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Council Directives 73/239/EEC, 92/49/EEC as well as Directives 98/78/EC and 2002/83/EC (Text with EEA relevance) (repealed)

TITLE III

CONDITIONS GOVERNING THE BUSINESS OF REINSURANCE

CHAPTER 1

Principles and methods of financial supervision

Section 1

Competent authorities and general rules

Article 15

Competent authorities and object of supervision

1 The financial supervision of a reinsurance undertaking, including that of the business it carries on either through branches or under the freedom to provide services, shall be the sole responsibility of the home Member State.

If the competent authorities of the host Member State have reason to consider that the activities of a reinsurance undertaking might affect its financial soundness, they shall inform the competent authorities of the reinsurance undertaking's home Member State. The latter authorities shall determine whether the reinsurance undertaking is complying with the prudential rules laid down in this Directive.

2 The financial supervision pursuant to paragraph 1 shall include verification, with respect to the reinsurance undertaking's entire business, of its state of solvency, of the establishment of technical provisions and of the assets covering them in accordance with the rules laid down or practices followed in the home Member State under provisions adopted at Community level.

3 The home Member State of the reinsurance undertaking shall not refuse a retrocession contract concluded by the reinsurance undertaking with a reinsurance undertaking authorised in accordance with this Directive or an insurance undertaking authorised in accordance with Directives 73/239/EEC or 2002/83/EC on grounds directly related to the financial soundness of that reinsurance undertaking or that insurance undertaking.

4 The competent authorities of the home Member State shall require every reinsurance undertaking to have sound administrative and accounting procedures and adequate internal control mechanisms.

Article 16

Supervision of branches established in another Member State

The Member State of the branch shall provide that, where a reinsurance undertaking authorised in another Member State carries on business through a branch, the competent authorities of the home Member State may, after having first informed the competent authorities of the Member State of the branch, carry out themselves or through the intermediary of persons they appoint for that purpose, on-the-spot verification of the information necessary to ensure the financial supervision of the undertaking. The authorities of the Member State of the branch may participate in that verification.

Article 17

Accounting, prudential and statistical information: supervisory powers

1 Each Member State shall require every reinsurance undertaking whose head office is situated in its territory to produce an annual account, covering all types of operation, of its financial situation and of its solvency.

2 Member States shall require reinsurance undertakings with head offices within their territories to render periodically the returns, together with statistical documents, which are necessary for the purposes of supervision. The competent authorities shall provide each other with any documents and information that are useful for the purposes of supervision.

3 Every Member State shall take all steps necessary to ensure that the competent authorities have the powers and means necessary for the supervision of the business of reinsurance undertakings with head offices within their territories, including business carried on outside those territories.

4 In particular, the competent authorities shall be enabled to:

a make detailed enquiries regarding a reinsurance undertaking's situation and the whole of its business, *inter alia,* by gathering information or requiring the submission of documents concerning its reinsurance and retrocession business, and by carrying out on-the-spot investigations at the reinsurance undertaking's premises;

b take any measures with regard to a reinsurance undertaking, its directors or managers or the persons who control it, that are appropriate and necessary to ensure that that reinsurance undertaking's business continues to comply with the laws, regulations and administrative provisions with which the reinsurance undertaking must comply in each Member State;

c ensure that those measures are carried out, if need be, by enforcement and where appropriate through judicial channels.

Member States may also make provision for the competent authorities to obtain any information regarding contracts which are held by intermediaries.

Article 18

Transfer of portfolio

Under the conditions laid down by national law, each Member State shall authorise reinsurance undertakings with head offices within its territory to transfer all or part of their portfolios of contracts, including those concluded either under the right of establishment or the freedom to provide services, to an accepting office established within the Community, if the competent authorities of the home Member State of the accepting office certify that, after taking the transfer into account, the latter possesses the necessary solvency margin referred to in Chapter 3.

Section 2

Qualifying holdings

Article 19

Acquisitions

Member States shall require any natural or legal person who proposes to hold, directly or indirectly, a qualifying holding in a reinsurance undertaking first to inform the competent authorities of the home Member State, indicating the size of his intended holding. That person must likewise inform the competent authorities of the home Member State if he proposes to increase his qualifying holding so that the proportion of the voting rights or of the capital he holds would reach or exceed 20 %, 33 % or 50 % or so that the reinsurance undertaking would become his subsidiary.

The competent authorities of the home Member State shall have up to three months from the date of the notification provided for in the first paragraph to oppose such a plan if, in view of the need to ensure sound and prudent management of the reinsurance undertaking in question, they are not satisfied as to the qualifications of the person referred to in the first paragraph. If they do not oppose the plan in question, they may fix a maximum period for its implementation.

Article 20

Acquisitions by financial undertakings

If the acquirer of the holdings referred to in Article 19 is an insurance undertaking, a reinsurance undertaking, a credit institution or an investment firm authorised in another Member State, or the parent undertaking of such an entity, or a natural or legal person controlling such an entity, and if, as a result of that acquisition, the undertaking in which the acquirer proposes to acquire such a holding would become a subsidiary or subject to the control of the acquirer, the assessment of the acquisition must be subject to the prior consultation referred to in Article 14.

