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 IV

Conditions governing business

Section 1

Responsibility of the administrative, management or supervisory body

Article 40

Responsibility of the administrative, management or supervisory body

Member States shall ensure that the administrative, management or supervisory body of the insurance or reinsurance undertaking has the ultimate responsibility for the compliance, by the undertaking concerned, with the laws, regulations and administrative provisions adopted pursuant to this Directive.

Section 2

System of governance

Article 41

General governance requirements

1 Member States shall require all insurance and reinsurance undertakings to have in place an effective system of governance which provides for sound and prudent management of the business.

That system shall at least include an adequate transparent organisational structure with a clear allocation and appropriate segregation of responsibilities and an effective system for ensuring the transmission of information. It shall include compliance with the requirements laid down in Articles 42 to 49.

The system of governance shall be subject to regular internal review.

2 The system of governance shall be proportionate to the nature, scale and complexity of the operations of the insurance or reinsurance undertaking.

3 Insurance and reinsurance undertakings shall have written policies in relation to at least risk management, internal control, internal audit and, where relevant, outsourcing. They shall ensure that those policies are implemented.

Those written policies shall be reviewed at least annually. They shall be subject to prior approval by the administrative, management or supervisory body and be adapted in view of any significant change in the system or area concerned.

4 Insurance and reinsurance undertakings shall take reasonable steps to ensure continuity and regularity in the performance of their activities, including the development of contingency plans. To that end, the undertaking shall employ appropriate and proportionate systems, resources and procedures.

5 The supervisory authorities shall have appropriate means, methods and powers for verifying the system of governance of the insurance and reinsurance undertakings and for evaluating emerging risks identified by those undertakings which may affect their financial soundness.

The Member States shall ensure that the supervisory authorities have the powers necessary to require that the system of governance be improved and strengthened to ensure compliance with the requirements set out in Articles 42 to 49.

Article 42

Fit and proper requirements for persons who effectively run the undertaking or have other key functions

1 Insurance and reinsurance undertakings shall ensure that all persons who effectively run the undertaking or have other key functions at all times fulfil the following requirements:

a their professional qualifications, knowledge and experience are adequate to enable sound and prudent management (fit); and

b they are of good repute and integrity (proper).

2 Insurance and reinsurance undertakings shall notify the supervisory authority of any changes to the identity of the persons who effectively run the undertaking or are responsible for other key functions, along with all information needed to assess whether any new persons appointed to manage the undertaking are fit and proper.

3 Insurance and reinsurance undertakings shall notify their supervisory authority if any of the persons referred to in paragraphs 1 and 2 have been replaced because they no longer fulfil the requirements referred to in paragraph 1.

Article 43

Proof of good repute

1 Where a Member State requires of its own nationals proof of good repute, proof of no previous bankruptcy, or both, that Member State shall accept as sufficient evidence in respect of nationals of other Member States the production of an extract from the judicial record or, failing this, of an equivalent document issued by a competent judicial or administrative authority in the home Member State or the Member State from which the foreign national comes showing that those requirements have been met.

2 Where the home Member State or the Member State from which the foreign national concerned comes does not issue the document referred to in paragraph 1, it may be replaced by a declaration on oath – or in Member States where there is no provision for declaration on oath by a solemn declaration – made by the foreign national concerned before a competent judicial or administrative authority or, where appropriate, a notary in the home Member State or the Member State from which that foreign national comes.

Such authority or notary shall issue a certificate attesting the authenticity of the declaration on oath or solemn declaration.

The declaration referred to in the first subparagraph in respect of no previous bankruptcy may also be made before a competent professional or trade body in the Member State concerned.

3 The documents and certificates referred to in paragraphs 1 and 2 shall not be presented more than three months after their date of issue.

4 Member States shall designate the authorities and bodies competent to issue the documents referred to in paragraphs 1 and 2 and shall forthwith inform the other Member States and the Commission thereof.

Each Member State shall also inform the other Member States and the Commission of the authorities or bodies to which the documents referred to in paragraphs 1 and 2 are to be submitted in support of an application to pursue in the territory of that Member State the activities referred to in Article 2.

Article 44

Risk management

1 Insurance and reinsurance undertakings shall have in place an effective risk-management system comprising strategies, processes and reporting procedures necessary to identify, measure, monitor, manage and report, on a continuous basis the risks, at an individual and at an aggregated level, to which they are or could be exposed, and their interdependencies.

That risk-management system shall be effective and well integrated into the organisational structure and in the decision-making processes of the insurance or reinsurance undertaking with proper consideration of the persons who effectively run the undertaking or have other key functions.

