

Commission Delegated Regulation (EU) 2015/35 of 10 October 2014
supplementing Directive 2009/138/EC of the European Parliament
and of the Council on the taking-up and pursuit of the business of
Insurance and Reinsurance (Solvency II) (Text with EEA relevance)

TITLE I

[^{X1}VALUATION AND RISK-BASED CAPITAL REQUIREMENTS
(PILLAR I), ENHANCED GOVERNANCE (PILLAR II)
AND INCREASED TRANSPARENCY (PILLAR III)]

CHAPTER IV

OWN FUNDS

SECTION 1

Determination of own funds

Subsection 1

Supervisory approval of ancillary own funds

Article 62

Assessment of the application

1 Supervisory authorities shall take all of the following into account for the purposes of the assessment referred to in Article 90 (4) of Directive 2009/138/EC:

- a the legal effectiveness and enforceability of the terms of the commitment in all relevant jurisdictions;
- b the contractual terms of the arrangement that the insurance or reinsurance undertaking has entered into, or will enter into, with the counterparties to provide funds;
- c where relevant, the insurance or reinsurance undertaking's memorandum and articles of association or statutes;
- d whether the insurance or reinsurance undertaking has processes in place to inform the supervisory authorities of any future changes, which may have the effect of reducing the loss-absorbency of the ancillary own-fund item, to any of the following:
 - (i) the structure or contractual terms of the arrangement;
 - (ii) the status of the counterparties concerned;
 - (iii) the recoverability of the ancillary own funds item.

Status: Point in time view as at 02/04/2016.

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2 Supervisory authorities shall also assess whether Article 90 of Directive 2009/138/EC is complied with taking into account the range of circumstances under which the item can be called up to absorb losses.

3 Where the insurance or reinsurance undertaking is seeking approval of a method by which to determine the amount of each ancillary own-fund item, the supervisory authorities shall assess whether the undertaking's process for regularly validating the method is appropriate to ensure that the results of the method reflect the loss-absorbency of the item on an ongoing basis.

4 In addition to the requirements set out in paragraphs 1 to 3, supervisory authorities shall assess the application for approval of ancillary own funds on the basis of the criteria set out in Articles 63, 64 and 65.

Article 63

Assessment of the application — Status of the counterparties

1 Supervisory authorities shall take all of the following into account for the purposes of the assessment of the counterparties' ability to pay referred to in Article 90(4)(a) of Directive 2009/138/EC:

- a the risk of default of the counterparties;
- b the risk that default arises from a delay in the counterparties satisfying their commitments under the ancillary own funds item.

2 In relation to paragraph 1(a), the supervisory authorities shall assess the risk of default of the counterparties by examining the probability of default of the counterparties and the loss given default, taking into account all of the following criteria:

- a the credit standing of the counterparties, provided that this appropriately reflects the counterparties' ability to satisfy their commitments under the ancillary own funds item;
- b whether there are any current or foreseeable practical or legal impediments to the counterparties' satisfaction of their commitments under the ancillary own funds item;
- c whether the counterparties are subject to legal or regulatory requirements that reduce the counterparties' ability to satisfy their commitments under the ancillary own funds item;
- d whether the legal form of the counterparties prejudice the counterparties' satisfaction of their commitments under the ancillary own funds item;
- e whether the counterparties are subject to other exposures which reduce the counterparties' ability to satisfy their commitments under the ancillary own funds item;
- f whether, in relation to their commitment under the ancillary own fund item, the contractual terms of the arrangement under any applicable law are such that the counterparties have rights to set-off amounts they owe against any amounts owed to them by the insurance or reinsurance undertaking.

3 In relation to paragraph 1(b), the supervisory authorities shall assess the liquidity position of the counterparties, taking into account all of the following:

- a whether there are any current or foreseeable practical or legal impediments to the counterparties' ability to promptly satisfy their commitments under the ancillary own funds item;
- b whether the counterparties are subject to legal or regulatory requirements that may reduce the counterparties' ability to promptly satisfy their commitments under the ancillary own funds item;
- c whether the legal form of the counterparties prejudices the counterparties' prompt satisfaction of their commitments under the ancillary own funds item.

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4 Supervisory authorities shall take all of the following into account for the purposes of the assessment of the counterparties' willingness to pay referred to in Article 90(4)(a) of Directive 2009/138/EC:

- a the range of circumstances under which the ancillary own funds item can be called up to absorb losses;
- b whether incentives or disincentives exist which may affect the counterparties' willingness to satisfy their commitments under the ancillary own funds item;
- c whether previous transactions between the counterparties and the insurance or reinsurance undertaking, including the counterparties' previous satisfaction of their commitments under ancillary own funds items, give an indication as to the counterparties' willingness to satisfy their current commitments under the ancillary own funds item.

5 The supervisory authorities shall, in assessing the counterparties' ability and willingness to pay, consider any other factors relevant to the status of the counterparties including, where relevant, the insurance or reinsurance undertaking's business model.