Article 21

Disposals

Member States shall require any natural or legal person who proposes to dispose, directly or indirectly, of a qualifying holding in a reinsurance undertaking first to inform the competent authorities of the home Member State, indicating the size of his intended holding.

Such a person shall likewise inform the competent authorities if he proposes to reduce his qualifying holding so that the proportion of the voting rights or of the capital he holds would fall below 20 %, 33 % or 50 % or so that the reinsurance undertaking would cease to be his subsidiary.

Article 22

Information to the competent authority by the reinsurance undertaking

On becoming aware of them, reinsurance undertakings shall inform the competent authorities of their home Member States of any acquisitions or disposals of holdings in their capital that cause holdings to exceed or fall below any of the thresholds referred to in Articles 19 and 21.

They shall also, at least once a year, inform them of the names of shareholders and members possessing qualifying holdings and the sizes of such holdings as shown, for example, by the information received at annual general meetings of shareholders or members or as a result of compliance with the regulations relating to companies listed on stock exchanges.

Article 23

Qualifying holdings: powers of the competent authority

Member States shall require that, where the influence exercised by the persons referred to in Article 19 is likely to operate against the prudent and sound management of a reinsurance undertaking, the competent authorities of the home Member State shall take appropriate measures to put an end to that situation. Such measures may consist, for example, in injunctions, penalties against directors and managers, or suspension of the exercise of the voting rights attaching to the shares held by the shareholders or members in question.

Similar measures shall apply to natural or legal persons failing to comply with the obligation to provide prior information imposed pursuant to Article 19. If a holding is acquired despite the opposition of the competent authorities, the Member States shall, regardless of any other penalties to be adopted, provide either for exercise of the corresponding voting rights to be suspended, or for the nullity of votes cast or for the possibility of their annulment.

Section 3

Professional secrecy and exchanges of information

Article 24

Obligation

1 Member States shall provide that all persons working or who have worked for the competent authorities, as well as auditors and experts acting on behalf of the competent authorities, are bound by an obligation of professional secrecy.

Pursuant to that obligation, and without prejudice to cases covered by criminal law, no confidential information which they may receive while performing their duties may be divulged to any person or authority whatsoever, except in summary or aggregate form, such that individual reinsurance undertakings cannot be identified.

2 However, where a reinsurance undertaking has been declared bankrupt or is being compulsorily wound up, confidential information which does not concern third parties involved in attempts to rescue that undertaking may be divulged in civil or commercial proceedings.

Article 25

Exchange of information between competent authorities of Member States

Article 24 shall not prevent the competent authorities of different Member States from exchanging information in accordance with the Directives applicable to reinsurance undertakings. Such information shall be subject to the conditions of professional secrecy laid down in Article 24.

Article 26

Cooperation agreements with third countries

Member States may conclude cooperation agreements providing for exchange of information with the competent authorities of third countries or with authorities or bodies of third countries as defined in Article 28(1) and (2) only if the information disclosed is subject to guarantees of professional secrecy at least equivalent to those referred to in this Section. Such exchange of information shall be intended for the performance of the supervisory task of the authorities or bodies mentioned.

Where the information originates in another Member State, it may not be disclosed without the express agreement of the competent authorities which have disclosed it and, where appropriate, solely for the purposes for which those authorities gave their agreement.

Article 27

Use of confidential information

Competent authorities receiving confidential information under Articles 24 and 25 may use it only in the course of their duties:

(a) to check that the conditions governing the taking up of the business of reinsurance are met and to facilitate monitoring of the conduct of such business, especially with regard to the monitoring of technical provisions, solvency margins, administrative and accounting procedures and internal control mechanisms,

(b) to impose penalties,

(c) in administrative appeals against decisions of the competent authorities, or

(d) in court proceedings initiated under Article 53 or under special provisions provided for in this Directive and other Directives adopted in the field of insurance and reinsurance undertakings.

Article 28

Exchange of information with other authorities

1 Articles 24 and 27 shall not preclude the exchange of information within a Member State, where there are two or more competent authorities in the same Member State, or, between Member States, between competent authorities and:

a authorities responsible for the official supervision of credit institutions and other financial organisations and the authorities responsible for the supervision of financial markets,
b bodies involved in the liquidation and bankruptcy of insurance and reinsurance undertakings and in other similar procedures, and
c persons responsible for carrying out statutory audits of the accounts of insurance undertakings, reinsurance undertakings and other financial institutions,

in the discharge of their supervisory functions, or the disclosure to bodies which administer compulsory winding-up proceedings or guarantee schemes of information necessary to the performance of their duties. The information received by those authorities, bodies and persons shall be subject to the conditions of professional secrecy laid down in Article 24.

2 Notwithstanding Articles 24 to 27, Member States may authorise exchanges of information between the competent authorities and:

a the authorities responsible for overseeing the bodies involved in the liquidation and bankruptcy of insurance or reinsurance undertakings and other similar procedures, or
b the authorities responsible for overseeing the persons charged with carrying out statutory audits of the accounts of insurance or reinsurance undertakings, credit institutions, investment firms and other financial institutions, or
c independent actuaries of insurance or reinsurance undertakings carrying out legal supervision of those undertakings and the bodies responsible for overseeing such actuaries.

