

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 III

Supervisory authorities and general rules

Article 27

Main objective of supervision

Member States shall ensure that the supervisory authorities are provided with the necessary means, and have the relevant expertise, capacity, and mandate to achieve the main objective of supervision, namely the protection of policy holders and beneficiaries.

Article 28

Financial stability and pro-cyclicality

Without prejudice to the main objective of supervision as set out in Article 27, Member States shall ensure that, in the exercise of their general duties, supervisory authorities shall duly consider the potential impact of their decisions on the stability of the financial systems concerned in the European Union, in particular in emergency situations, taking into account the information available at the relevant time.

In times of exceptional movements in the financial markets, supervisory authorities shall take into account the potential pro-cyclical effects of their actions.

Article 29

General principles of supervision

1 Supervision shall be based on a prospective and risk-based approach. It shall include the verification on a continuous basis of the proper operation of the insurance or reinsurance business and of the compliance with supervisory provisions by insurance and reinsurance undertakings.

2 Supervision of insurance and reinsurance undertakings shall comprise an appropriate combination of off-site activities and on-site inspections.

3 Member States shall ensure that the requirements laid down in this Directive are applied in a manner which is proportionate to the nature, scale and complexity of the risks inherent in the business of an insurance or reinsurance undertaking.

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4 The Commission shall ensure that implementing measures take into account the principle of proportionality, thus ensuring the proportionate application of this Directive, in particular to small insurance undertakings.

Article 30

Supervisory authorities and scope of supervision

1 The financial supervision of insurance and reinsurance undertakings, including that of the business they pursue either through branches or under the freedom to provide services, shall be the sole responsibility of the home Member State.

2 Financial supervision pursuant to paragraph 1 shall include verification, with respect to the entire business of the insurance and reinsurance undertaking, of its state of solvency, of the establishment of technical provisions, of its assets and of the eligible own funds, in accordance with the rules laid down or practices followed in the home Member State under provisions adopted at Community level.

Where the insurance undertaking concerned is authorised to cover the risks classified in class 18 in Part A of Annex I, supervision shall extend to monitoring of the technical resources which the insurance undertaking has at its disposal for the purpose of carrying out the assistance operations it has undertaken to perform, where the law of the home Member State provides for the monitoring of such resources.

3 If the supervisory authorities of the Member State in which the risk is situated or the Member State of the commitment or, in case of a reinsurance undertaking, the supervisory authorities of the host Member State, have reason to consider that the activities of an insurance or reinsurance undertaking might affect its financial soundness, they shall inform the supervisory authorities of the home Member State of that undertaking.

The supervisory authorities of the home Member State shall determine whether the undertaking is complying with the prudential principles laid down in this Directive.

Article 31

Transparency and accountability

1 The supervisory authorities shall conduct their tasks in a transparent and accountable manner with due respect for the protection of confidential information.

2 Member States shall ensure that the following information is disclosed:

- a the texts of laws, regulations, administrative rules and general guidance in the field of insurance regulation;
- b the general criteria and methods, including the tools developed in accordance with Article 34(4), used in the supervisory review process as set out in Article 36;
- c aggregate statistical data on key aspects of the application of the prudential framework;
- d the manner of exercise of the options provided for in this Directive;
- e the objectives of the supervision and its main functions and activities.

The disclosure provided for in the first subparagraph shall be sufficient to enable a comparison of the supervisory approaches adopted by the supervisory authorities of the different Member States.

The disclosure shall be made in a common format and be updated regularly. The information referred to in points (a) to (e) of the first subparagraph shall be accessible at a single electronic location in each Member State.

3 Member States shall provide for transparent procedures regarding the appointment and dismissal of the members of the governing and managing bodies of their supervisory authorities.

4 The Commission shall adopt implementing measures relating to paragraph 2 specifying the key aspects on which aggregate statistical data are to be disclosed, and the format, structure, contents list and publication date of the disclosures.

Those measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 301(3).