6 Where an ancillary own-fund item concerns a group of counterparties, supervisory authorities and insurance and reinsurance undertakings may assess the status of the group of counterparties as though it were a single counterparty provided that all of the following conditions are fulfilled:

- a the counterparties are individually non-material;
- b the counterparties included in that group are sufficiently homogeneous;
- c the assessment of a group of counterparties does not overestimate the ability and willingness to pay of the counterparties included in that group.

7 A counterparty shall be considered as material where the status of that single counterparty is likely to have a significant effect on the assessment of the group of counterparties' ability and willingness to pay.

Article 64

Assessment of the application — Recoverability of the funds

Supervisory authorities shall take all of the following into account for the purposes of the assessment of the recoverability of the funds referred to in Article 90(4)(b) of Directive 2009/138/EC:

- (a) whether the recoverability of the funds is increased as a result of the availability of collateral or an analogous arrangement that complies with Articles 209 to 214;
- (b) whether there is any current or foreseeable practical or legal impediment to the recoverability of the funds;
- (c) whether the recoverability of the funds is subject to legal or regulatory requirements;
- (d) the ability of the insurance or reinsurance undertaking to take action to enforce the counterparties' satisfaction of their commitments under the ancillary own funds item.

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Article 65

Assessment of the application — Information on the outcome of past calls

Supervisory authorities shall take all of the following into account for the purposes of the assessment of the information on the outcome of past calls referred to in Article 90(4)(c) of Directive 2009/138/EC:

- (a) whether the insurance or reinsurance undertaking has made past calls from the same or similar counterparties under the same or similar circumstances;
- (b) whether that information is relevant and reliable as regards the expected outcome of future calls.

Article 66

Specification of amount relating to an unlimited amount of ancillary own funds

1 The supervisory authorities shall not approve an unlimited amount of ancillary own funds.

2 Where the supervisory authorities approve an amount of ancillary own funds, the decision of the supervisory authorities shall specify whether the amount that has been approved is the amount for which the insurance or reinsurance undertaking has applied or a lower amount.

Article 67

Specification of amount and timing relating to the approval of a method

Where the supervisory authorities approve a method to determine the amount of each ancillary own fund item, the supervisory authorities' decision shall set out all of the following:

- (a) the initial amount of the ancillary own funds item that has been calculated using that method at the date the approval is granted;
- (b) the minimum frequency of recalculation of the amount of ancillary own funds item using that method where it is more frequent than annual, and the reasons for that frequency;
- (c) the time period for which the calculation of the ancillary own funds item using that method is granted.

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Subsection 2

Own funds treatment of participations

Article 68

Treatment of participations in the determination of basic own funds

1 For the purpose of determining the basic own funds of insurance and reinsurance undertakings, basic own funds as referred to in Article 88 of Directive 2009/138/EC shall be reduced by the full value of participations, as referred to in Article 92(2) of that Directive, in a financial and credit institution that exceeds 10 % of items included in points (a) (i), (ii), (iv) and (vi) of Article 69.

2 For the purpose of determining the basic own funds of insurance and reinsurance undertakings, basic own funds as referred to in Article 88 of Directive 2009/138/EC shall be reduced by the part of the value of all participations, as referred to in Article 92(2) of that Directive, in financial and credit institutions, other than participations referred to in paragraph 1, that exceeds 10 % of items included in points (a) (i), (ii), (iv) and (vi) of Article 69.

[^{F13} Notwithstanding paragraphs 1 and 2, insurance and reinsurance undertakings shall not deduct strategic participations as referred to in Article 171 which are included in the calculation of the group solvency on the basis of method 1 as set out in Annex I to Directive 2002/87/EC or on the basis of method 1 as set out in Article 230 of Directive 2009/138/EC.]

4 The deductions set out in paragraph 2 shall be applied on a pro-rata basis to all participations referred to in that paragraph.

5 The deductions set out in paragraphs 1 and 2 shall be made from the corresponding tier in which the participation has increased the own funds of the related undertaking as follows:

- a holdings of Common Equity Tier 1 items of financial and credit institutions shall be deducted from the items included in points (a) (i), (ii), (iv) and (vi) of Article 69;
- b holdings of Additional Tier 1 instruments of financial and credit institutions shall be deducted from the items included in points (a)(iii) and (v) and point (b) of Article 69;
- c holdings of Tier 2 instruments of financial and credit institutions shall be deducted from the basic own-fund items included in Article 72.

Textual Amendments

- F1** Substituted by [Commission Delegated Regulation \(EU\) 2016/467 of 30 September 2015 amending Commission Delegated Regulation \(EU\) 2015/35 concerning the calculation of regulatory capital requirements for several categories of assets held by insurance and reinsurance undertakings \(Text with EEA relevance\)](#).