Member States which have recourse to the option provided for in the first subparagraph shall require at least that the following conditions are met:

a this exchange of information shall be for the purpose of carrying out the overseeing or legal supervision referred to in the first subparagraph;
b information received in this context shall be subject to the conditions of professional secrecy imposed in Article 24;
c where the information originates in another Member State, it may not be disclosed without the express agreement of the competent authorities which have disclosed it and, where appropriate, may only be disclosed for the purposes for which those authorities gave their agreement.

Member States shall communicate to the Commission and to the other Member States the names of the authorities, persons and bodies which may receive information pursuant to this paragraph.

3 Notwithstanding Articles 24 to 27, Member States may, with the aim of strengthening the stability, including the integrity, of the financial system, authorise the exchange of information between the competent authorities and the authorities or bodies responsible under the law for the detection and investigation of breaches of company law.

Member States which have recourse to the option provided for in the first subparagraph shall require at least that the following conditions are met:

a the information shall be for the purpose of performing the task referred to in the first subparagraph;

b information received in this context shall be subject to the conditions of professional secrecy imposed in Article 24;

c where the information originates in another Member State, it may not be disclosed without the express agreement of the competent authorities which have disclosed it and, where appropriate, solely for the purposes for which those authorities gave their agreement.

Where, in a Member State, the authorities or bodies referred to in the first subparagraph perform their task of detection or investigation with the aid, in view of their specific competence, of persons appointed for that purpose and not employed in the public sector, the possibility of exchanging information provided for in the first subparagraph may be extended to such persons under the conditions laid down in the second subparagraph.

In order to implement point (c) of the second subparagraph, the authorities or bodies referred to in the first subparagraph shall communicate to the competent authorities which have disclosed the information the names and precise responsibilities of the persons to whom it is to be sent.

Member States shall communicate to the Commission and to the other Member States the names of the authorities or bodies which may receive information pursuant to this paragraph.

Article 29

Transmission of information to central banks and monetary authorities

This Section shall not prevent a competent authority from transmitting to central banks and other bodies with a similar function in their capacity as monetary authorities, and where appropriate, to other public authorities responsible for overseeing payment systems, information intended for the performance of their task. Nor shall it prevent such authorities or bodies from communicating to the competent authorities such information as they may need for the purposes of Article 27.

Information received in this context shall be subject to the conditions of professional secrecy imposed in this Section.

Article 30

Disclosure of information to government administrations responsible for financial legislation

Notwithstanding Articles 24 and 27, Member States may, under provisions laid down by law, authorise the disclosure of certain information to other departments of their central government administrations responsible for legislation on the supervision of credit institutions, financial institutions, investment services and insurance or reinsurance undertakings and to inspectors acting on behalf of those departments.

However, such disclosures may be made only where necessary for reasons of prudential control.

Member States shall, however, provide that information received under Articles 25 and 28(1) and that obtained by means of the on-the-spot verification referred to in Article 16 may never be disclosed in the cases referred to in this Article except with the express consent of the competent authorities which disclosed the information or of the competent authorities of the Member State in which on-the-spot verification was carried out.

Section 4

Duties of auditors

Article 31

Duties of auditors

1 Member States shall provide at least that any person authorised in accordance with Directive 84/253/EEC[(1)], performing in a reinsurance undertaking the task described in Article 51 of Directive 78/660/EEC[(2)], Article 37 of Directive 83/349/EEC or Article 31 of Directive 85/611/EEC[(3)] or any other statutory task, shall have a duty to report promptly to the competent authorities any fact or decision concerning that undertaking of which he/she has become aware while carrying out that task which is liable to:

- a constitute a material breach of the laws, regulations or administrative provisions which lay down the conditions governing authorisation or which specifically govern pursuit of the activities of insurance or reinsurance undertakings, or
- b affect the continuous functioning of the reinsurance undertaking, or
- c lead to refusal to certify the accounts or to the expression of reservations.

That person shall also have a duty to report any facts and decisions of which he/she becomes aware in the course of carrying out a task as described in the first subparagraph in an undertaking having close links resulting from a control relationship with the reinsurance undertaking within which he/she is carrying out the abovementioned task.

2 The disclosure to the competent authorities, by persons authorised in accordance with Directive 84/253/EEC, of any relevant fact or decision referred to in paragraph 1 of this Article shall not constitute a breach of any restriction on disclosure of information imposed by contract or by any legislative, regulatory or administrative provision and shall not involve such persons in liability of any kind.

CHAPTER 2

Rules relating to technical provisions

Article 32

Establishment of technical provisions

1 The home Member State shall require every reinsurance undertaking to establish adequate technical provisions in respect of its entire business.

The amount of such technical provisions shall be determined in accordance with the rules laid down in Directive 91/674/EEC. Where applicable, the home Member State may lay down more specific rules in accordance with Article 20 of Directive 2002/83/EC.

2 Member States shall not retain or introduce a system with gross reserving which requires pledging of assets to cover unearned premiums and outstanding claims provisions if the reinsurer is a reinsurance undertaking authorised in accordance with this Directive or an insurance undertaking authorised in accordance with Directives 73/239/EEC or 2002/83/EC.

3 When the home Member State allows any technical provisions to be covered by claims against reinsurers who are not authorised in accordance with this Directive or insurance undertakings which are not authorised in accordance with Directives 73/239/EEC or 2002/83/EC, it shall set the conditions for accepting such claims.

