



COMMISSION OF THE EUROPEAN COMMUNITIES

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Proposal for a

**DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**on reinsurance and amending Council Directives 73/239/EEC, 92/49/EEC and Directives  
98/78/EC and 2002/83/EC**

**{SEC(2004)443}**

(presented by the Commission)

## EXPLANATORY MEMORANDUM

### 1. GENERAL COMMENTS<sup>1</sup>

A single financial market in the EU will be a key factor in promoting the competitiveness of the European economy and the lowering the capital cost to companies. An integrated market, properly regulated and prudentially sound, will deliver major benefits to consumers and other market actors, through increased security against institutional default. The vehicle to achieve this integrated market is the Financial Services Action Plan. The Financial Services Action Plan announces a proposal for a directive on reinsurance supervision at the beginning of 2004.

Reinsurance is a structured risk transfer between an insurance undertaking and a reinsurance company. Reinsurance fulfils the following functions for an insurance company: reduction of technical risks, permanent transfer of technical risks to the reinsurer, increase of homogeneity of insurance portfolio, reduction of volatility of technical results, substitute for capital/own funds, supply of funds for financing purposes and supply of service provision.

In spite of its obvious connection to direct insurance business, there are some specific characteristics of reinsurance that may be important to highlight. There is no direct contractual relationship between the reinsurer and the original insured, and the policyholders have normally no priority to the assets of the reinsurer to cover their claims. Furthermore reinsurance is a business activity between professional parties. Reinsurance business is more international and has higher degrees of diversity in respect of geography and combinations of insured lines than direct insurance business.

The reinsurance sector plays a key role in the economy by providing wholesale cover for the risks assumed by insurance companies on behalf of their clients. While the average cession level in the EU is rather low (i.e. some 10% of all insurance premiums are reinsured), the cession level is relatively high for certain activities (i.e. 18% of non-life insurance premiums are reinsured, compared to 3% for life insurance premiums on average). Besides insuring insurers, reinsurers are also major financial intermediaries and institutional investors and reinsurers' financial assets represented 1% of the global securities market in 2001<sup>2</sup>. Accordingly, the stability of the reinsurance sector is not only vital to the stability of the insurance sector generally but also has important implications for the financial system as a whole.

Recent evidence of financial strain among reinsurers has focused the attention on the level and nature of risk assumed within the sector. Reinsurers face two risks in addition to those faced by primary insurers. First, they are usually exposed to greater volatility in their financial results because they protect the primary market against peak exposures such as catastrophe risks. In consequence of this risk, they need to maintain relatively high levels of capitalisation. Second, they may be called upon to support ailing subsidiaries, as they are often the top trading company in a group structure. Despite these additional risks, reinsurers operate in a global market where their activities are often not subject to prudential oversight or the regime is lighter than that applying to primary insurers. Moreover, there is no global framework for

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<sup>1</sup> For more extensive presentation of the issues included in this chapter, see the Extended Impact Assessment concerning the Proposal for a Reinsurance Directive available at the Commission website: [http://europa.eu.int/comm/internal\\_market/insurance/reinsurance\\_en.htm](http://europa.eu.int/comm/internal_market/insurance/reinsurance_en.htm)

<sup>2</sup> Source: "Reinsurance – a systemic risk?"; Sigma 5/2003, Swiss Re.

reinsurance supervision. This situation has raised concern about potential risks in the reinsurance industry. On the other hand, reinsurers can benefit from significant geographical and sectoral diversification effects to a greater extent than direct companies.

Reinsurance is a highly international industry with a limited number of large companies. In 2002, the total reinsurance premium of the 40 largest reinsurance groups amounted to USD 138 601 200 000, whereof USD 58 544 000 000 stemmed from EU reinsurers<sup>3</sup>. In the EU, Germany has a dominant position with companies as Munich Re, Hannover Re and Allianz Re. Lloyd's is the largest UK writer of reinsurance, and SCOR together with Axa Re are the largest French reinsurers.

### **1) The need for a European legal framework for reinsurance supervision**

There are currently no harmonised reinsurance supervision rules in the EU. The lack of an EU regulatory framework for reinsurance has resulted in significant differences in the level of supervision of reinsurance undertakings in the EU. The different national rules have created uncertainty for direct insurance companies (and their policyholders), barriers to trade within the internal market, administrative burden and costs as well as weakening the EU position in international trade negotiations:

***Uncertainty for direct insurance undertakings (and their policyholders):*** The different reinsurance supervision regimes in the EU have resulted in increased difficulties for direct insurance undertakings to choose their reinsurers in a prudent and cost-efficient way. The selection of reinsurers is of decisive importance for an insurance company, and could also affect the company's ability to pay claims towards policyholders.