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SECTION 2

Classification of own funds

Article 69

Tier 1 — List of own-fund items

The following basic own-fund items shall be deemed to substantially possess the characteristics set out in Article 93(1)(a) and (b) of Directive 2009/138/EC, taking into consideration the features set out in Article 93(2) of that Directive, and shall be classified as Tier 1, where those items display all of the features set out in Article 71:

- (a) the part of excess of assets over liabilities, valued in accordance with Article 75 and Section 2 of Chapter VI of Directive 2009/138/EC, comprising the following items:
 - (i) paid-in ordinary share capital and the related share premium account;
 - (ii) paid-in initial funds, members' contributions or the equivalent basic own-fund item for mutual and mutual-type undertakings;
 - (iii) paid-in subordinated mutual member accounts;
 - (iv) surplus funds that are not considered as insurance and reinsurance liabilities in accordance with Article 91(2) of Directive 2009/138/EC;
 - (v) paid-in preference shares and the related share premium account;
 - (vi) a reconciliation reserve;
- (b) paid-in subordinated liabilities valued in accordance with Article 75 of Directive 2009/138/EC.

Article 70

Reconciliation Reserve

1 The reconciliation reserve referred to in point (a)(vi) of Article 69 equals the total excess of assets over liabilities reduced by all of the following:

- a the amount of own shares held by the insurance and reinsurance undertaking;
- b foreseeable dividends, distributions and charges;
- c the basic own-fund items included in points (a)(i) to (v) of Article 69, Article 72(a) and Article 76(a);
- d the basic own-fund items not included in points (a)(i) to (v) of Article 69, point (a) of Article 72 and point (a) of Article 76, which have been approved by the supervisory authority in accordance with Article 79;
- e the restricted own-fund items that meet one of the following requirements:
 - (i) exceed the notional Solvency Capital Requirement in the case of matching adjustment portfolios and ring-fenced funds determined in accordance with Article 81(1);
 - (ii) that are excluded in accordance with Article 81(2);

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- f the amount of participations held in financial and credit institutions as referred to in Article 92(2) of Directive 2009/138/EC deducted in accordance with Article 68, to the extent that this is not already included in points (a) to (e).
- 2 The excess of assets over liabilities referred to in paragraph 1 includes the amount that corresponds to the expected profit included in future premiums set out in paragraph 2 of Article 260.
- 3 The determination of whether, and to what extent, the reconciliation reserve displays the features set out in Article 71 shall not amount to an assessment of the features of the assets and liabilities that are included in computing the excess of assets over liabilities or the underlying items in the undertakings' financial statements.

Article 71

Tier 1 — Features determining classification

- 1 The features referred to in Article 69 shall be the following:
- a the basic own fund item:
- (i) in the case of items referred to in points (a) (i) and (ii) of Article 69, ranks after all other claims in the event of winding-up proceedings regarding the insurance or reinsurance undertaking;
- (ii) in the case of items referred to in points (a)(iii) and (v) and point (b) of Article 69, ranks to the same degree as, or ahead of, the items referred to in points (a) (i) and (ii) of Article 69, but after items listed in Articles 72 and 76 that display the features set out in Article 73 and 77 respectively and after the claims of all policy holders and beneficiaries and non-subordinated creditors;
- b the basic own-fund item does not include features which may cause the insolvency of the insurance or reinsurance undertaking or may accelerate the process of the undertaking becoming insolvent;
- c the basic own fund item is immediately available to absorb losses;
- d the basic own-fund item absorbs losses at least once there is non-compliance with the Solvency Capital Requirement and does not hinder the recapitalisation of the insurance or reinsurance undertaking;
- e the basic own-fund item, in the case of items referred to in points (a)(iii) and (v) and point (b) of Article 69, possesses one of the following principal loss absorbency mechanisms to be triggered at the trigger event specified in paragraph 8:
- (i) the nominal or principal amount of the basic own-fund item is written down as set out in paragraph 5;
- (ii) the basic own-fund item automatically converts into a basic own-fund item listed in point (a)(i) or (ii) of Article 69 as set out in paragraph 6;
- (iii) a principal loss absorbency mechanism that achieves an equivalent outcome to the principal loss absorbency mechanisms set out in points (i) or (ii);
- f the basic own-fund item meets one of the following criteria:
- (i) in the case of items referred to in points (a)(i) and (ii) of Article 69, the item is undated or, where the insurance or reinsurance undertaking has a fixed maturity, is of the same maturity as the undertaking;