Article 32

Prohibition of refusal of reinsurance contracts or retrocession contracts

1 The home Member State of an insurance undertaking shall not refuse a reinsurance contract concluded with a reinsurance undertaking or an insurance undertaking authorised in accordance with Article 14 on grounds directly related to the financial soundness of that reinsurance undertaking or that insurance undertaking.

2 The home Member State of the reinsurance undertaking shall not refuse a retrocession contract concluded by a reinsurance undertaking with a reinsurance undertaking or an insurance undertaking authorised in accordance with Article 14 on grounds directly related to the financial soundness of that reinsurance undertaking or that insurance undertaking.

Article 33

Supervision of branches established in another Member State

Member States shall provide that, where an insurance or reinsurance undertaking authorised in another Member State carries on business through a branch, the supervisory authorities of the home Member State may, after having informed the supervisory authorities of the host Member State concerned, carry out themselves, or through the intermediary of persons appointed for that purpose, on-site verifications of the information necessary to ensure the financial supervision of the undertaking.

The authorities of the host Member State concerned may participate in those verifications.

Article 34

General supervisory powers

1 Member States shall ensure that the supervisory authorities have the power to take preventive and corrective measures to ensure that insurance and reinsurance undertakings comply with the laws, regulations and administrative provisions with which they have to comply in each Member State.

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2 The supervisory authorities shall have the power to take any necessary measures, including where appropriate, those of an administrative or financial nature, with regard to insurance or reinsurance undertakings, and the members of their administrative, management or supervisory body.

3 Member States shall ensure that supervisory authorities have the power to require all information necessary to conduct supervision in accordance with Article 35.

4 Member States shall ensure that supervisory authorities have the power to develop, in addition to the calculation of the Solvency Capital Requirement and where appropriate, necessary quantitative tools under the supervisory review process to assess the ability of the insurance or reinsurance undertakings to cope with possible events or future changes in economic conditions that could have unfavourable effects on their overall financial standing. The supervisory authorities shall have the power to require that corresponding tests are performed by the undertakings.

5 The supervisory authorities shall have the power to carry out on-site investigations at the premises of the insurance and reinsurance undertakings.

6 Supervisory powers shall be applied in a timely and proportionate manner.

7 The powers with regard to insurance and reinsurance undertakings referred to in paragraphs 1 to 5 shall also be available with regard to outsourced activities of insurance and reinsurance undertakings.

8 The powers referred to in paragraphs 1 to 5 and 7 shall be exercised, if need be by enforcement and, where appropriate, through judicial channels.

Article 35

Information to be provided for supervisory purposes

1 Member States shall require insurance and reinsurance undertakings to submit to the supervisory authorities the information which is necessary for the purposes of supervision. That information shall include at least the information necessary for the following when performing the process referred to in Article 36:

- a to assess the system of governance applied by the undertakings, the business they are pursuing, the valuation principles applied for solvency purposes, the risks faced and the risk-management systems, and their capital structure, needs and management;
- b to make any appropriate decisions resulting from the exercise of their supervisory rights and duties.

2 Member States shall ensure that the supervisory authorities have the following powers:

- a to determine the nature, the scope and the format of the information referred to in paragraph 1 which they require insurance and reinsurance undertakings to submit at the following points in time:
 - (i) at predefined periods;
 - (ii) upon occurrence of predefined events;
 - (iii) during enquiries regarding the situation of an insurance or reinsurance undertaking;
- b to obtain any information regarding contracts which are held by intermediaries or regarding contracts which are entered into with third parties; and