Article 33

Equalisation reserves

1 The home Member State shall require every reinsurance undertaking which reinsures risks included in class 14 listed in point A of the Annex to Directive 73/239/EEC to set up an equalisation reserve for the purpose of offsetting any technical deficit or above-average claims ratio arising in that class in any financial year.

2 The equalisation reserve for credit reinsurance shall be calculated in accordance with the rules laid down by the home Member State in accordance with one of the four methods set out in point D of the Annex to Directive 73/239/EEC, which shall be regarded as equivalent.

3 The home Member State may exempt reinsurance undertakings from the obligation to set up equalisation reserves for reinsurance of credit insurance business where the premiums or contributions receivable in respect of reinsurance of credit insurance are less than 4 % of the total premiums or contributions receivable by them and less than EUR 2 500 000.

4 The home Member State may require every reinsurance undertaking to set up equalisation reserves for classes of risks other than credit reinsurance. The equalisation reserves shall be calculated according to the rules laid down by the home Member State.

Article 34

Assets covering technical provisions

1 The home Member State shall require every reinsurance undertaking to invest the assets covering the technical provisions and the equalisation reserve referred to in Article 33 in accordance with the following rules:

- a the assets shall take account of the type of business carried out by a reinsurance undertaking, 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;
- b the reinsurance undertaking shall ensure that the assets are diversified and adequately spread and allow the undertaking to respond adequately to changing economic circumstances, in particular developments in the financial markets and real estate markets or major catastrophic events. The undertaking shall assess the impact of irregular market circumstances on its assets and shall diversify the assets in such a way as to reduce such impact;

c investment in assets which are not admitted to trading on a regulated financial market shall in any event be kept to prudent levels;
d investment in derivative instruments shall be possible insofar as they contribute to a reduction of investment risks or facilitate efficient portfolio management. They shall be valued on a prudent basis, taking into account the underlying assets, and included in the valuation of the institution's assets. The institution shall also avoid excessive risk exposure to a single counterparty and to other derivative operations;
e the assets shall be properly diversified in such a way as to avoid excessive reliance on any one particular asset, issuer or group of undertakings and accumulations of risk in the portfolio as a whole. Investments in assets issued by the same issuer or by issuers belonging to the same group shall not expose the undertaking to excessive risk concentration.

Member States may decide not to apply the requirements referred to in point (e) to investment in government bonds.

2 Member States shall not require reinsurance undertakings situated in their territory to invest in particular categories of assets.

3 Member States shall not subject the investment decisions of a reinsurance undertaking situated in their territory or its investment manager to any kind of prior approval or systematic notification requirements.

4 Notwithstanding paragraphs 1 to 3, the home Member State may, for every reinsurance undertaking whose head office is situated in its territory, lay down the following quantitative rules, provided that they are prudentially justified:
a investments of gross technical provisions in currencies other than those in which technical provisions are set should be limited to 30 %;
b investments of gross technical provisions in shares and other negotiable securities treated as shares, bonds and debt securities which are not admitted to trading on a regulated market should be limited to 30 %;
c the home Member State may require every reinsurance undertaking to invest no more than 5 % of its gross technical provisions in shares and other negotiable securities treated as shares, bonds, debt securities and other money and capital market instruments from the same undertaking, and no more than 10 % of its total gross technical provisions in shares and other negotiable securities treated as shares, bonds, debt securities and other money and capital market instruments from undertakings which are members of the same group.

5 Furthermore, the home Member State shall lay down more detailed rules setting the conditions for the use of amounts outstanding from a special purpose vehicle as assets covering technical provisions pursuant to this Article.

CHAPTER 3

Rules relating to the solvency margin and to the guarantee fund

Section 1

Available solvency margin

Article 35

General rule

Each Member State shall require of every reinsurance undertaking whose head office is situated in its territory an adequate available solvency margin in respect of its entire business at all times, which is at least equal to the requirements of this Directive.

Article 36

Eligible items

1 The available solvency margin shall consist of the assets of the reinsurance undertaking free of any foreseeable liabilities, less any intangible items, including:

a the paid-up share capital or, in the case of a mutual reinsurance undertaking, the effective initial fund plus any members' accounts which meet all the following criteria:

(i) the memorandum and articles of association shall stipulate that payments may be made from those accounts to members only in so far as this does not cause the available solvency margin to fall below the required level, or, after the dissolution of the undertaking, if all the undertaking's other debts have been settled;

(ii) the memorandum and articles of association shall stipulate, with respect to any payments referred to in point (i) for reasons other than the individual termination of membership, that the competent authorities must be notified at least one month in advance and can prohibit the payment within that period;

(iii) the relevant provisions of the memorandum and articles of association may be amended only after the competent authorities have declared that they have no objection to the amendment, without prejudice to the criteria stated in points (i) and (ii);

b statutory and free reserves which neither correspond to underwriting liabilities nor are classified as equalisation reserves;

c the profit or loss brought forward after deduction of dividends to be paid.

2 The available solvency margin shall be reduced by the amount of own shares directly held by the reinsurance undertaking.