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- (ii) in the case of items referred to in points (a)(iii) and (v) and point (b) of Article 69, the item is undated; the first contractual opportunity to repay or redeem the basic own-fund item does not occur before 5 years from the date of issuance;
- g the basic own-fund item referred to in points (a)(iii) and (v) and point (b) of Article 69 may only allow for repayment or redemption of that item between 5 and 10 years after the date of issuance where the undertaking's Solvency Capital Requirement is exceeded by an appropriate margin taking into account the solvency position of the undertaking including the undertaking's medium-term capital management plan;
- h the basic own-fund item, in the case of items referred to in points (a)(i), (ii), (iii) and (v) and point (b) of Article 69, is only repayable or redeemable at the option of the insurance or reinsurance undertaking and the repayment or redemption of the basic own-fund item is subject to prior supervisory approval;
- i the basic own-fund item, in the case of items referred to in points (a)(i), (ii), (iii) and (v) and point (b) of Article 69, does not include any incentives to repay or redeem that item that increase the likelihood that an insurance or reinsurance undertaking will repay or redeem that basic own-fund item where it has the option to do so;
- j the basic own-fund item, in the case of items referred to in points (a)(i), (ii), (iii) and (v) and point (b) of Article 69, provides for the suspension of repayment or redemption of that item where there is non-compliance with the Solvency Capital Requirement or repayment or redemption would lead to such non-compliance until the undertaking complies with the Solvency Capital Requirement and the repayment or redemption would not lead to non-compliance with the Solvency Capital Requirement;
- k notwithstanding point (j), the basic own-fund item may only allow for repayment or redemption of that item where there is non-compliance with the Solvency Capital Requirement or repayment or redemption would lead to such non-compliance, where all of the following conditions are met:
 - (i) the supervisory authority has exceptionally waived the suspension of repayment or redemption of that item;
 - (ii) the item is exchanged for or converted into another Tier 1 own-fund item of at least the same quality;
 - (iii) the Minimum Capital Requirement is complied with after the repayment or redemption.
- l the basic own-fund item meets one of the following criteria:
 - (i) in the case of items referred to in points (a)(i) and (ii) of Article 69(1), either the legal or contractual arrangements governing the basic own-fund item or national legislation allow for the cancellation of distributions in relation to that item where there is non-compliance with the Solvency Capital Requirement or the distribution would lead to such non-compliance until the undertaking complies with the Solvency Capital Requirement and the distribution would not lead to non-compliance with the Solvency Capital Requirement;
 - (ii) in the case of items referred to in points (a)(iii) and (v) and point (b) of Article 69 the terms of the contractual arrangement governing the basic own-fund item provide for the cancellation of distributions in relation to that item where there is non-compliance with the Solvency Capital Requirement or the distribution would lead to such non-compliance until the undertaking complies with the Solvency Capital Requirement and the distribution would not lead to non-compliance with the Solvency Capital Requirement;

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- m the basic own-fund item may only allow for a distribution to be made where there is non-compliance with the Solvency Capital Requirement or the distribution on a basic-own fund item would lead to such non-compliance, where all of the following conditions are met:
 - (i) the supervisory authority has exceptionally waived the cancellation of distributions;
 - (ii) the distribution does not further weaken the solvency position of the insurance or reinsurance undertaking;
 - (iii) the Minimum Capital Requirement is complied with after the distribution is made.
- n the basic own fund item, in the case of items referred to in points (a)(i), (ii), (iii) and (v) and point (b) of Article 69, provides the insurance or reinsurance undertaking with full flexibility over the distributions on the basic own-fund item;
- o the basic own-fund item is free from encumbrances and is not connected with any other transaction, which when considered with the basic own-fund item, could result in that basic own-fund item not complying with Article 94(1) of Directive 2009/138/EC.

2 For the purposes of this Article, the exchange or conversion of a basic own-fund item into another Tier 1 basic own-fund item or the repayment or redemption of a Tier 1 own-fund item out of the proceeds of a new basic own-fund item of at least the same quality shall not be deemed to be a repayment or redemption, provided that the exchange, conversion, repayment or redemption is subject to the approval of the supervisory authority.

3 For the purposes of point (n) of paragraph 1, in the case of basic own-fund items referred to in points (a)(i) and (ii) of Article 69, full flexibility over the distributions is provided where all of the following conditions are met:

- a there is no preferential distribution treatment regarding the order of distribution payments and the terms of the contractual arrangement governing the own-fund item do not provide preferential rights to the payment of distributions;
- b distributions are paid out of distributable items;
- c the level of distributions is not determined on the basis of the amount for which the own-fund item was purchased at issuance and there is no cap or other restriction on the maximum level of distribution;
- d notwithstanding point (c), in the case of instruments issued by mutual and mutual-type undertakings, a cap or other restriction on the maximum level of distribution may be set, provided that cap or other restriction is not an event linked to distributions being made, or not made, on other own fund items;
- e there is no obligation for an insurance or reinsurance undertaking to make distributions;
- f non-payment of distributions does not constitute an event of default of the insurance or reinsurance undertaking;
- g the cancellation of distributions imposes no restrictions on the insurance or reinsurance undertaking.

