinsurance supervision under Solvency II.
- (23) A reinsurance undertaking should have assets to cover technical provisions and equalisation reserves which should take account of the type of business that it carries out

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in particular the nature, amount and duration of the expected claims payments, in such a way as to secure the sufficiency, liquidity, security, quality, profitability and matching of its investments, which the undertaking should ensure are diversified and adequately spread and which gives the undertaking the possibility of responding adequately to changing economic circumstances, in particular developments in the financial markets and real estate markets or major catastrophic events.

- (24) It is necessary that, over and above technical provisions, reinsurance undertakings should possess a supplementary reserve, known as the solvency margin, represented by free assets and, with the agreement of the competent authority, by other implicit assets, which is to act as a buffer against adverse business fluctuations. This requirement is an important element of prudential supervision. Pending the revision of the existing solvency margin regime, which the Commission is carrying on under the so-called ‘Solvency II project’, in order to determine the required solvency margin of reinsurance undertakings, the rules provided for in existing legislation in the field of direct insurance should be applicable.
- (25) In the light of the similarities between life reinsurance covering mortality risk and non-life reinsurance, in particular the cover of insurance risks and the duration of the life reinsurance contracts, the required solvency margin for life reinsurance should be determined in accordance with the provisions laid down in this Directive for the calculation of the required solvency margin for non-life reinsurance; the home Member State should however be allowed to apply the rules provided for in Directive 2002/83/EC for the establishment of the required solvency margin in respect of life reinsurance activities which are linked to investment funds or participating contracts.
- (26) In order to take account of the particular nature of some types of reinsurance contracts or specific lines of business, provision should be made to make adjustments to the calculation of the required solvency margin; these adjustments should be made by the Commission, after consulting the European Insurance and Occupational Pensions Committee, set up by Commission Decision 2004/9/EC⁽¹⁰⁾ in the exercise of its implementing powers conferred by the Treaty.
- (27) These measures should be adopted by the use of the regulatory procedure provided for in Article 5 of Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission⁽¹¹⁾.
- (28) The list of items eligible to represent the available solvency margin laid down by this Directive should be that provided for in Directives 73/239/EEC and 2002/83/EC.
- (29) Reinsurance undertakings should also possess a guarantee fund in order to ensure that they possess adequate resources when they are set up and that in the subsequent course of business the solvency margin in no event falls below a minimum of security; however, in order to take account of the specificities of captive reinsurance undertakings, provision should be made to allow the home Member State to set the minimum guarantee fund required for captive reinsurance undertakings at a lower amount.

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- (30) Certain provisions of this Directive define minimum standards. A home Member State should be able to lay down stricter rules for reinsurance undertakings authorised by its own competent authorities, in particular with respect to solvency margin requirements.
- (31) This Directive should be applicable to finite reinsurance activities; therefore, a definition of finite reinsurance for the purposes of this Directive is necessary; owing to the special nature of this line of reinsurance activity, the home Member State should be given the option of laying down specific provisions for the pursuit of finite reinsurance activities. These provisions could differ from the general regime laid down in this Directive on a number of specific points.
- (32) This Directive should provide for rules concerning those special purpose vehicles that assume risks from insurance and reinsurance undertakings. The special nature of such special purpose vehicles, which are not insurance or reinsurance undertakings, calls for the establishment of specific provisions in Member States. Furthermore, this Directive should provide that the home Member State should lay down more detailed rules in order to set the conditions under which outstanding amounts from a special purpose vehicle can be used as assets covering technical provisions by an insurance or a reinsurance undertaking. This Directive should also provide that recoverable amounts from a special purpose vehicle may be considered as amounts deductible under reinsurance or retrocession contracts within the limits set out in this Directive, subject to an application by the insurance undertaking or reinsurance undertaking to the competent authority and after agreement by that authority.
- (33) It is necessary to provide for measures in cases where the financial position of the reinsurance undertaking becomes such that it is difficult for it to meet its underwriting liabilities. In specific situations, there is also a need for the competent authorities to be empowered to intervene at a sufficiently early stage, but in the exercise of those powers, competent authorities should inform the reinsurance undertakings of the reasons motivating such supervisory action, in accordance with the principles of sound administration and due process. As long as such a situation exists, the competent authorities should be prevented from certifying that the reinsurance undertaking has a sufficient solvency margin.
- (34) It is necessary to make provision for cooperation between the competent authorities of the Member States in order to ensure that a reinsurance undertaking carrying on its activities under the right of establishment and the freedom to provide services complies with the provisions applicable to it in the host Member State.
- (35) Provision should be made for the right to apply to the courts should an authorisation be refused or withdrawn.
- (36) It is important to provide that reinsurance undertakings whose head office is situated outside the Community and which conduct reinsurance business in the Community should not be subject to provisions which result in treatment more favourable than that provided to reinsurance undertakings having their head office in a Member State.
- (37) In order to take account of the international aspects of reinsurance, provision should be made to enable the conclusion of international agreements with a third country aimed