- c to require information from external experts, such as auditors and actuaries.
- 3 The information referred to in paragraphs 1 and 2 shall comprise the following:
- a qualitative or quantitative elements, or any appropriate combination thereof;
 - b historic, current or prospective elements, or any appropriate combination thereof; and
 - c data from internal or external sources, or any appropriate combination thereof.
- 4 The information referred to in paragraphs 1 and 2 shall comply with the following principles:
- a it must reflect the nature, scale and complexity of the business of the undertaking concerned, and in particular the risks inherent in that business;
 - b it must be accessible, complete in all material respects, comparable and consistent over time; and
 - c it must be relevant, reliable and comprehensible.
- 5 Member States shall require insurance and reinsurance undertakings to have appropriate systems and structures in place to fulfil the requirements laid down in paragraphs 1 to 4 as well as a written policy, approved by the administrative, management or supervisory body of the insurance or reinsurance undertaking, ensuring the ongoing appropriateness of the information submitted.
- 6 The Commission shall adopt implementing measures specifying the information referred to in paragraphs 1 to 4, with a view to ensuring to the appropriate extent convergence of supervisory reporting.

Those measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 301(3).

Article 36

Supervisory review process

1 Member States shall ensure that the supervisory authorities review and evaluate the strategies, processes and reporting procedures which are established by the insurance and reinsurance undertakings to comply with the laws, regulations and administrative provisions adopted pursuant to this Directive.

That review and evaluation shall comprise the assessment of the qualitative requirements relating to the system of governance, the assessment of the risks which the undertakings concerned face or may face and the assessment of the ability of those undertakings to assess those risks taking into account the environment in which the undertakings are operating.

2 The supervisory authorities shall in particular review and evaluate compliance with the following:

- a the system of governance, including the own-risk and solvency assessment, as set out in Chapter IV, Section 2;
- b the technical provisions as set out in Chapter VI, Section 2;
- c the capital requirements as set out in Chapter VI, Sections 4 and 5;
- d the investment rules as set out in Chapter VI, Section 6;
- e the quality and quantity of own funds as set out in Chapter VI, Section 3;

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- f where the insurance or reinsurance undertaking uses a full or partial internal model, ongoing compliance with the requirements for full and partial internal models set out in Chapter VI, Section 4, Subsection 3.

3 The supervisory authorities shall have in place appropriate monitoring tools that enable them to identify deteriorating financial conditions in an insurance or reinsurance undertaking and to monitor how that deterioration is remedied.

4 The supervisory authorities shall assess the adequacy of the methods and practices of the insurance and reinsurance undertakings designed to identify possible events or future changes in economic conditions that could have adverse effects on the overall financial standing of the undertaking concerned.

The supervisory authorities shall assess the ability of the undertakings to withstand those possible events or future changes in economic conditions.

5 The supervisory authorities shall have the necessary powers to require insurance and reinsurance undertakings to remedy weaknesses or deficiencies identified in the supervisory review process.

6 The reviews, evaluations and assessments referred to in paragraphs 1, 2 and 4 shall be conducted regularly.

The supervisory authorities shall establish the minimum frequency and the scope of those reviews, evaluations and assessments having regard to the nature, scale and complexity of the activities of the insurance or reinsurance undertaking concerned.

Article 37

Capital add-on

1 Following the supervisory review process supervisory authorities may in exceptional circumstances set a capital add-on for an insurance or reinsurance undertaking by a decision stating the reasons. That possibility shall exist only in the following cases:

- a the supervisory authority concludes that the risk profile of the insurance or reinsurance undertaking deviates significantly from the assumptions underlying the Solvency Capital Requirement, as calculated using the standard formula in accordance with Chapter VI, Section 4, Subsection 2 and:
 - (i) the requirement to use an internal model under Article 119 is inappropriate or has been ineffective; or
 - (ii) while a partial or full internal model is being developed in accordance with Article 119;
- b the supervisory authority concludes that the risk profile of the insurance or reinsurance undertaking deviates significantly from the assumptions underlying the Solvency Capital Requirement, as calculated using an internal model or partial internal model in accordance with Chapter VI, Section 4, Subsection 3, because certain quantifiable risks are captured insufficiently and the adaptation of the model to better reflect the given risk profile has failed within an appropriate timeframe; or
- c the supervisory authority concludes that the system of governance of an insurance or reinsurance undertaking deviates significantly from the standards laid down in Chapter IV, Section 2, that those deviations prevent it from being able to properly identify, measure, monitor, manage and report the risks that it is or could be exposed to and

that the application of other measures is in itself unlikely to improve the deficiencies sufficiently within an appropriate timeframe.