4 For the purposes of point (n) of paragraph 1, in the case of basic own-fund items referred to in points (a)(iii) and (a)(v) and point (b) of Article 69 full flexibility over the distributions is provided where all of the following conditions are met:

- a distributions are paid out of distributable items;
- b insurance and reinsurance undertakings have full discretion at all times to cancel distributions in relation to the own-fund item for an unlimited period and on a

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- non-cumulative basis and the undertakings may use the cancelled payments without restriction to meet its obligations as they fall due;
- c there is no obligation to substitute the distribution by a payment in any other form;
 - d there is no obligation to make distributions in the event of a distribution being made on another own fund item;
 - e non-payment of distributions does not constitute an event of default of the insurance or reinsurance undertaking;
 - f the cancellation of distributions imposes no restrictions on the insurance or reinsurance undertaking.
- 5 For the purposes of paragraph (1)(e)(i), the nominal or principal amount of the basic own-fund item shall be written down in such a way that all of the following are reduced:
- a the claim of the holder of that item in the event of winding-up proceedings;
 - b the amount required to be paid on repayment or redemption of that item;
 - c the distributions paid on that item.
- 6 For the purposes of paragraph (1)(e)(ii), the provisions governing the conversion into basic own-fund items listed in points (a) (i) or (ii) of Article 69 shall specify either of the following:
- a the rate of conversion and a limit on the permitted amount of conversion;
 - b a range within which the instruments will convert into the basic own funds item listed in points (a)(i) or (ii) of Article 69.
- 7 The nominal or principal amount of the basic own-fund item shall absorb losses at the trigger event. Loss absorbency resulting from the cancellation of, or a reduction in, distributions shall not be deemed to be sufficient to be considered to be a principal loss absorbency mechanism in accordance with paragraph (1)(e).
- 8 The trigger event referred to in paragraph (1)(e) shall be significant non-compliance with the Solvency Capital Requirement.

For the purposes of this paragraph, non-compliance with the Solvency Capital Requirement shall be considered significant where any of the following conditions is met:

- a the amount of own-fund items eligible to cover the Solvency Capital Requirement is equal to or less than the 75 % of the Solvency Capital Requirement;
- b the amount of own-fund items eligible to cover the Minimum Capital Requirement is equal to or less than Minimum Capital Requirement;
- c compliance with the Solvency Capital Requirement is not re-established within a period of three months of the date when non-compliance with the Solvency Capital Requirement was first observed.

Insurance and reinsurance undertakings may specify, in the provisions governing the instrument, one or more trigger events in addition to the events referred to in points (a) to (c).

- 9 For the purposes of points (d), (j) and (l) of paragraph 1, references to the Solvency Capital Requirement shall be read as references to the Minimum Capital Requirement where non-compliance with the Minimum Capital Requirement occurs before non-compliance with the Solvency Capital Requirement.

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Article 72

Tier 2 Basic own-funds — List of own-fund items

The following basic own-fund items shall be deemed to substantially possess the characteristics set out in Article 93(1)(b) of Directive 2009/138/EC, taking into consideration the features set out in Article 93(2) of that Directive, and shall be classified as Tier 2 where the following items display all of the features set out in Article 73:

- (a) the part excess of assets over liabilities, valued in accordance with Article 75 and Section 2 of Chapter VI of Directive 2009/138/EC, comprising the following items:
 - (i) ordinary share capital and the related share premium account;
 - (ii) initial funds, members' contributions or the equivalent basic own-fund item for mutual and mutual-type undertakings;
 - (iii) subordinated mutual member accounts;
 - (iv) preference shares and the related share premium account;
- (b) subordinated liabilities valued in accordance with Article 75 of Directive 2009/138/EC.

Article 73

Tier 2 Basic own-funds — Features determining classification

- 1 [F¹The features referred to in Article 72 shall be either those set out in points (a) to (i) or those set out in point (j):]
- a the basic own-fund item ranks after the claims of all policy holders and beneficiaries and non-subordinated creditors;
 - b the basic own-fund item does not include features which may cause the insolvency of the insurance or reinsurance undertaking or may accelerate the process of the undertaking becoming insolvent;
 - c the basic own-fund item is undated or has an original maturity of at least 10 years; the first contractual opportunity to repay or redeem the basic own-fund item does not occur before 5 years from the date of issuance;
 - d the basic own-fund item is only repayable or redeemable at the option of the insurance or reinsurance undertaking and the repayment or redemption of the basic own-fund item is subject to prior supervisory approval;
 - e the basic own-fund item may include limited incentives to repay or redeem that basic own-fund item, provided that these do not occur before 10 years from the date of issuance;
 - f the basic own-fund item provides for the suspension of repayment or redemption of that item where there is non-compliance with the Solvency Capital Requirement or repayment or redemption would lead to such non-compliance until the undertaking complies with the Solvency Capital Requirement and the repayment or redemption would not lead to non-compliance with the Solvency Capital Requirement;
 - g the basic own-fund item meets one of the following criteria:

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- (i) in the case of items referred to in points (a)(i) and (ii) of Article 72, either the legal or contractual arrangements governing the basic own-fund item or national legislation allow for the distributions in relation to that item to be deferred where there is non-compliance with the Solvency Capital Requirement or the distribution would lead to such non-compliance until the undertaking complies with the Solvency Capital Requirement and the distribution would not lead to non-compliance with the Solvency Capital Requirement;
- (ii) in the case of items referred to in points (a)(iii) and (iv) and point (b) of Article 72 the terms of the contractual arrangement governing the basic own-fund item provide for the distributions in relation to that item to be deferred where there is non-compliance with the Solvency Capital Requirement or the distribution would lead to such non-compliance until the undertaking complies with the Solvency Capital Requirement and the distribution would not lead to non-compliance with the Solvency Capital Requirement;
- h the basic own-fund item may only allow for a distribution to be made where there is non-compliance with the Solvency Capital Requirement or the distribution on a basic-own fund item would lead to such non-compliance, where all of the following conditions are met:
 - (i) the supervisory authority has exceptionally waived the deferral of distributions;
 - (ii) the payment does not further weaken the solvency position of the insurance or reinsurance undertaking;
 - (iii) the Minimum Capital Requirement is complied with after the distribution is made.
- i the basic own-fund item is free from encumbrances and is not connected with any other transaction, which when considered with the basic own-fund item, could result in that basic own-fund item not complying with the first subparagraph of Article 94(2) of Directive 2009/138/EC.
- j the basic own-fund item displays the features set out in Article 71 that are relevant for basic own-fund items referred to in points (a)(iii), (v) and (b) of Article 69, but exceeds the limit set out in Article 82(3).

Notwithstanding point (f), the basic own-fund item may only allow for the repayment or redemption of that item where there is non-compliance with the Solvency Capital Requirement or repayment or redemption would lead to such non-compliance, where all of the following conditions are met:

- (i) the supervisory authority has exceptionally waived the suspension of repayment or redemption of that item;
- (ii) the item is exchanged for or converted into another Tier 1 or Tier 2 basic own-fund item of at least the same quality;
- (iii) the Minimum Capital Requirement is complied with after the repayment or redemption.

2 For the purposes of this Article, the exchange or conversion of a basic own-fund item into another Tier 1 or Tier 2 basic own-fund item or the repayment or redemption of a Tier 2 basic own-fund item out of the proceeds of a new basic own-fund item of at least the same quality

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shall not be deemed to be a repayment or redemption, provided that the exchange, conversion, repayment or redemption is subject to the approval of the supervisory authority.

3 For the purposes of points (f) and (g) of paragraph 1, references to the Solvency Capital Requirement shall be read as references to the Minimum Capital Requirement where non-compliance with the Minimum Capital Requirement occurs before non-compliance with the Solvency Capital Requirement.

4 For the purposes of point (e) of paragraph 1, undertakings shall consider incentives to redeem in the form of an interest rate step-up associated with a call option as limited where the step-up takes the form of a single increase in the coupon rate and results in an increase in the initial rate that is no greater than the higher of the following amounts:

- a 100 basis points, less the swap spread between the initial index basis and the stepped-up index basis;
- b 50 % of the initial credit spread, less the swap spread between the initial index basis and the stepped-up index basis.

Textual Amendments

- F1** Substituted by [Commission Delegated Regulation \(EU\) 2016/467 of 30 September 2015 amending Commission Delegated Regulation \(EU\) 2015/35 concerning the calculation of regulatory capital requirements for several categories of assets held by insurance and reinsurance undertakings \(Text with EEA relevance\)](#).

Article 74

Tier 2 Ancillary own-funds — List of own-fund items

Without prejudice to Article 96 of Directive 2009/138/EC, the following ancillary own-fund items shall be deemed to substantially possess the characteristics set out in Article 93(1)(b) of Directive 2009/138/EC, taking into consideration the features set out in Article 93(2) of that Directive, and shall be classified as Tier 2, where the following items display all of the features set out in Article 75:

- (a) unpaid and uncalled ordinary share capital callable on demand;
- (b) unpaid and uncalled initial funds, members' contributions or the equivalent basic own-fund item for mutual and mutual-type undertakings, callable on demand;
- (c) unpaid and uncalled preference shares callable on demand;
- (d) a legally binding commitment to subscribe and pay for subordinated liabilities on demand;
- (e) letters of credit and guarantees which are held in trust for the benefit of insurance creditors by an independent trustee and provided by credit institutions authorised in accordance with Article 8 of Directive 2013/36/EU;
- (f) letters of credit and guarantees provided that the items can be called up on demand and are clear of encumbrances;
- (g) any future claims which mutual or mutual-type associations of shipowners with variable contributions solely insuring risks listed in classes 6, 12 and 17 in Part A of

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Annex 1 of Directive 2009/138/EC may have against their members by way of a call for supplementary contributions, within the following 12 months;

- (h) any future claims which mutual or mutual-type associations may have against their members by way of a call for supplementary contributions, within the following 12 months, provided that a call can be made on demand and is clear of encumbrances;
- (i) other legally binding commitments received by the insurance or reinsurance undertaking, provided that the item can be called up on demand and is clear of encumbrances.

Article 75

Tier 2 Ancillary own-funds — Features determining classification

In order to be classified as Tier 2, the ancillary own-fund items listed in Article 74 shall display the features of a basic own fund item classified in Tier 1 in accordance with Articles 69 and 71 once that item has been called up and paid in.