***Barriers to trade:*** Certain EU countries use systems where assets of the reinsurer must be pledged (collateralised) in order to cover outstanding claims provisions. This makes optimal investment management more difficult and thus results in higher operational costs for reinsurance undertakings. This could in fact increase the price the reinsurer charges for taking over risks from direct insurance companies. Reinsurance companies may also decide not to be active in markets where the posting of collaterals is required, and consequently the availability of reinsurance protection will be more restricted.

***Administrative burden:*** In the EU, the Comité Européen des Assurances (CEA) and the OECD have identified administrative impediments for cross-border reinsurance services. The lack of mutual recognition between EU supervisory authorities in reinsurance in certain cases means that reinsurance undertakings are subject to different supervisory rules in several Member States. For reinsurance companies this could lead to significant double work and increased administrative burdens. Examples of burdensome administrative measures are the multiple fit and proper checks of the group's highest management, double requirement for auditors' confirmation of balances as well as the obligation for branches to issue financial statements according to local GAAP (generally accepted accounting principles) for the whole group.

***International trade negotiations:*** It is argued that the lack of a harmonised EU system makes international mutual recognition agreements more difficult. The absence of such agreements means that European reinsurers are confronted with important barriers to entry into foreign

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<sup>3</sup> Standard & Poor's, Global Reinsurance Highlights 2003 Edition, London/New York 2003.

markets, such as the requirement of posting collateral for the value of their commitments in the foreign market where the reinsurer intends to conduct business.

If no actions are taken at EU level, there is a risk that the internal market for reinsurance services would continue to work in a suboptimal way, which would harm the EU reinsurance industry. Negotiations with third markets on mutual recognition agreements could be significantly more difficult.

Internationally significant attention has been paid in recent years to reinsurance supervision. G7 and the IMF have expressed concern that lack of reinsurance regulation could impede international financial stability. In fact, at recent Financial Sector Assessment Programme (FSAP) reviews in Member States, IMF has reiterated the need for legislation in this field. The FSF (Financial Stability Forum) has repeatedly expressed concerns about the transparency of the reinsurance market and has therefore created a task force to address the issue. The OECD has ongoing work in the reinsurance field, particularly as concerns exchange of reinsurance company information between supervisors. The IAIS (International Association of Insurance Supervisors) reinsurance work is closely coordinated with the EU fast-track project. A set of principles for minimum requirements for supervision of reinsurers as well as a standard on reinsurance supervision have been adopted.

## **2) The approach of the Directive**

Early in the reinsurance supervision work, the Commission Services established three guiding principles for a future EU reinsurance supervision regime:

- The system should establish a sound and prudent regime in the interest of insurance policyholders. Strong and well-supervised reinsurers contribute to a stronger internal market and international financial stability.
- The system should build on essential coordination of Member States' legislation and mutual recognition of the supervision in the Member State where the reinsurance undertaking is licensed. Once licensed by its home Member State a reinsurance undertaking should automatically be allowed to conduct reinsurance business all over the European Community under the freedom of establishment and the freedom to provide services. No additional supervision or checks on the reinsurance undertaking should be performed by supervisors in host Member States. This approach has shown its suitability during many years in the direct insurance field, where it was introduced by the Third Insurance Directives<sup>4</sup>.
- The introduction of a harmonised system for reinsurance supervision should lead to the abolition of systems with pledging of assets to cover outstanding claims provisions.

After extensive consultation, the Commission has chosen to present a proposal for a directive with the following features:

- a supervisory approach based on harmonisation and mutual recognition
- fast-track approach for a directive based primarily on current direct supervision rules

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<sup>4</sup> Directive 92/49/EEC (OJ L 228, 11.8.1992, p. 1, as last amended by Directive 2002/87/EC of the European Parliament and of the Council (OJ L 35, 11.2.2003, p. 1), and Directive 92/96/EEC (OJ L 360, 9.12.1992, p.1), this Directive has been recast by Directive 2002/83/EC (OJ L 19.12.2002, p. 1).