For those reinsurance undertakings which discount or reduce their non-life technical provisions for claims outstanding to take account of investment income as permitted by Article 60(1)(g) of Directive 91/674/EEC, the available solvency margin shall be reduced by the difference between the undiscounted technical provisions or technical provisions before deductions as disclosed in the notes on the accounts, and the discounted or technical provisions after deductions. This adjustment shall be made for all risks listed in point A of the Annex to Directive 73/239/EEC, except for risks listed under classes 1 and 2 of point A of that Annex. For classes other than 1 and 2 listed in point A of that Annex, no adjustment need be made in respect of the discounting of annuities included in technical provisions.

In addition to the deductions in the first and second subparagraphs, the available solvency margin shall be reduced by the following items:

a participations which the reinsurance undertaking holds in the following entities:

(i) insurance undertakings within the meaning of Article 6 of Directive 73/239/EEC, Article 4 of Directive 2002/83/EC, or Article 1(b) of Directive 98/78/EC,

(ii) reinsurance undertakings within the meaning of Article 3 of this Directive or non-member country reinsurance undertakings within the meaning of Article 1(l) of Directive 98/78/EC,

(iii) insurance holding companies within the meaning of Article 1(i) of Directive 98/78/EC,

(iv) credit institutions and financial institutions within the meaning of Article 1(1) and (5) of Directive 2000/12/EC,

(v) investment firms and financial institutions within the meaning of Article 1(2) of Directive 93/22/EEC[(4)] and of Article 2(4) and (7) of Directive 93/6/EEC[(5)];

b each of the following items which the reinsurance undertaking holds in respect of the entities defined in (a) in which it holds a participation:

(i) instruments referred to in paragraph 4,

(ii) instruments referred to in Article 27(3) of Directive 2002/83/EC,

(iii) subordinated claims and instruments referred to in Article 35 and Article 36(3) of Directive 2000/12/EC.

Where shares in another credit institution, investment firm, financial institution, insurance or reinsurance undertaking or insurance holding company are held temporarily for the purposes of a financial assistance operation designed to reorganise and save that entity, the competent authority may waive the provisions on deduction referred to under (a) and (b) of the third subparagraph.

As an alternative to the deduction of the items referred to in (a) and (b) of the third subparagraph which the reinsurance undertaking holds in credit institutions, investment firms and financial institutions, Member States may allow their reinsurance undertakings to apply *mutatis mutandis* methods 1, 2, or 3 of Annex I to Directive 2002/87/EC. Method 1 (Accounting consolidation) shall only be applied if the competent authority is confident about the level of integrated management and internal control regarding the entities which would be included in the scope of consolidation. The method chosen shall be applied in a consistent manner over time.

Member States may provide that, for the calculation of the solvency margin as provided for by this Directive, reinsurance undertakings subject to supplementary supervision in accordance with Directive 98/78/EC or to supplementary supervision in accordance with Directive 2002/87/EC need not deduct the items referred to in (a) and (b) of the third subparagraph which are held in credit institutions, investment firms, financial institutions, insurance or reinsurance undertakings or insurance holding companies which are included in the supplementary supervision.

For the purposes of the deduction of participations referred to in this paragraph, participation shall mean a participation within the meaning of Article 1(f) of Directive 98/78/EC.

3 The available solvency margin may also consist of:

a cumulative preferential share capital and subordinated loan capital up to 50 % of the available solvency margin or the required solvency margin, whichever is the smaller, no more than 25 % of which shall consist of subordinated loans with a fixed maturity, or fixed-term cumulative preferential share capital, provided that, in the event of the bankruptcy or liquidation of the reinsurance undertaking, binding agreements exist under which the subordinated loan capital or preferential share capital ranks after the claims of all other creditors and is not to be repaid until all other debts outstanding at the time have been settled.

Subordinated loan capital shall also fulfil the following conditions:

(i) only fully paid-up funds may be taken into account;

(ii) for loans with a fixed maturity, the original maturity shall be at least five years. No later than one year before the repayment date the reinsurance undertaking shall submit to the competent authorities for their approval a plan showing how the available solvency margin will be kept at or brought to the required level at maturity, unless the extent to which the loan may rank as a component of the available solvency margin is gradually reduced during at least the last five years before the repayment date. The competent authorities may authorise the early repayment of such loans provided that application is made by the issuing reinsurance undertaking and that its available solvency margin will not fall below the required level;

(iii) loans the maturity of which is not fixed shall be repayable only subject to five years' notice unless the loans are no longer considered as a component of the available solvency margin or unless the prior consent of the competent authorities is specifically required for early repayment. In the latter event the reinsurance undertaking shall notify the competent authorities at least six months before the date of the proposed repayment, specifying the available solvency margin and the required solvency margin both before and after that repayment. The competent authorities shall authorise repayment only if the reinsurance undertaking's available solvency margin will not fall below the required level;

(iv) the loan agreement shall not include any clause providing that in specified circumstances, other than the winding-up of the reinsurance undertaking, the debt will become repayable before the agreed repayment dates;

(v) the loan agreement may be amended only after the competent authorities have declared that they have no objection to the amendment;

b securities with no specified maturity date and other instruments, including cumulative preferential shares other than those referred to in point (a), up to 50 % of the available solvency margin or the required solvency margin, whichever is the smaller, for the total of such securities and the subordinated loan capital referred to in point (a) provided that they fulfil the following:

(i) they may not be repaid on the initiative of the bearer or without the prior consent of the competent authority;

(ii) the contract of issue shall enable the reinsurance undertaking to defer the payment of interest on the loan;

(iii) the lender's claims on the reinsurance undertaking shall rank entirely after those of all non-subordinated creditors;

(iv) the documents governing the issue of the securities shall provide for the loss-absorption capacity of the debt and unpaid interest, while enabling the reinsurance undertaking to continue its business;

(v) only fully paid-up amounts may be taken into account.