Article 76

Tier 3 Basic own-funds– List of own-fund items

The following basic own-fund items shall be deemed to possess the characteristics set out in Article 93(1)(b) of Directive 2009/138/EC, taking into consideration the features set out in Article 93(2) of that Directive, and shall be classified as Tier 3 where the following items display all of the features set out in Article 77:

- (a) the part excess of assets over liabilities, valued in accordance with Sections 1 and 2 of Chapter VI of Directive 2009/138/EC, comprising the following items:
 - (i) subordinated mutual member accounts;
 - (ii) preference shares and the related share premium account;
 - (iii) an amount equal to the value of net deferred tax assets;
- (b) subordinated liabilities valued in accordance with Article 75 of Directive 2009/138/EC.

Article 77

Tier 3 Basic own-funds– Features determining classification

- 1 The features referred to in Article 76 shall be the following:
 - a the basic own-fund item, in the case of items referred to in points (a)(i) and (ii) and point (b) of Article 76, ranks after the claims of all policy holders and beneficiaries and non-subordinated creditors;
 - b the basic own-fund item does not include features which may cause the insolvency of the insurance or reinsurance undertaking or may accelerate the process of the undertaking becoming insolvent;
 - c the basic own-fund item, in the case of items referred to in points (a)(i) and (ii) and point (b) of Article 76, is undated or has an original maturity of at least 5 years, where

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- the maturity date is the first contractual opportunity to repay or redeem the basic own-fund item;
- d the basic own-fund item, in the case of items referred to in points (a)(i) and (ii) and point (b) of Article 76, is only repayable or redeemable at the option of the insurance or reinsurance undertaking and the repayment or redemption of the basic own-fund item is subject to prior supervisory approval;
 - e the basic own-fund item, in the case of items referred to in points (a)(i) and (ii) and point (b) of Article 76, may include limited incentives to repay or redeem that basic own-fund item;
 - f the basic own-fund item, in the case of items referred to in points (a)(i) and (ii) and point (b) of Article 76, provides for the suspension of repayment or redemption where there is non-compliance with the Solvency Capital Requirement or repayment or redemption would lead to such non-compliance until the undertaking complies with the Solvency Capital Requirement and the repayment or redemption would not lead to non-compliance with the Solvency Capital Requirement;
 - g the basic own-fund item, in the case of items referred to in points (a)(i) and (ii) and point (b) of Article 76, provides for the deferral of distributions where there is non-compliance with the Minimum Capital Requirement or the distribution would lead to such non-compliance until the undertaking complies with the Minimum Capital Requirement and the distribution would not lead to non-compliance with the Minimum Capital Requirement;
 - h the basic own-fund item is free from encumbrances and is not connected with any other transaction, which could undermine the features that the item is required to possess in accordance with this Article.

Notwithstanding point (f), the basic own-fund item may only allow for the repayment or redemption of that item where there is non-compliance with the Solvency Capital Requirement or repayment or redemption would lead to such non-compliance, where all the following conditions are met:

- (i) the supervisory authority has exceptionally waived the suspension of repayment or redemption of that item;
- (ii) the item is exchanged for or converted into another Tier 1, Tier 2 basic own-fund item or Tier 3 basic own-fund item of at least the same quality;
- (iii) the Minimum Capital Requirement is complied with after the repayment or redemption.

2 For the purposes of this Article, the exchange or conversion of a basic own-fund item into another Tier 1, Tier 2 basic own-fund item or Tier 3 basic own-fund item or the repayment or redemption of a Tier 3 basic own-fund item out of the proceeds of a new basic own-fund item of at least the same quality shall not be deemed to be a repayment or redemption, provided that the exchange, conversion, repayment or redemption is subject to the approval of the supervisory authority.

3 For the purposes of point (f) of paragraph 1, references to the Solvency Capital Requirement shall be read as references to the Minimum Capital Requirement where non-compliance with the Minimum Capital Requirement occurs before non-compliance with the Solvency Capital Requirement.

4 For the purposes of point (e) of paragraph 1, undertakings shall consider incentives to redeem in the form of an interest rate step-up associated with a call option as limited where the

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step-up takes the form of a single increase in the coupon rate and results in an increase in the initial rate that is no greater than the higher of the following amounts:

- a 100 basis points, less the swap spread between the initial index basis and the stepped-up index basis;
- b 50 % of the initial credit spread, less the swap spread between the initial index basis and the stepped-up index basis.

Article 78

Tier 3 Ancillary own-funds– List of own-funds items

Ancillary own-fund items that have been approved by the supervisory authority in accordance with Article 90 of Directive 2009/138/EC, and which do not display all of the features set out in Article 75 shall be classified as Tier 3 ancillary own funds.

Article 79

Supervisory Authorities approval of the assessment and classification of own-fund items

1 Without prejudice to Article 90 of Directive 2009/138/EC, where an own-fund item is not included in the list of own-funds items set out in Articles 69, 72, 74, 76 and 78, insurance or reinsurance undertakings shall only consider that item as own funds where an approval of the item's assessment and classification has been received from the supervisory authority.