2 In the circumstances set out in points (a) and (b) of paragraph 1 the capital add-on shall be calculated in such a way as to ensure that the undertaking complies with Article 101(3).

In the circumstances set out in paragraph 1(c) the capital add-on shall be proportionate to the material risks arising from the deficiencies which gave rise to the decision of the supervisory authority to set the add-on.

3 In the cases set out in points (b) and (c) of paragraph 1 the supervisory authority shall ensure that the insurance or reinsurance undertaking makes every effort to remedy the deficiencies that led to the imposition of the capital add-on.

4 The capital add-on referred to in paragraph 1 shall be reviewed at least once a year by the supervisory authority and be removed when the undertaking has remedied the deficiencies which led to its imposition.

5 The Solvency Capital Requirement including the capital add-on imposed shall replace the inadequate Solvency Capital Requirement.

Notwithstanding the first subparagraph the Solvency Capital Requirement shall not include the capital add-on imposed in accordance with paragraph 1(c) for the purposes of the calculation of the risk margin referred to in Article 77(5).

6 The Commission shall adopt implementing measures laying down further specifications for the circumstances under which a capital add-on may be imposed and the methodologies for the calculation thereof.

Those measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 301(3).

Article 38

Supervision of outsourced functions and activities

1 Without prejudice to Article 49, Member States shall ensure that insurance and reinsurance undertakings which outsource a function or an insurance or reinsurance activity take the necessary steps to ensure that the following conditions are satisfied:

- a the service provider must cooperate with the supervisory authorities of the insurance and reinsurance undertaking in connection with the outsourced function or activity;
- b the insurance and reinsurance undertakings, their auditors and the supervisory authorities must have effective access to data related to the outsourced functions or activities;
- c the supervisory authorities must have effective access to the business premises of the service provider and must be able to exercise those rights of access.

2 The Member State where the service provider is located shall permit the supervisory authorities of the insurance or reinsurance undertaking to carry out themselves, or through the intermediary of persons they appoint for that purpose, on-site inspections at the premises of the service provider. The supervisory authority of the insurance or reinsurance undertaking shall inform the appropriate authority of the Member State of the service provider prior to conducting the on-site inspection. In the case of a non-supervised entity the appropriate authority shall be the supervisory authority.

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The supervisory authorities of the Member State of the insurance or reinsurance undertaking may delegate such on-site inspections to the supervisory authorities of the Member State where the service provider is located.

Article 39

Transfer of portfolio

1 Under the conditions laid down by national law, Member States shall authorise insurance and reinsurance undertakings with head offices within their territory to transfer all or part of their portfolios of contracts, concluded either under the right of establishment or the freedom to provide services, to an accepting undertaking established within the Community.

Such transfer shall be authorised only if the supervisory authorities of the home Member State of the accepting undertaking 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 In the case of insurance undertakings paragraphs 3 to 6 shall apply.

3 Where a branch proposes to transfer all or part of its portfolio of contracts, the Member State where that branch is situated shall be consulted.

4 In the circumstances referred to in paragraphs 1 and 3, the supervisory authorities of the home Member State of the transferring insurance undertaking shall authorise the transfer after obtaining the agreement of the authorities of the Member States where the contracts were concluded, either under the right of establishment or the freedom to provide services.

5 The authorities of the Member States consulted shall give their opinion or consent to the authorities of the home Member State of the transferring insurance undertaking within three months of receiving a request for consultation.

The absence of any response within that period from the authorities consulted shall be considered as tacit consent.

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

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

The first and second subparagraphs of this paragraph shall not affect the right of the Member States to give policy holders the option of cancelling contracts within a fixed period after a transfer.