4 Upon application, with supporting evidence, by the reinsurance undertaking to the competent authority of the home Member State and with the agreement of that competent authority, the available solvency margin may also consist of:

a one half of the unpaid share capital or initial fund, once the paid-up part amounts to 25 % of that share capital or fund, up to 50 % of the available solvency margin or the required solvency margin, whichever is the smaller;

b in the case of a non-life mutual or mutual-type association with variable contributions, any claim which it has against its members by way of a call for supplementary contribution, within the financial year, up to one half of the difference between the maximum contributions and the contributions actually called in, and subject to a limit of 50 % of the available solvency margin or the required solvency margin, whichever is the smaller. The competent national authorities shall establish guidelines laying down the conditions under which supplementary contributions may be accepted;

c any hidden net reserves arising out of the valuation of assets, in so far as such hidden net reserves are not of an exceptional nature.

5 In addition, with respect to life reassurance activities, the available solvency margin may, upon application, with supporting evidence, by the reinsurance undertaking to the competent authority of the home Member State and with the agreement of that competent authority, consist of:

a until 31 December 2009, an amount equal to 50 % of the undertaking's future profits, but not exceeding 25 % of the available solvency margin or the required solvency margin, whichever is the smaller; the amount of the future profits shall be obtained by multiplying the estimated annual profit by a factor which represents the average period left to run on policies; the factor used may not exceed six; the estimated annual profit shall not exceed the arithmetical average of the profits made over the last five financial years in the activities listed in Article 2(1) of Directive 2002/83/EC.

Competent authorities may only agree to include such an amount for the available solvency margin:

(i) when an actuarial report is submitted to the competent authorities substantiating the likelihood of emergence of these profits in the future; and

(ii) insofar as that part of future profits emerging from hidden net reserves referred to in paragraph 4(c) has not already been taken into account;

b where Zillmerising is not practised or where, if practised, it is less than the loading for acquisition costs included in the premium, the difference between a non-Zillmerised or partially Zillmerised mathematical provision and a mathematical provision Zillmerised at a rate equal to the loading for acquisition costs included in the premium; this figure may not, however, exceed 3,5 % of the sum of the differences between the relevant capital sums of life reassurance activities and the mathematical provisions for all policies for which Zillmerising is possible; the difference shall be reduced by the amount of any undepreciated acquisition costs entered as an asset.

6 Amendments to paragraphs 1 to 5 of this Article to take into account developments that justify a technical adjustment of the elements eligible for the available solvency margin shall be adopted in accordance with the procedure laid down in Article 55(2).

Section 2

Required solvency margin

Article 37

Required solvency margin for non-life reinsurance activities

1 The required solvency margin shall be determined on the basis either of the annual amount of premiums or contributions, or of the average burden of claims for the past three financial years.

However, in the case of reinsurance undertakings which essentially underwrite only one or more of the risks of credit, storm, hail or frost, the last seven financial years shall be taken as the reference period for the average burden of claims.

2 Subject to Article 40, the amount of the required solvency margin shall be equal to the higher of the two results as set out in paragraphs 3 and 4 of this Article.

3 The premium basis shall be calculated using the higher of gross written premiums or contributions as calculated below, and gross earned premiums or contributions.

Premiums or contributions in respect of the classes 11, 12 and 13 listed in point A of the Annex to Directive 73/239/EEC shall be increased by 50 %.

Premiums or contributions in respect of classes other than classes 11, 12 and 13 listed in point A of the Annex to Directive 73/239/EEC may be increased by up to 50 %, for specific reinsurance activities or contract types, in order to take account of the specificities of these activities or contracts, in accordance with the procedure referred to in Article 55(2) of this Directive. The premiums or contributions, inclusive of charges ancillary to premiums or contributions, due in respect of reinsurance business in the last financial year shall be aggregated.

From that sum there shall then be deducted the total amount of premiums or contributions cancelled in the last financial year, as well as the total amount of taxes and levies pertaining to the premiums or contributions entering into the aggregate.

The amount so obtained shall be divided into two portions, the first portion extending up to EUR 50 000 000, the second comprising the excess; 18 % and 16 % of these portions respectively shall be calculated and added together.

The sum so obtained shall be multiplied by the ratio existing in respect of the sum of the last three financial years between the amount of claims remaining to be borne by the reinsurance undertaking after deduction of amounts recoverable under retrocession and the gross amount of claims; that ratio may in no case be less than 50 %. Upon application, with supporting evidence, by the reinsurance undertaking to the competent authority of the home Member State and with the agreement of that authority, amounts recoverable from special purpose vehicles as referred to in Article 46 may also be deducted as retrocession.

With the approval of the competent authorities, statistical methods may be used to allocate the premiums or contributions.