2 The supervisory authority shall assess the following, on the basis of documents submitted by the insurance or reinsurance undertaking, when approving the assessment and classification of own-fund items not included in the list of own-fund items set out in Articles 69, 72, 74, 76 and 78:

- a where the undertaking is applying for approval for classification as Tier 1, whether the basic own-fund item substantially possesses the characteristics set out in Article 93(1)(a) and (b) of Directive 2009/138/EC, taking into consideration the features set out in Article 93(2) of that Directive;
- b where the undertaking is applying for classification as Tier 2 basic own funds, whether the basic own-fund item substantially possesses the characteristics set out in Article 93(1)(b) of Directive 2009/138/EC, taking into consideration the features set out in Article 93(2) of that Directive;
- c where the undertaking is applying for classification as Tier 2 ancillary own funds, whether the ancillary own-fund item substantially possesses the characteristics in Article 93(1)(a) and (b) of Directive 2009/138/EC, taking into consideration the features set out in Article 93(2) of that Directive;
- d where the undertaking is applying for classification as Tier 3 basic own funds, whether the basic own-fund item possesses the characteristics set out in Article 93(1)(b) of Directive 2009/138/EC, taking into consideration the features set out in Article 93(2) of that Directive;
- e the legal enforceability of the contractual terms of the own-fund item in all relevant jurisdictions;
- f whether the own-fund item has been fully paid-in.

3 Basic own-fund items not included in the list of own-fund items set out in Articles 69, 72 and 76 shall only be classified as Tier 1 basic own funds where they are fully paid-in.

Status: Point in time view as at 02/04/2016.

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4 The inclusion of own-fund items approved by the supervisory authority in accordance with this Article shall be subject to quantitative limits set out in Article 82.

SECTION 3

Eligibility of own funds

Subsection 1

Ring-fenced funds

Article 80

Ring-fenced funds requiring adjustments

1 A reduction of the reconciliation reserve referred to in Article 70(1)(e) shall be required where own-fund items within a ring-fenced fund have a reduced capacity to fully absorb losses on a going-concern basis due to their lack of transferability within the insurance or reinsurance undertaking for any of the following reasons:

- a the items can only be used to cover losses on a defined portion of the insurance or reinsurance undertaking's insurance or reinsurance contracts;
- b the items can only be used to cover losses in respect of certain policy holders or beneficiaries;
- c the items can only be used to cover losses arising from particular risks or liabilities.

2 The own-fund items referred to in paragraph 1, (hereinafter referred to as 'restricted own-fund items'), shall not include the value of future transfers attributable to shareholders.

Article 81

Adjustment for ring-fenced funds and matching adjustment portfolios

1 For the purposes of calculating the reconciliation reserve, insurance and reinsurance undertakings shall reduce the excess of assets over liabilities referred to in Article 70 by comparing the following amounts:

- a the restricted own-fund items within the ring-fenced fund or matching adjustment portfolio;
- b the notional Solvency Capital Requirement for the ring-fenced fund or matching adjustment portfolio.

Where the insurance or reinsurance undertaking calculates the Solvency Capital Requirement using the standard formula, the notional Solvency Capital Requirement shall be calculated in accordance with Article 217.

Where the undertaking calculates the Solvency Capital Requirement using an internal model, the notional Solvency Capital Requirement shall be calculated using that internal model, as if the undertaking pursued only the business included in the ring-fenced fund or matching adjustment portfolio.

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2 By way of derogation from paragraph 1, where the assets, the liabilities and the risk within a ring-fenced fund are not material, insurance and reinsurance undertakings may reduce the reconciliation reserve by the total amount of restricted own-fund items.

Subsection 2

Quantitative limits

Article 82

Eligibility and limits applicable to Tiers 1, 2 and 3

1 As far as compliance with the Solvency Capital Requirement is concerned, the eligible amounts of Tier 2 and Tier 3 items shall be subject to all of the following quantitative limits:

- a the eligible amount of Tier 1 items shall be at least one half of the Solvency Capital Requirement;
- b the eligible amount of Tier 3 items shall be less than 15 % of the Solvency Capital Requirement;
- c the sum of the eligible amounts of Tier 2 and Tier 3 items shall not exceed 50 % of the Solvency Capital Requirement.

2 As far as compliance with the Minimum Capital Requirements is concerned, the eligible amounts of Tier 2 items shall be subject to all of the following quantitative limits:

- a the eligible amount of Tier 1 items shall be at least 80 % of the Minimum Capital Requirement;
- b the eligible amounts of Tier 2 items shall not exceed 20 % of the Minimum Capital Requirement.

3 Within the limit referred to in point (a) of paragraph 1 and point (a) of paragraph 2, the sum of the following basic own-fund items shall make up less than 20 % of the total amount of Tier 1 items:

- a items referred to in point (a)(iii) of Article 69;
- b items referred to in point (a)(v) of Article 69;
- c items referred to in point (b) of Article 69;
- d items that are included in Tier 1 basic own funds under the transitional arrangement set out in Article 308b(9) of Directive 2009/138/EC.

Status:

Point in time view as at 02/04/2016.

Changes to legislation:

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