2 The risk-management system shall cover the risks to be included in the calculation of the Solvency Capital Requirement as set out in Article 101(4) as well as the risks which are not or not fully included in the calculation thereof.

The risk-management system shall cover at least the following areas:

a underwriting and reserving;
b asset–liability management;
c investment, in particular derivatives and similar commitments;
d liquidity and concentration risk management;
e operational risk management;
f reinsurance and other risk-mitigation techniques.

The written policy on risk management referred to in Article 41(3) shall comprise policies relating to points (a) to (f) of the second subparagraph of this paragraph.

3 As regards investment risk, insurance and reinsurance undertakings shall demonstrate that they comply with Chapter VI, Section 6.

4 Insurance and reinsurance undertakings shall provide for a risk-management function which shall be structured in such a way as to facilitate the implementation of the risk-management system.

5 For insurance and reinsurance undertakings using a partial or full internal model approved in accordance with Articles 112 and 113 the risk-management function shall cover the following additional tasks:

a to design and implement the internal model;

b to test and validate the internal model;

c to document the internal model and any subsequent changes made to it;

d to analyse the performance of the internal model and to produce summary reports thereof;

e to inform the administrative, management or supervisory body about the performance of the internal model, suggesting areas needing improvement, and up-dating that body on the status of efforts to improve previously identified weaknesses.

Article 45

Own risk and solvency assessment

1 As part of its risk-management system every insurance undertaking and reinsurance undertaking shall conduct its own risk and solvency assessment.

That assessment shall include at least the following:

a the overall solvency needs taking into account the specific risk profile, approved risk tolerance limits and the business strategy of the undertaking;

b the compliance, on a continuous basis, with the capital requirements, as laid down in Chapter VI, Sections 4 and 5 and with the requirements regarding technical provisions, as laid down in Chapter VI, Section 2;

c the significance with which the risk profile of the undertaking concerned deviates from the assumptions underlying the Solvency Capital Requirement as laid down in Article 101(3), calculated with the standard formula in accordance with Chapter VI, Section 4, Subsection 2 or with its partial or full internal model in accordance with Chapter VI, Section 4, Subsection 3.

2 For the purposes of paragraph 1(a), the undertaking concerned shall have in place processes which are proportionate to the nature, scale and complexity of the risks inherent in its business and which enable it to properly identify and assess the risks it faces in the short and long term and to which it is or could be exposed. The undertaking shall demonstrate the methods used in that assessment.

3 In the case referred to in paragraph 1(c), when an internal model is used, the assessment shall be performed together with the recalibration that transforms the internal risk numbers into the Solvency Capital Requirement risk measure and calibration.

4 The own-risk and solvency assessment shall be an integral part of the business strategy and shall be taken into account on an ongoing basis in the strategic decisions of the undertaking.

5 Insurance and reinsurance undertakings shall perform the assessment referred to in paragraph 1 regularly and without any delay following any significant change in their risk profile.

6 The insurance and reinsurance undertakings shall inform the supervisory authorities of the results of each own-risk and solvency assessment as part of the information reported under Article 35.

7 The own-risk and solvency assessment shall not serve to calculate a capital requirement. The Solvency Capital Requirement shall be adjusted only in accordance with Articles 37, 231 to 233 and 238.

Article 46

Internal control

1 Insurance and reinsurance undertakings shall have in place an effective internal control system.

That system shall at least include administrative and accounting procedures, an internal control framework, appropriate reporting arrangements at all levels of the undertaking and a compliance function.

2 The compliance function shall include advising the administrative, management or supervisory body on compliance with the laws, regulations and administrative provisions adopted pursuant to this Directive. It shall also include an assessment of the possible impact of any changes in the legal environment on the operations of the undertaking concerned and the identification and assessment of compliance risk.

Article 47

Internal audit

1 Insurance and reinsurance undertakings shall provide for an effective internal audit function.

The internal audit function shall include an evaluation of the adequacy and effectiveness of the internal control system and other elements of the system of governance.

2 The internal audit function shall be objective and independent from the operational functions.

3 Any findings and recommendations of the internal audit shall be reported to the administrative, management or supervisory body which shall determine what actions are to be taken with respect to each of the internal audit findings and recommendations and shall ensure that those actions are carried out.