4 The claims basis shall be calculated, as follows, using in respect of the classes 11, 12 and 13 listed in point A of the Annex to Directive 73/239/EEC, claims, provisions and recoveries increased by 50 %.

Claims, provisions and recoveries in respect of classes other than classes 11, 12 and 13 listed in point A of the Annex to Directive 73/239/EEC, may be increased by up to 50 %, for specific reinsurance activities or contract types, in order to take account of the specificities of those activities or contracts, in accordance with the procedure referred to in Article 55(2) of this Directive.

The amounts of claims paid, without any deduction of claims borne by retrocessionaires, in the periods specified in paragraph 1 shall be aggregated.

To that sum there shall be added the amount of provisions for claims outstanding established at the end of the last financial year.

From that sum there shall be deducted the amount of recoveries effected during the periods specified in paragraph 1.

From the sum then remaining, there shall be deducted the amount of provisions for claims outstanding established at the commencement of the second financial year preceding the last financial year for which there are accounts. If the reference period established in paragraph 1 equals seven years, the amount of provisions for claims outstanding established at the commencement of the sixth financial year preceding the last financial year for which there are accounts shall be deducted.

One third, or one seventh, of the amount so obtained, according to the reference period established in paragraph 1, shall be divided into two portions, the first extending up to EUR 35 000 000 and the second comprising the excess; 26 % and 23 % of these portions respectively shall be calculated and added together.

The sum so obtained shall be multiplied by the ratio existing in respect of the sum of the last three financial years between the amount of claims remaining to be borne by the undertaking after deduction of amounts recoverable under retrocession and the gross amount of claims; that ratio may in no case be less than 50 %. Upon application, with supporting evidence, by the reinsurance undertaking to the competent authority of the home Member State and with the agreement of that authority, amounts recoverable from special purpose vehicles as referred to in Article 46 may also be deducted as retrocession.

With the approval of the competent authorities, statistical methods may be used to allocate claims, provisions and recoveries.

5 If the required solvency margin as calculated in paragraphs 2, 3 and 4 is lower than the required solvency margin of the year before, the required solvency margin shall be at least equal to the required solvency margin of the year before multiplied by the ratio between the amount of the technical provisions for claims outstanding at the end of the last financial year and the amount of the technical provisions for claims outstanding at the beginning of the last financial year. In these calculations technical provisions shall be calculated net of retrocession but the ratio may in no case be higher than 1.

6 The fractions applicable to the portions referred to in the fifth subparagraph of paragraph 3 and the seventh subparagraph of paragraph 4 shall each be reduced to a third in the case of reinsurance of health insurance practised on a similar technical basis to that of life assurance, if:

- a the premiums paid are calculated on the basis of sickness tables according to the mathematical method applied in insurance;
- b a provision is set up for increasing age;
- c an additional premium is collected in order to set up a safety margin of an appropriate amount;
- d the insurance undertaking may cancel the contract before the end of the third year of insurance at the latest;
- e the contract provides for the possibility of increasing premiums or reducing payments even for current contracts.

Article 38

Required solvency margin for life reassurance activities

1 The required solvency margin for life reassurance activities shall be determined in accordance with Article 37.

2 Notwithstanding paragraph 1 of this Article, the home Member State may provide that for reinsurance classes of assurance business covered by Article 2(1)(a) of Directive 2002/83/EC linked to investment funds or participating contracts and for the operations referred to in Article 2(1)(b), 2(2)(b), (c), (d) and (e) of Directive 2002/83/EC, the required solvency margin is to be determined in accordance with Article 28 of Directive 2002/83/EC.

Article 39

Required solvency margin for a reinsurance undertaking simultaneously conducting non-life and life reinsurance

1 The home Member State shall require every reinsurance undertaking conducting both non-life and life reinsurance business to have an available solvency margin to cover the total sum of required solvency margins in respect of both non-life and life reinsurance activities which shall be determined in accordance with Articles 37 and 38 respectively.

2 If the available solvency margin does not reach the level required in paragraph 1 of this Article, the competent authorities shall apply the measures provided for in Articles 42 and 43.

Section 3

Guarantee fund

Article 40

Amount of the guarantee fund

1 One third of the required solvency margin as specified in Articles 37, 38 and 39 shall constitute the guarantee fund. This fund shall consist of the items listed in Article 36(1), (2)

and (3) and, with the agreement of the competent authority of the home Member State, in Article 36(4)(c).

2 The guarantee fund shall not be less than a minimum of EUR 3 000 000.

Any Member State may provide that as regards captive reinsurance undertakings, the minimum guarantee fund shall not be not less than EUR 1 000 000.

Article 41

Review of the amount of the guarantee fund

1 The amounts in euro as laid down in Article 40(2) shall be reviewed annually as from 10 December 2007 in order to take account of changes in the European index of consumer prices comprising all Member States as published by Eurostat.

The amounts shall be adapted automatically by increasing the base amount in euro by the percentage change in that index over the period between the entry into force of this Directive and the review date and rounded up to a multiple of EUR 100 000.

If the percentage change since the last adaptation is less than 5 %, no adaptation shall take place.

2 The Commission shall inform the European Parliament and the Council annually of the review and the adapted amounts referred to in paragraph 1.