- mandatory licensing system
- solvency margin requirements in line with those of direct insurance, however with the possibility to increase this margin up to 50 % through comitology for non-life reinsurance when this is objectively justified.

An EU supervisory approach should be based on *harmonised legal rules ensuring mutual recognition between Member States*. The Commission believes that insurance and reinsurance supervision is a public concern and requires public regulation. Other systems (for example, voluntary, disclosure-based approaches) would not provide sufficient trust in the supervisory system. The lack of tangible sanctions in such a disclosure-based approach could make the system less efficient when addressing potential problems in reinsurance undertakings.

The Commission believes that there is a need for expedient action to achieve tangible results in a short to medium-term perspective. Such a *"fast-track" solution* would take its starting point in current direct supervision rules and business practice, when appropriate with adjustments. The long-term project "Solvency II" for direct insurance will however also affect reinsurance, and this work could to a fairly large extent build on the achievements in a fast-track project.

The proposed Directive requires reinsurance undertakings – like direct insurance companies – to be *licensed in order to conduct reinsurance business*. The efficiency of a licensing system has been proved by its wide use in the financial sector. Such a system also gives a clear mandate to supervisors, including the power to remove unsuited companies from the reinsurance market. A licensing system will furthermore ensure consistent treatment of all reinsurance entities in the EU, which would not have been the case had a so called "passport" solution (in which a company itself could choose whether to apply for a passport) been chosen. Moreover, this system will increase the responsibility of the Home Member State's supervisory authorities, as they become the sole competent authority for the prudential supervision of the reinsurance undertaking within the Community. The system will require enhanced cooperation between Member States' competent authorities.

Insurance and reinsurance are related activities and consequently the *solvency requirements* for the two activities should be similar. The proposed Directive does therefore contain solvency requirements for life reinsurance that are identical to those of life insurance. For non-life reinsurance the starting point is that similar rules should apply. However, for non-life reinsurance the proposed Directive contains a possibility for increased solvency requirement after a comitology decision. The Commission considers this "class enhancement" possibility for certain reinsurance classes or types of reinsurance contracts (up to 50%) as an essential part of the proposed Directive. It will provide an important tool to fine-tune the solvency requirements to better fit the nature of reinsurance business. The comitology option will only be used after detailed analysis and extensive consultation with interested parties. In order to ensure a level playing field between reinsurance undertakings and insurance undertakings carrying on reinsurance activities, the proposal also provides for the subsequent adaptations to the non-life insurance Directive 73/239/EEC and life assurance Directive 2002/83/EC. Accordingly, insurance undertakings which conduct reinsurance by way of acceptances activities shall be subject to the provisions of the reinsurance directive in respect of the required solvency margin, where the volume of their reinsurance activities represents a significant part of their entire business (Articles 57(5) and 59(8)). These provisions will only be applicable when the decision adjusting the required solvency margin for non-life reinsurance activities has been adopted by the Commission.

## 2. CONSULTATION OF STAKEHOLDERS AND INTERESTED PARTIES AND IMPACT ASSESSMENT

### a) Consultation of stakeholders and interested parties

Stakeholders have been consulted regularly during the project, and have provided the Commission with very important input. In the beginning of the project, a major hearing with over 100 participants was organised, and subsequently all participants (as well as other interested parties) were included in a mailing -list that received all documents produced under the project or a message stating that new documents have been posted on the Commission's reinsurance website. A study on reinsurance supervision was also published.<sup>5</sup>

The project has been followed by interested parties from a broad variety of sectors and professions. The sectors consulted are basically the following: insurance (commercial companies, mutuals, cooperatives etc), insurance associations (EU level as well as nationally), insurance intermediaries (brokers etc), accounting associations, actuarial associations, industry general (UNICE), analysts, risk/captive managers, SME-organisation (BEUC), consulting firms, banks, lawyer firms, rating agencies.

The Commission has benefited significantly from the input given by stakeholders and interested parties, particularly as the project has involved many very difficult technical matters. The documents sent out for comments dealt with policy issues as well as detailed matters.

#### *Comments received on the objectives of the reinsurance project*

Commentators have generally been very supportive of all the three major objectives of the project. A few Member States have raised comments on the fact that the essential coordination of national's legislation and mutual recognition would prohibit additional checks or requirements by Host States. In particular, the Member States that currently use collateralisation have obviously expressed objections to abolition of systems with pledging of assets to cover outstanding claims technical provisions. However all other stakeholders have unanimously supported the objective as formulated by the Commission services. Certain Member States have commented on the difference in collaterals between the life and non-life insurance fields.