Article 48

Actuarial function

1 Insurance and reinsurance undertakings shall provide for an effective actuarial function to:

a coordinate the calculation of technical provisions;

b ensure the appropriateness of the methodologies and underlying models used as well as the assumptions made in the calculation of technical provisions;

c assess the sufficiency and quality of the data used in the calculation of technical provisions;

d compare best estimates against experience;

e inform the administrative, management or supervisory body of the reliability and adequacy of the calculation of technical provisions;

f oversee the calculation of technical provisions in the cases set out in Article 82;

g express an opinion on the overall underwriting policy;

h express an opinion on the adequacy of reinsurance arrangements; and

i contribute to the effective implementation of the risk-management system referred to in Article 44, in particular with respect to the risk modelling underlying the calculation of the capital requirements set out in Chapter VI, Sections 4 and 5, and to the assessment referred to in Article 45.

2 The actuarial function shall be carried out by persons who have knowledge of actuarial and financial mathematics, commensurate with the nature, scale and complexity of the risks inherent in the business of the insurance or reinsurance undertaking, and who are able to demonstrate their relevant experience with applicable professional and other standards.

Article 49

Outsourcing

1 Member States shall ensure that insurance and reinsurance undertakings remain fully responsible for discharging all of their obligations under this Directive when they outsource functions or any insurance or reinsurance activities.

2 Outsourcing of critical or important operational functions or activities shall not be undertaken in such a way as to lead to any of the following:

a materially impairing the quality of the system of governance of the undertaking concerned;

b unduly increasing the operational risk;

c impairing the ability of the supervisory authorities to monitor the compliance of the undertaking with its obligations;

d undermining continuous and satisfactory service to policy holders.

3 Insurance and reinsurance undertakings shall, in a timely manner, notify the supervisory authorities prior to the outsourcing of critical or important functions or activities as well as of any subsequent material developments with respect to those functions or activities.

Article 50

Implementing measures

1 The Commission shall adopt implementing measures to further specify the following:

a the elements of the systems referred to in Articles 41, 44, 46 and 47, and in particular the areas to be covered by the asset–liability management and investment policy, as referred to in Article 44(2), of insurance and reinsurance undertakings;

b the functions referred to in Articles 44 and 46 to 48;

c the requirements set out in Article 42 and the functions subject thereto;

d the conditions under which outsourcing, in particular to service providers located in third countries, may be performed.

2 Where necessary to ensure appropriate convergence of the assessment referred to in Article 45(1)(a), the Commission may adopt implementing measures to further specify the elements of that assessment.

3 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).

Section 3

Public disclosure

Article 51

Report on solvency and financial condition: contents

1 Member States shall, taking into account the information required in paragraph 3 and the principles set out in paragraph 4 of Article 35, require insurance and reinsurance undertakings to disclose publicly, on an annual basis, a report on their solvency and financial condition.

That report shall contain the following information, either in full or by way of references to equivalent information, both in nature and scope, disclosed publicly under other legal or regulatory requirements:

a a description of the business and the performance of the undertaking;

b a description of the system of governance and an assessment of its adequacy for the risk profile of the undertaking;

c a description, separately for each category of risk, of the risk exposure, concentration, mitigation and sensitivity;

d a description, separately for assets, technical provisions, and other liabilities, of the bases and methods used for their valuation, together with an explanation of any major differences in the bases and methods used for their valuation in financial statements;

e a description of the capital management, including at least the following:

(i) the structure and amount of own funds, and their quality;

(ii) the amounts of the Solvency Capital Requirement and of the Minimum Capital Requirement;

(iii) the option set out in Article 304 used for the calculation of the Solvency Capital Requirement;

(iv) information allowing a proper understanding of the main differences between the underlying assumptions of the standard formula and those of any internal model used by the undertaking for the calculation of its Solvency Capital Requirement;

(v) the amount of any non-compliance with the Minimum Capital Requirement or any significant non-compliance with the Solvency Capital Requirement during the reporting period, even if subsequently resolved, with an

explanation of its origin and consequences as well as any remedial measures taken.

2 The description referred to in point (e)(i) of paragraph 1 shall include an analysis of any significant changes as compared to the previous reporting period and an explanation of any major differences in relation to the value of such elements in financial statements, and a brief description of the capital transferability.

The disclosure of the Solvency Capital Requirement referred to in point (e)(ii) of paragraph 1 shall show separately the amount calculated in accordance with Chapter VI, Section 4, Subsections 2 and 3 and any capital add-on imposed in accordance with Article 37 or the impact of the specific parameters the insurance or reinsurance undertaking is required to use in accordance with Article 110, together with concise information on its justification by the supervisory authority concerned.