CHAPTER 4

Reinsurance undertakings in difficulty or in an irregular situation and withdrawal of authorisation

Article 42

Reinsurance undertakings in difficulty

1 If a reinsurance undertaking does not comply with Article 32, the competent authority of its home Member State may prohibit the free disposal of its assets after having communicated its intention to the competent authorities of the host Member States.

2 For the purposes of restoring the financial situation of a reinsurance undertaking the solvency margin of which has fallen below the minimum required under Articles 37, 38 and 39, the competent authority of the home Member State shall require that a plan for the restoration of a sound financial situation be submitted for its approval.

In exceptional circumstances, if the competent authority is of the opinion that the financial situation of the reinsurance undertaking will deteriorate further, it may also restrict or prohibit the free disposal of the reinsurance undertaking's assets. It shall inform the authorities of other Member States within the territories of which the reinsurance undertaking carries on business of any measures it has taken and the latter shall, at the request of the former, take the same measures.

3 If the solvency margin falls below the guarantee fund as defined in Article 40, the competent authority of the home Member State shall require the reinsurance undertaking to submit a short-term finance scheme for its approval.

It may also restrict or prohibit the free disposal of the reinsurance undertaking's assets. It shall inform the authorities of all other Member States and the latter shall, at the request of the former, take the same measures.

4 Each Member State shall take the measures necessary to be able, in accordance with its national law, to prohibit the free disposal of assets located within its territory at the request, in the cases provided for in paragraphs 1, 2 and 3, of the reinsurance undertaking's home Member State, which shall designate the assets to be covered by such measures.

Article 43

Financial recovery plan

1 Member States shall ensure that the competent authorities have the power to require a financial recovery plan for those reinsurance undertakings where competent authorities consider that their obligations arising out of reinsurance contracts are threatened.

2 The financial recovery plan shall, as a minimum, include particulars or proof for the next three financial years concerning:

- a estimates of management expenses, in particular current general expenses and commissions;
- b a plan setting out detailed estimates of income and expenditure in respect of reinsurance acceptances and reinsurance cessions;
- c a forecast balance sheet;
- d estimates of the financial resources intended to cover underwriting liabilities and the required solvency margin;
- e the overall retrocession policy.

3 Where the financial position of the reinsurance undertaking is deteriorating and the contractual obligations of the reinsurance undertaking are threatened, Member States shall ensure that the competent authorities have the power to oblige reinsurance undertakings to have a higher required solvency margin, in order to ensure that the reinsurance undertaking is able to fulfil the solvency requirements in the near future. The level of this higher required solvency margin shall be based on a financial recovery plan referred to in paragraph 1.

4 Member States shall ensure that the competent authorities have the power to revalue downwards all elements eligible for the available solvency margin, in particular, where there has been a significant change in the market value of those elements since the end of the last financial year.

5 Member States shall ensure that the competent authorities have the power to decrease the reduction, based on retrocession, to the solvency margin as determined in accordance with Articles 37, 38 and 39 where:

- a the nature or quality of retrocession contracts has changed significantly since the last financial year;
- b there is no or a limited risk transfer under the retrocession contracts.

6 If the competent authorities have required a financial recovery plan for the reinsurance undertaking in accordance with paragraph 1 of this Article, they shall refrain from issuing a

certificate in accordance with Article 18, as long as they consider that its obligations arising out of reinsurance contracts are threatened within the meaning of the said paragraph 1.

Article 44

Withdrawal of authorisation

1 Authorisation granted to a reinsurance undertaking by the competent authority of its home Member State may be withdrawn by that authority if that undertaking:

a does not make use of that authorisation within 12 months, expressly renounces it or ceases to carry on business for more than 6 months, unless the Member State concerned has made provision for authorisation to lapse in such cases;
b no longer fulfils the conditions for admission;
c has been unable, within the time allowed, to take the measures specified in the restoration plan or finance scheme referred to in Article 42;
d fails seriously in its obligations under the regulations to which it is subject.

In the event of the withdrawal or lapse of authorisation, the competent authority of the home Member State shall notify the competent authorities of the other Member States accordingly, and they shall take appropriate measures to prevent the reinsurance undertaking from commencing new operations within their territories, under either the right of establishment or the freedom to provide services.

2 Any decision to withdraw an authorisation shall be supported by precise reasons and communicated to the reinsurance undertaking in question.

(**1**) Eighth Council Directive 84/253/EEC of 10 April 1984 based on Article 54(3)(g) of the Treaty on the approval of persons responsible for carrying out the statutory audits of accounting documents (OJ L 126, 12.5.1984, p. 20).

(**2**) Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies (OJ L 222, 14.8.1978, p. 11). Directive as last amended by Directive 2003/51/EC.

(**3**) Council Directive 85/611/EEC of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (OJ L 375, 31.12.1985, p. 3). Directive as last amended by Directive 2005/1/EC.

(**4**) Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field (OJ L 141, 11.6.1993, p. 27). Directive as last amended by Directive 2002/87/EC of the European Parliament and of the Council (OJ L 35, 11.2.2003, p. 1).

(**5**) Council Directive 93/6/EEC of 15 March 1993 on the capital adequacy of investments firms and credit institutions (OJ L 141, 11.6.1993, p. 1). Directive as last amended by Directive 2005/1/EC.