

Directive 2005/68/EC of the European Parliament and of the Council of 16 November 2005 on reinsurance and amending Council Directives 73/239/EEC, 92/49/EEC as well as Directives 98/78/EC and 2002/83/EC (Text with EEA relevance) (repealed)

### TITLE III

## CONDITIONS GOVERNING THE BUSINESS OF REINSURANCE

### CHAPTER 3

#### Rules relating to the solvency margin and to the guarantee fund

##### Section 1

#### Available solvency margin

##### *Article 35*

#### General rule

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

##### *Article 36*

#### Eligible items

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

- a the paid-up share capital or, in the case of a mutual reinsurance undertaking, the effective initial fund plus any members' accounts which meet all the following criteria:
  - (i) the memorandum and articles of association shall stipulate that payments may be made from those accounts to members only in so far as this does not cause the available solvency margin to fall below the required level, or, after the dissolution of the undertaking, if all the undertaking's other debts have been settled;
  - (ii) the memorandum and articles of association shall stipulate, with respect to any payments referred to in point (i) for reasons other than the individual termination of membership, that the competent authorities must be notified at least one month in advance and can prohibit the payment within that period;
  - (iii) the relevant provisions of the memorandum and articles of association may be amended only after the competent authorities have declared that they have no objection to the amendment, without prejudice to the criteria stated in points (i) and (ii);

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- b statutory and free reserves which neither correspond to underwriting liabilities nor are classified as equalisation reserves;
- c the profit or loss brought forward after deduction of dividends to be paid.

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

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

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

- a participations which the reinsurance undertaking holds in the following entities:
  - (i) insurance undertakings within the meaning of Article 6 of Directive 73/239/EEC, Article 4 of Directive 2002/83/EC, or Article 1(b) of Directive 98/78/EC,
  - (ii) reinsurance undertakings within the meaning of Article 3 of this Directive or non-member country reinsurance undertakings within the meaning of Article 1(1) of Directive 98/78/EC,
  - (iii) insurance holding companies within the meaning of Article 1(i) of Directive 98/78/EC,
  - (iv) credit institutions and financial institutions within the meaning of Article 1(1) and (5) of Directive 2000/12/EC,
  - (v) investment firms and financial institutions within the meaning of Article 1(2) of Directive 93/22/EEC<sup>(1)</sup> and of Article 2(4) and (7) of Directive 93/6/EEC<sup>(2)</sup>;
- b each of the following items which the reinsurance undertaking holds in respect of the entities defined in (a) in which it holds a participation:
  - (i) instruments referred to in paragraph 4,
  - (ii) instruments referred to in Article 27(3) of Directive 2002/83/EC,
  - (iii) subordinated claims and instruments referred to in Article 35 and Article 36(3) of Directive 2000/12/EC.

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

As an alternative to the deduction of the items referred to in (a) and (b) of the third subparagraph which the reinsurance undertaking holds in credit institutions, investment firms and financial institutions, Member States may allow their reinsurance undertakings to apply *mutatis mutandis* methods 1, 2, or 3 of Annex I to Directive

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2002/87/EC. Method 1 (Accounting consolidation) shall only be applied if the competent authority is confident about the level of integrated management and internal control regarding the entities which would be included in the scope of consolidation. The method chosen shall be applied in a consistent manner over time.

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

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

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

Subordinated loan capital shall also fulfil the following conditions:

- (i) only fully paid-up funds may be taken into account;
- (ii) for loans with a fixed maturity, the original maturity shall be at least five years. No later than one year before the repayment date the reinsurance undertaking shall submit to the competent authorities for their approval a plan showing how the available solvency margin will be kept at or brought to the required level at maturity, unless the extent to which the loan may rank as a component of the available solvency margin is gradually reduced during at least the last five years before the repayment date. The competent authorities may authorise the early repayment of such loans provided that application is made by the issuing reinsurance undertaking and that its available solvency margin will not fall below the required level;
- (iii) loans the maturity of which is not fixed shall be repayable only subject to five years' notice unless the loans are no longer considered as a component of the available solvency margin or unless the prior consent of the competent authorities is specifically required for early repayment. In the latter event the reinsurance undertaking shall notify the competent authorities at least six months before the date of the proposed repayment, specifying the available solvency margin and the required solvency margin both before and after that repayment. The competent authorities shall authorise repayment only if the reinsurance undertaking's available solvency margin will not fall below the required level;
- (iv) the loan agreement shall not include any clause providing that in specified circumstances, other than the winding-up of the reinsurance undertaking, the debt will become repayable before the agreed repayment dates;