However, and without prejudice to any disclosure that is mandatory under any other legal or regulatory requirements, Member States may provide that, although the total Solvency Capital Requirement referred to in point (e)(ii) of paragraph 1 is disclosed, the capital add-on or the impact of the specific parameters the insurance or reinsurance undertaking is required to use in accordance with Article 110 need not be separately disclosed during a transitional period ending no later than 31 October 2017.

The disclosure of the Solvency Capital Requirement shall be accompanied, where applicable, by an indication that its final amount is still subject to supervisory assessment.

Article 52

Information for and reports by CEIOPS

1 Member States shall require the supervisory authorities to provide the following information to CEIOPS on an annual basis:

a the average capital add-on per undertaking and the distribution of capital add-ons imposed by the supervisory authority during the previous year, measured as a percentage of the Solvency Capital Requirement, shown separately as follows:

(i) for all insurance and reinsurance undertakings;

(ii) for life insurance undertakings;

(iii) for non-life insurance undertakings;

(iv) for insurance undertakings pursuing both life and non-life activities;

(v) for reinsurance undertakings;

b for each of the disclosures set out in point (a), the proportion of capital add-ons imposed under points (a), (b) and (c) of Article 37(1) respectively.

2 CEIOPS shall publicly disclose, on an annual basis, the following information:

a for all Member States together, the total distribution of capital add-ons, measured as a percentage of the Solvency Capital Requirement, for each of the following:

(i) all insurance and reinsurance undertakings;

(ii) life insurance undertakings;

(iii) non-life insurance undertakings;

(iv) insurance undertakings pursuing both life and non-life activities;

(v) reinsurance undertakings;

b for each Member State separately, the distribution of capital add-ons, measured as a percentage of the Solvency Capital Requirement, covering all insurance and reinsurance undertakings in that Member State;

c for each of the disclosures referred to in points (a) and (b), the proportion of capital add-ons imposed under points (a), (b) and (c) of Article 37(1) respectively.

3 CEIOPS shall provide the information referred to in paragraph 2 to the European Parliament, the Council and the Commission, together with a report outlining the degree of supervisory convergence in the use of capital add-ons between supervisory authorities in the different Member States.

Article 53

Report on solvency and financial condition: applicable principles

1 Supervisory authorities shall permit insurance and reinsurance undertakings not to disclose information where:

a by disclosing such information, the competitors of the undertaking would gain significant undue advantage;

b there are obligations to policy holders or other counterparty relationships binding an undertaking to secrecy or confidentiality.

2 Where non-disclosure of information is permitted by the supervisory authority, undertakings shall make a statement to this effect in their report on solvency and financial condition and shall state the reasons.

3 Supervisory authorities shall permit insurance and reinsurance undertakings, to make use of – or refer to – public disclosures made under other legal or regulatory requirements, to the extent that those disclosures are equivalent to the information required under Article 51 in both their nature and scope.

4 Paragraphs 1 and 2 shall not apply to the information referred to in Article 51(1)(e).

Article 54

Report on solvency and financial condition: updates and additional voluntary information

1 In the event of any major development affecting significantly the relevance of the information disclosed in accordance with Articles 51 and 53, insurance and reinsurance undertakings shall disclose appropriate information on the nature and effects of that major development.

For the purposes of the first subparagraph, at least the following shall be regarded as major developments:

a non-compliance with the Minimum Capital Requirement is observed and the supervisory authorities either consider that the undertaking will not be able to submit a

realistic short-term finance scheme or do not obtain such a scheme within one month of the date when non-compliance was observed;

b significant non-compliance with the Solvency Capital Requirement is observed and the supervisory authorities do not obtain a realistic recovery plan within two months of the date when non-compliance was observed.

In regard to point (a) of the second subparagraph, the supervisory authorities shall require the undertaking concerned to disclose immediately the amount of non-compliance, together with an explanation of its origin and consequences, including any remedial measure taken. Where, in spite of a short-term finance scheme initially considered to be realistic, non-compliance with the Minimum Capital Requirement has not been resolved three months after its observation, it shall be disclosed at the end of that period, together with an explanation of its origin and consequences, including any remedial measures taken as well as any further remedial measures planned.

In regard to point (b) of the second subparagraph, the supervisory authorities shall require the undertaking concerned to disclose immediately the amount of non-compliance, together with an explanation of its origin and consequences, including any remedial measure taken. Where, in spite of the recovery plan initially considered to be realistic, a significant non-compliance with the Solvency Capital Requirement has not been resolved six months after its observation, it shall be disclosed at the end of that period, together with an explanation of its origin and consequences, including any remedial measures taken as well as any further remedial measures planned.