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at defining the means of supervision over reinsurance entities which conduct business in the territory of each contracting party.

- (38) Provision should be made for a flexible procedure to make it possible to assess prudential equivalence with third countries on a Community basis, so as to improve liberalisation of reinsurance services in third countries, be it through establishment or cross-border provision of services. To that end, this Directive should provide for procedures for negotiating with third countries.
- (39) The Commission should be empowered to adopt implementing measures provided that these do not modify the essential elements of this Directive. These implementing measures should enable the Community to take account of the future development of reinsurance. The measures necessary for implementation of this Directive should be adopted in accordance with Decision 1999/468/EC.
- (40) The existing Community legal framework for insurance should be adapted in order to take account of the new supervisory regime for reinsurance undertakings laid down by this Directive and in order to ensure a consistent regulatory framework for the whole insurance sector. In particular, the existing provisions which permit ‘indirect supervision’ of reinsurance undertakings by the authorities competent for the supervision of direct insurance undertakings should be adapted. Furthermore, it is necessary to abolish the current provisions enabling Member States to require pledging of assets covering the technical provisions of an insurance undertaking, whatever form this requirement might take, when the insurer is reinsured by a reinsurance undertaking authorised pursuant to this Directive or by an insurance undertaking. Finally, provision should be made for the solvency margin required for insurance undertakings conducting reinsurance activities, when such activities represent a significant part of their business, to be subject to the solvency rules provided for reinsurance undertakings in this Directive. Directives 73/239/EEC, 92/49/EEC and 2002/83/EC should therefore be amended accordingly.
- (41) Directive 98/78/EC should be amended in order to guarantee that reinsurance undertakings in an insurance or a reinsurance group are subject to supplementary supervision in the same manner as insurance undertakings which are currently part of an insurance group.
- (42) The Council, in accordance with paragraph 34 of the Interinstitutional agreement on better law-making⁽¹²⁾, should encourage Member States to draw up, for themselves and in the interest of the Community, their own tables, illustrating, as far as possible, the correlation between this Directive and the transposition measures, and to make them public.
- (43) Since the objective of this Directive, namely the establishment of a legal framework for the taking up and pursuit of reinsurance activities, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of the action, be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve this objective.

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- (44) Since this Directive defines minimum standards, Member States may lay down stricter rules,

HAVE ADOPTED THIS DIRECTIVE:

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- (1) [OJ C 120, 20.5.2005, p. 1.](#)
- (2) Opinion of the European Parliament of 7 June 2005 (not yet published in the Official Journal) and Decision of the Council of 17 October 2005.
- (3) [OJ L 228, 16.8.1973, p. 3.](#) Directive as last amended by Directive 2005/1/EC of the European Parliament and of the Council ([OJ L 79, 24.3.2005, p. 9.](#))
- (4) [OJ L 228, 11.8.1992, p. 1.](#) Directive as last amended by Directive 2005/1/EC.
- (5) [OJ L 345, 19.12.2002, p. 1.](#) Directive as last amended by Directive 2005/1/EC.
- (6) [OJ 56, 4.4.1964, p. 878.](#)
- (7) [OJ L 330, 5.12.1998, p. 1.](#) Directive as last amended by Directive 2005/1/EC.
- (8) [OJ L 35, 11.2.2003, p. 1.](#) Directive as amended by Directive 2005/1/EC.
- (9) [OJ L 374, 31.12.1991, p. 7.](#) Directive as amended by Directive 2003/51/EC of the European Parliament and of the Council ([OJ L 178, 17.7.2003, p. 16.](#))
- (10) [OJ L 3, 7.1.2004, p. 34.](#)
- (11) [OJ L 184, 17.7.1999, p. 23.](#)
- (12) [OJ C 321, 31.12.2003, p. 1.](#)