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- (v) the loan agreement may be amended only after the competent authorities have declared that they have no objection to the amendment;
  - b securities with no specified maturity date and other instruments, including cumulative preferential shares other than those referred to in point (a), up to 50 % of the available solvency margin or the required solvency margin, whichever is the smaller, for the total of such securities and the subordinated loan capital referred to in point (a) provided that they fulfil the following:
    - (i) they may not be repaid on the initiative of the bearer or without the prior consent of the competent authority;
    - (ii) the contract of issue shall enable the reinsurance undertaking to defer the payment of interest on the loan;
    - (iii) the lender's claims on the reinsurance undertaking shall rank entirely after those of all non-subordinated creditors;
    - (iv) the documents governing the issue of the securities shall provide for the loss-absorption capacity of the debt and unpaid interest, while enabling the reinsurance undertaking to continue its business;
    - (v) only fully paid-up amounts may be taken into account.
- 4 Upon application, with supporting evidence, by the reinsurance undertaking to the competent authority of the home Member State and with the agreement of that competent authority, the available solvency margin may also consist of:
- a one half of the unpaid share capital or initial fund, once the paid-up part amounts to 25 % of that share capital or fund, up to 50 % of the available solvency margin or the required solvency margin, whichever is the smaller;
  - b in the case of a non-life mutual or mutual-type association with variable contributions, any claim which it has against its members by way of a call for supplementary contribution, within the financial year, up to one half of the difference between the maximum contributions and the contributions actually called in, and subject to a limit of 50 % of the available solvency margin or the required solvency margin, whichever is the smaller. The competent national authorities shall establish guidelines laying down the conditions under which supplementary contributions may be accepted;
  - c any hidden net reserves arising out of the valuation of assets, in so far as such hidden net reserves are not of an exceptional nature.
- 5 In addition, with respect to life reinsurance activities, the available solvency margin may, upon application, with supporting evidence, by the reinsurance undertaking to the competent authority of the home Member State and with the agreement of that competent authority, consist of:
- a until 31 December 2009, an amount equal to 50 % of the undertaking's future profits, but not exceeding 25 % of the available solvency margin or the required solvency margin, whichever is the smaller; the amount of the future profits shall be obtained by multiplying the estimated annual profit by a factor which represents the average period left to run on policies; the factor used may not exceed six; the estimated annual profit shall not exceed the arithmetical average of the profits made over the last five financial years in the activities listed in Article 2(1) of Directive 2002/83/EC.

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

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- (i) when an actuarial report is submitted to the competent authorities substantiating the likelihood of emergence of these profits in the future; and
  - (ii) insofar as that part of future profits emerging from hidden net reserves referred to in paragraph 4(c) has not already been taken into account;
- b where Zillmerising is not practised or where, if practised, it is less than the loading for acquisition costs included in the premium, the difference between a non-Zillmerised or partially Zillmerised mathematical provision and a mathematical provision Zillmerised at a rate equal to the loading for acquisition costs included in the premium; this figure may not, however, exceed 3,5 % of the sum of the differences between the relevant capital sums of life reinsurance activities and the mathematical provisions for all policies for which Zillmerising is possible; the difference shall be reduced by the amount of any undepreciated acquisition costs entered as an asset.
- 6 Amendments to paragraphs 1 to 5 of this Article to take into account developments that justify a technical adjustment of the elements eligible for the available solvency margin shall be adopted in accordance with the procedure laid down in Article 55(2).

## Section 2

### Required solvency margin

#### Article 37

#### Required solvency margin for non-life reinsurance activities

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The sum so obtained shall be multiplied by the ratio existing in respect of the sum of the last three financial years between the amount of claims remaining to be borne by the undertaking after deduction of amounts recoverable under retrocession and the gross amount of claims; that ratio may in no case be less than 50 %. Upon application, with supporting evidence, by the reinsurance undertaking to the competent authority of

the home Member State and with the agreement of that authority, amounts recoverable from special purpose vehicles as referred to in Article 46 may also be deducted as retrocession.

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

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

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

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

#### *Article 38*

##### **Required solvency margin for life reinsurance activities**

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

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

#### *Article 39*

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

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

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

### Section 3

#### **Guarantee fund**

##### *Article 40*

#### **Amount of the guarantee fund**

1 One third of the required solvency margin as specified in Articles 37, 38 and 39 shall constitute the guarantee fund. This fund shall consist of the items listed in Article 36(1), (2) and (3) and, with the agreement of the competent authority of the home Member State, in Article 36(4)(c).

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

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

##### *Article 41*

#### **Review of the amount of the guarantee fund**

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

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

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

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



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- (1) Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field ([OJ L 141, 11.6.1993, p. 27](#)). Directive as last amended by Directive 2002/87/EC of the European Parliament and of the Council ([OJ L 35, 11.2.2003, p. 1](#)).
- (2) Council Directive 93/6/EEC of 15 March 1993 on the capital adequacy of investments firms and credit institutions ([OJ L 141, 11.6.1993, p. 1](#)). Directive as last amended by Directive 2005/1/EC.