2 Insurance and reinsurance undertakings may disclose, on a voluntary basis, any information or explanation related to their solvency and financial condition which is not already required to be disclosed in accordance with Articles 51 and 53 and paragraph 1 of this Article.

Article 55

Report on solvency and financial condition: policy and approval

1 Member States shall require insurance and reinsurance undertakings to have appropriate systems and structures in place to fulfil the requirements laid down in Articles 51 and 53 and Article 54(1), as well as to have a written policy ensuring the ongoing appropriateness of any information disclosed in accordance with Articles 51, 53 and 54.

2 The solvency and financial condition report shall be subject to approval by the administrative, management or supervisory body of the insurance or reinsurance undertaking and be published only after that approval.

Article 56

Solvency and financial condition report: implementing measures

The Commission shall adopt implementing measures further specifying the information which must be disclosed and the means by which this is to be achieved.

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).

Section 4

Qualifying holdings

Article 57

Acquisitions

1 Member States shall require any natural or legal person or such persons acting in concert (the proposed acquirer) who have taken a decision either to acquire, directly or indirectly, a qualifying holding in an insurance or reinsurance undertaking or to further increase, directly or indirectly, such a qualifying holding in an insurance or reinsurance undertaking as a result of which the proportion of the voting rights or of the capital held would reach or exceed 20 %, 30 % or 50 % or so that the insurance or reinsurance undertaking would become its subsidiary (the proposed acquisition), first to notify in writing the supervisory authorities of the insurance or reinsurance undertaking in which they are seeking to acquire or increase a qualifying holding, indicating the size of the intended holding and relevant information, as referred to in Article 59(4). Member States need not apply the 30 % threshold where, in accordance with Article 9(3)(a) of Directive 2004/109/EC, they apply a threshold of one third.

2 Member States shall require any natural or legal person who has taken a decision to dispose, directly or indirectly, of a qualifying holding in an insurance or reinsurance undertaking first to notify in writing the supervisory authorities of the home Member State, indicating the size of that person's holding after the intended disposal. Such a person shall likewise notify the supervisory authorities of a decision to reduce that person's qualifying holding so that the proportion of the voting rights or of the capital held would fall below 20 %, 30 % or 50 % or so that the insurance or reinsurance undertaking would cease to be a subsidiary of that person. Member States need not apply the 30 % threshold where, in accordance with Article 9(3)(a) of Directive 2004/109/EC, they apply a threshold of one third.

Article 58

Assessment period

1 The supervisory authorities shall, promptly and in any event within two working days following receipt of the notification required under Article 57(1), as well as following the possible subsequent receipt of the information referred to in paragraph 2, acknowledge receipt thereof in writing to the proposed acquirer.

The supervisory authorities shall have a maximum of 60 working days as from the date of the written acknowledgement of receipt of the notification and all documents required by the Member State to be attached to the notification on the basis of the list referred to in Article 59(4) (the assessment period), to carry out the assessment provided for in Article 59(1) (the assessment).

The supervisory authorities shall inform the proposed acquirer of the date of the expiry of the assessment period at the time of acknowledging receipt.

2 The supervisory authorities may, during the assessment period, if necessary, and no later than on the fiftieth working day of the assessment period, request any further information that is necessary to complete the assessment. Such request shall be made in writing and shall specify the additional information needed.

For the period between the date of request for information by the supervisory authorities and the receipt of a response thereto by the proposed acquirer, the assessment period shall be interrupted. That interruption shall not exceed 20 working days. Any further requests by the supervisory authorities for completion or clarification of the information shall be at their discretion but shall not result in an interruption of the assessment period.

3 The supervisory authorities may extend the interruption referred to in the second subparagraph of paragraph 2 up to 30 working days if the proposed acquirer is:

a situated or regulated outside the Community; or

b a natural or legal person not subject to supervision under this Directive, 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)[1], Directive 2004/39/EC, or Directive 2006/48/EC.

4 If the supervisory authorities, upon completion of the assessment, decide to oppose the proposed acquisition, they shall, within two working days, and not exceeding the assessment period, inform the proposed acquirer in writing stating the reasons. Subject to national law, an appropriate statement of the reasons for the decision may be made accessible to the public at the request of the proposed acquirer. This shall not prevent a Member State from allowing the supervisory authority to make such disclosure in the absence of a request by the proposed acquirer.

5 If the supervisory authorities do not oppose the proposed acquisition within the assessment period in writing, it shall be deemed to be approved.

