

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 VI

**Rules relating to the valuation of assets and liabilities, technical provisions, own funds,
Solvency Capital Requirement, Minimum Capital Requirement and investment rules**

Section 3

Own funds

Subsection 1

Determination of own funds

Article 87

Own funds

Own funds shall comprise the sum of basic own funds, referred to in Article 88 and ancillary own funds referred to in Article 89.

Article 88

Basic own funds

Basic own funds shall consist of the following items:

- (1) the excess of assets over liabilities, valued in accordance with Article 75 and Section 2;
- (2) subordinated liabilities.

The excess amount referred to in point (1) shall be reduced by the amount of own shares held by the insurance or reinsurance undertaking.

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Article 89

Ancillary own funds

1 Ancillary own funds shall consist of items other than basic own funds which can be called up to absorb losses.

Ancillary own funds may comprise the following items to the extent that they are not basic own-fund items:

- a unpaid share capital or initial fund that has not been called up;
- b letters of credit and guarantees;
- c any other legally binding commitments received by insurance and reinsurance undertakings.

In the case of a mutual or mutual-type association with variable contributions, ancillary own funds may also comprise any future claims which that association may have against its members by way of a call for supplementary contribution, within the following 12 months.

2 Where an ancillary own-fund item has been paid in or called up, it shall be treated as an asset and cease to form part of ancillary own-fund items.

Article 90

Supervisory approval of ancillary own funds

1 The amounts of ancillary own-fund items to be taken into account when determining own funds shall be subject to prior supervisory approval.

2 The amount ascribed to each ancillary own-fund item shall reflect the loss-absorbency of the item and shall be based upon prudent and realistic assumptions. Where an ancillary own-fund item has a fixed nominal value, the amount of that item shall be equal to its nominal value, where it appropriately reflects its loss-absorbency.

3 Supervisory authorities shall approve either of the following:

- a a monetary amount for each ancillary own-fund item;
- b a method by which to determine the amount of each ancillary own-fund item, in which case supervisory approval of the amount determined in accordance with that method shall be granted for a specified period of time.

4 For each ancillary own-fund item, supervisory authorities shall base their approval on an assessment of the following:

- a the status of the counterparties concerned, in relation to their ability and willingness to pay;
- b the recoverability of the funds, taking account of the legal form of the item, as well as any conditions which would prevent the item from being successfully paid in or called up;
- c any information on the outcome of past calls which insurance and reinsurance undertakings have made for such ancillary own funds, to the extent that information can be reliably used to assess the expected outcome of future calls.

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Article 91

Surplus funds

1 Surplus funds shall be deemed to be accumulated profits which have not been made available for distribution to policy holders and beneficiaries.

2 In so far as authorised under national law, surplus funds shall not be considered as insurance and reinsurance liabilities to the extent that they fulfil the criteria set out in Article 94(1).

Article 92

[^{F1}Delegated acts and regulatory and implementing technical standards]

[^{F1}1 In order to ensure consistent harmonisation in relation to the determination of own funds, EIOPA shall, subject to Article 301b, develop draft regulatory technical standards to specify the criteria for granting supervisory approval of ancillary own funds in accordance with Article 90.

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1094/2010.

1a The Commission shall adopt delegated acts in accordance with Article 301a specifying the treatment of participations, within the meaning of the third subparagraph of Article 212(2), in financial and credit institutions with respect to the determination of own funds.]

2 Participations in financial and credit institutions as referred to in paragraph 1(b) shall comprise the following:

- a participations which insurance and reinsurance undertakings hold in:
 - (i) credit institutions and financial institutions within the meaning of Article 4(1) and (5) of Directive 2006/48/EC,
 - (ii) investment firms within the meaning of point 1 of Article 4(1) of Directive 2004/39/EC;
- b subordinated claims and instruments referred to in Article 63 and Article 64(3) of Directive 2006/48/EC which insurance and reinsurance undertakings hold in respect of the entities defined in point (a) of this paragraph in which they hold a participation.

[^{F23} In order to ensure uniform conditions of application of Article 90, EIOPA shall develop draft implementing technical standards on the procedures for granting supervisory approval for the use of ancillary own funds.

EIOPA shall submit those draft implementing technical standards to the Commission by 31 October 2014.

Power is conferred on the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1094/2010.]

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Textual Amendments

- F1** Substituted by Directive 2014/51/EU of the European Parliament and of the Council of 16 April 2014 amending Directives 2003/71/EC and 2009/138/EC and Regulations (EC) No 1060/2009, (EU) No 1094/2010 and (EU) No 1095/2010 in respect of the powers of the European Supervisory Authority (European Insurance and Occupational Pensions Authority) and the European Supervisory Authority (European Securities and Markets Authority).
- F2** Inserted by Directive 2014/51/EU of the European Parliament and of the Council of 16 April 2014 amending Directives 2003/71/EC and 2009/138/EC and Regulations (EC) No 1060/2009, (EU) No 1094/2010 and (EU) No 1095/2010 in respect of the powers of the European Supervisory Authority (European Insurance and Occupational Pensions Authority) and the European Supervisory Authority (European Securities and Markets Authority).