6 The supervisory authorities may fix a maximum period for concluding the proposed acquisition and extend it where appropriate.

7 Member States shall not impose requirements for the notification to and approval by the supervisory authorities of direct or indirect acquisitions of voting rights or capital that are more stringent than those set out in this Directive.

8 The Commission shall adopt implementing measures further specifying the adjustments of the criteria set out in Article 59(1), in order to take account of future developments and to ensure the uniform application of Articles 57 to 63.

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 59

Assessment

1 In assessing the notification provided for in Article 57(1) and the information referred to in Article 58(2) the supervisory authorities shall, in order to ensure the sound and prudent management of the insurance or reinsurance undertaking in which an acquisition is proposed, and having regard to the likely influence of the proposed acquirer on the insurance or reinsurance undertaking, appraise the suitability of the proposed acquirer and the financial soundness of the proposed acquisition against all of the following criteria:

a the reputation of the proposed acquirer;

b the reputation and experience of any person who will direct the business of the insurance or reinsurance undertaking as a result of the proposed acquisition;

c the financial soundness of the proposed acquirer, in particular in relation to the type of business pursued and envisaged in the insurance or reinsurance undertaking in which the acquisition is proposed;

d whether the insurance or reinsurance undertaking will be able to comply and continue to comply with the prudential requirements based on this Directive and, where applicable, other Directives, notably, Directive 2002/87/EC, in particular, whether the group of which it will become part has a structure that makes it possible to exercise effective supervision, effectively exchange information among the supervisory authorities and determine the allocation of responsibilities among the supervisory authorities;

e whether there are reasonable grounds to suspect that, in connection with the proposed acquisition, money laundering or terrorist financing within the meaning of Article 1 of Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing[(2)] is being or has been committed or attempted, or that the proposed acquisition could increase the risk thereof.

2 The supervisory authorities may oppose the proposed acquisition only if there are reasonable grounds for doing so on the basis of the criteria set out in paragraph 1 or if the information provided by the proposed acquirer is incomplete.

3 Member States shall neither impose any prior conditions in respect of the level of holding that must be acquired nor allow their supervisory authorities to examine the proposed acquisition in terms of the economic needs of the market.

4 Member States shall make publicly available a list specifying the information that is necessary to carry out the assessment and that must be provided to the supervisory authorities at the time of notification referred to in Article 57(1). The information required shall be proportionate and adapted to the nature of the proposed acquirer and the proposed acquisition. Member States shall not require information that is not relevant for a prudential assessment.

5 Notwithstanding Article 58(1), (2) and (3), where two or more proposals to acquire or increase qualifying holdings in the same insurance or reinsurance undertaking have been notified to the supervisory authority, the latter shall treat the proposed acquirers in a non-discriminatory manner.

Article 60

Acquisitions by regulated financial undertakings

1 The relevant supervisory authorities shall work in full consultation with each other when carrying out the assessment if the proposed acquirer is one of the following:

a a credit institution, insurance or reinsurance undertaking, investment firm or management company within the meaning of point 2 of Article 1a of Directive 85/611/EEC (the UCITS management company) authorised in another Member State or in a sector other than that in which the acquisition is proposed;

b the parent undertaking of a credit institution, insurance or reinsurance undertaking, investment firm or UCITS management company authorised in another Member State or in a sector other than that in which the acquisition is proposed; or

c a natural or legal person controlling a credit institution, insurance or reinsurance undertaking, investment firm or UCITS management company authorised in another Member State or in a sector other than that in which the acquisition is proposed.

2 The supervisory authorities shall, without undue delay, provide each other with any information which is essential or relevant for the assessment. In this regard, the supervisory authorities shall communicate to each other upon request all relevant information and shall communicate on their own initiative all essential information. A decision by the supervisory authority that has authorised the insurance or reinsurance undertaking in which the acquisition is proposed shall indicate any views or reservations expressed by the supervisory authority responsible for the proposed acquirer.

Article 61

Information to the supervisory authority by the insurance or reinsurance undertaking

On becoming aware of them, the insurance or reinsurance undertaking shall inform the supervisory authority of its home Member State of any acquisitions or disposals of holdings in its capital that cause those holdings to exceed or fall below any of the thresholds referred to in Article 57 and Article 58(1) to (7).

The insurance or reinsurance undertaking shall also, at least once a year, inform the supervisory authority of its home Member State 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 62

Qualifying holdings, powers of the supervisory authority

Member States shall require that, where the influence exercised by the persons referred to in Article 57 is likely to operate against the sound and prudent management of an insurance or reinsurance undertaking, the supervisory authority of the home Member State of that undertaking in which a qualifying holding is sought or increased take appropriate measures to put an end to that situation. Such measures may consist, for example, of 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 notification obligation established in Article 57.

Where a holding is acquired despite the opposition of the supervisory authorities, the Member States shall, regardless of any other sanctions to be adopted, provide for:

(1) the suspension of the exercise of the corresponding voting rights; or

(2) the nullity of any votes cast or the possibility of their annulment.

Article 63

Voting rights

For the purposes of this Section, the voting rights referred to in Articles 9 and 10 of Directive 2004/109/EC, as well as the conditions regarding aggregation thereof laid down in Article 12(4) and (5) of that Directive, shall be taken into account.

Member States shall not take into account voting rights or shares which investment firms or credit institutions may hold as a result of providing the underwriting of financial instruments and/or placing of financial instruments on a firm commitment basis included under point 6 of Section A of Annex I to Directive 2004/39/EC, provided that those rights are, on the one hand, not exercised or otherwise used to intervene in the management of the issuer and, on the other, disposed of within one year of acquisition.

Section 5

Professional secrecy, exchange of information and promotion of supervisory convergence

Article 64

Professional secrecy

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

Without prejudice to cases covered by criminal law, any confidential information received by such persons whilst performing their duties shall not be divulged to any person or authority whatsoever, except in summary or aggregate form, such that individual insurance and reinsurance undertakings cannot be identified.

However, where an insurance or 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 65

Exchange of information between supervisory authorities of Member States

Article 64 shall not preclude the exchange of information between supervisory authorities of different Member States. Such information shall be subject to the obligation of professional secrecy laid down in Article 64.

Article 66

Cooperation agreements with third countries

Member States may conclude cooperation agreements providing for the exchange of information with the supervisory authorities of third countries or with authorities or bodies of third countries as defined in Article 68(1) and (2) only if the information to be disclosed is subject to guarantees of professional secrecy at least equivalent to those referred to in this Section. Such exchange of information must be intended for the performance of the supervisory task of those authorities or bodies.

Where the information to be disclosed by a Member State to a third country originates in another Member State, it shall not be disclosed without the express agreement of the supervisory authority of that Member State and, where appropriate, solely for the purposes for which that authority gave its agreement.

Article 67

Use of confidential information

Supervisory authorities which receive confidential information under Articles 64 or 65 may use it only in the course of their duties and for the following purposes:

(1) to check that the conditions governing the taking-up of the business of insurance or reinsurance are met and to facilitate the monitoring of the conduct of such business, especially with regard to the monitoring of the technical provisions, the Solvency Capital Requirement, the Minimum Capital Requirement, and the system of governance;

(2) to impose sanctions;

(3) in administrative appeals against decisions of the supervisory authorities;

(4) in court proceedings under this Directive.

Article 68

Exchange of information with other authorities

1 Articles 64 and 67 shall not preclude any of the following:

a the exchange of information between several supervisory authorities in the same Member State in the discharge of their supervisory functions;

b the exchange of information, in the discharge of their supervisory functions, between supervisory authorities and any of the following which are situated in the same Member State:

(i) authorities responsible for the supervision of credit institutions and other financial organisations and the authorities responsible for the supervision of financial markets;

(ii) bodies involved in the liquidation and bankruptcy of insurance undertakings or reinsurance undertakings and in other similar procedures;

(iii) persons responsible for carrying out statutory audits of the accounts of insurance undertakings, reinsurance undertakings and other financial institutions;

c the disclosure, to bodies which administer compulsory winding-up proceedings or guarantee funds, of information necessary for the performance of their duties.

The exchanges of information referred to in points (b) and (c) may also take place between different Member States.

The information received by those authorities, bodies and persons shall be subject to the obligation of professional secrecy laid down in Article 64.

2 Articles 64 to 67 shall not preclude Member States from authorising exchanges of information between the supervisory authorities and any of the following:

a the authorities responsible for overseeing the bodies involved in the liquidation and bankruptcy of insurance undertakings, reinsurance undertakings and other similar procedures;

b the authorities responsible for overseeing the persons charged with carrying out statutory audits of the accounts of insurance undertakings, reinsurance undertakings, credit institutions, investment firms and other financial institutions;

c independent actuaries of insurance undertakings or reinsurance undertakings carrying out legal supervision of those undertakings and the bodies responsible for overseeing such actuaries.

Member States which apply the first subparagraph shall require at least that the following conditions are met:

a the information must be for the purpose of carrying out the overseeing or legal supervision referred to in the first subparagraph;

b the information received must be subject to the obligation of professional secrecy laid down in Article 64;

c where the information originates in another Member State, it must not be disclosed without the express agreement of the supervisory authority from which it originates and, where appropriate, solely for the purposes for which that authority gave its 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 the first and second subparagraphs.

3 Articles 64 to 67 shall not preclude Member States from authorising, with the aim of strengthening the stability, and integrity, of the financial system, the exchange of information between the supervisory authorities and the authorities or bodies responsible for the detection and investigation of breaches of company law.

Member States which apply the first subparagraph shall require that at least the following conditions are met:

a the information must be intended for the purpose of detection and investigation as referred to in the first subparagraph;

b information received must be subject to the obligation of professional secrecy laid down in Article 64;

c where the information originates in another Member State, it shall not be disclosed without the express agreement of the supervisory authority from which it originates and, where appropriate, solely for the purposes for which that authority gave its 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 of persons appointed, in view of their specific competence, 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 set out 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 supervisory authority from which the information originates the names and precise responsibilities of the persons to whom it is to be sent.

4 Member States shall communicate to the Commission and to the other Member States the names of the authorities, persons or bodies which may receive information pursuant to paragraph 3.

Article 69

Disclosure of information to government administrations responsible for financial legislation

Articles 64 and 67 shall not preclude Member States from authorising, under provisions laid down by law, 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.

Such disclosure shall be made only where necessary for reasons of prudential control. Member States shall, however, provide that information received under Article 65 and Article 68(1), and information obtained by means of on-site verification referred to in Article 32 may only be disclosed with the express consent of the supervisory authority from which the information originated or of the supervisory authority of the Member State in which the on-site verification was carried out.

Article 70

Transmission of information to central banks and monetary authorities

Without prejudice to this Section, a supervisory authority may transmit information intended for the performance of their tasks to the following:

(1) central banks and other bodies with a similar function in their capacity as monetary authorities;

(2) where appropriate, other public authorities responsible for overseeing payment systems.

Such authorities or bodies may also communicate to the supervisory authorities such information as they may need for the purposes of Article 67. Information received in this context shall be subject to the provisions on professional secrecy laid down in this Section..

Article 71

Supervisory convergence

1 Member States shall ensure that the mandates of supervisory authorities take into account, in an appropriate way, a European Union dimension.

2 Member States shall ensure that in the exercise of their duties supervisory authorities have regard to the convergence in respect of supervisory tools and supervisory practices in the application of the laws, regulations and administrative requirements adopted pursuant to this Directive. For that purpose, Member States shall ensure that the supervisory authorities participate in the activities of CEIOPS pursuant to Decision 2009/79/EC and take duly into account its guidelines and recommendations referred to in paragraph 3 of this Article.

3 CEIOPS shall, where necessary, provide for non-legally binding guidelines and recommendations concerning the implementation of the provisions of this Directive and its implementing measures in order to enhance the convergence of supervisory practices. In addition, CEIOPS shall report regularly and at least every two years to the European Parliament, the Council and the Commission on the progress of the supervisory convergence in the Community.

Section 6

Duties of auditors

Article 72

Duties of auditors

1 Member States shall provide at least that persons authorised within the meaning of 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[(3)], who perform in an insurance or reinsurance undertaking the statutory audit referred to in Article 51 of Directive 78/660/EEC, Article 37 of Directive 83/349/EEC or Article 31 of Directive 85/611/EEC or any other statutory task, shall have a duty to report promptly to the supervisory authorities any fact or decision concerning that undertaking of which they have become aware while carrying out that task and which is liable to bring about any of the following:

- a 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 and reinsurance undertakings;
- b the impairment of the continuous functioning of the insurance or reinsurance undertaking;
- c a refusal to certify the accounts or to the expression of reservations;
- d non-compliance with the Solvency Capital Requirement;
- e non-compliance with the Minimum Capital Requirement.

The persons referred to in the first subparagraph shall also report any facts or decisions of which they have become aware in the course of carrying out a task as described in the first subparagraph in an undertaking which has close links resulting from a control relationship with the insurance or reinsurance undertaking within which they are carrying out that task.

2 The disclosure in good faith to the supervisory authorities, by persons authorised within the meaning of Directive 84/253/EEC, of any fact or decision referred to in paragraph 1 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.

(**1**) OJ L 375, 31.12.1985, p. 3.

(**2**) OJ L 309, 25.11.2005, p. 15.

(**3**) OJ L 126, 12.5.1984, p. 20.