#### *Comments received on the major policy issues*

#### Approach to a supervisory framework for reinsurance

Most commentators have been in favour of a supervisory approach to reinsurance. Certain companies have argued in favour of voluntary solutions, but a greater number of companies and associations have stated that only a supervisory solution would give an additional quality mark to EU reinsurance. A status quo alternative has not been supported by any of the major stakeholders.

Member States have argued in favour of a fast-track approach, and this has also been the clear view of the Insurance Committee. Other stakeholders have also been very supportive of a fast-track solution based on current direct supervision rules. Technical specialists (like actuaries and accountants) have however pointed out that the restricted time frame scheduled (2004)

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<sup>5</sup> [http://europa.eu.int/comm/internal\\_market/insurance/studies/reins-sup\\_en.htm](http://europa.eu.int/comm/internal_market/insurance/studies/reins-sup_en.htm)

would limit the number of possible solutions, thereby postponing the introduction of certain methods until the Solvency II project is finalised.

Solvency requirements for non-life reinsurance: The reactions from stakeholders on the level of the solvency requirements have been many and strong. There has been a large number of meetings with interested parties, particularly the insurance industry, the captive reinsurance industry, risk managers, actuaries, consultants and accountants. Generally, industry representatives and insurance consultants have argued that reinsurance is an activity that is close to direct insurance and therefore the same solvency requirements should apply. Some insurance supervisors have however strongly taken the view that reinsurance is more volatile and difficult to supervise and consequently a slightly higher requirement would be appropriate. The Commission has taken account of the different views expressed when elaborating the solvency requirements laid down in the proposal for a Directive. (Articles 37 and 40)

Solvency requirements for life reinsurance: This issue has also been the subject of much discussion, both as regards the actual requirements as the calculation methods. The Commission's Services have in fact consulted on different solutions. Considering the comments received, the Commission has concluded that the same approach as direct insurance (use direct life rules for life reinsurance, direct non-life rules for non-life reinsurance) would be preferable (Articles 38- 40).

*Comments received on detailed legal issues.*

During 2003 there have also been several consultations on detailed legal issues. The current proposal has been prepared taking account of comments from interested parties, in particular the insurance industry and the actuarial profession. Some of the submissions were very detailed and provided very useful input to the work of the Commission Services.

## **b) Impact assessment**

An extended impact assessment has been carried out in order to identify whether there is a need for action at EU level and in case of a positive reply, the action required.

The impact assessment shows an overall agreement on the need for such an action if the objectives referred to in Section 1 of this explanatory memorandum were to be achieved.

With regard to the different policy alternatives considered to reach these objectives, three main options were considered:

1. Status quo, *i.e.* no changes to the current situation
2. Market mechanism solution/voluntary disclosure of reinsurance information, and alternatively a recommendation concerning indirect supervision practice.
3. Supervisory solutions.

As stated earlier in Section 2, the majority of Member States and industry organisations believe that there is a need for supervisory action in the field. Option 1 has not received support by practically no commentator. Option 2 was also thought as not providing sufficient trust in the supervisory system. The lack of tangible sanctions in such a disclosure-based approach could make the system less efficient when addressing potential problems in reinsurance undertakings.

As far as the option 3 is concerned (supervisory approach), two alternatives were considered:

1. A voluntary passport system for companies wanting to adhere to the system
2. A mandatory licensing system.

After wide consultation with Member State, insurance industry and other interested parties the Commission has decided to propose a licensing system. A licensing system is in line with the approach carried out by the EU in order to achieve the internal market in the financial sector in general and in insurance in particular (single license and home country control of prudential issues). Such a system has showed its efficiency since its establishment by the third insurance Directives in 1994. It ensures the financial soundness of reinsurance undertakings, and therefore the stability of insurance markets, since it applies to any Community reinsurance undertaking and not only those having a European perspective. A licensing system would furthermore lead to more coordination between Member States' treatments of all reinsurers and it will best suited to meet the objective of establishing a true internal market for reinsurance. Last the introduction of a supervisory regime based on supervision of all reinsurance undertakings by public competent authorities is also in line with the direction of the ongoing reinsurance supervision project carried out by IAIS, to which all Member States and the European Commission are members.

The extended impact assessment also was conducted in respect of quantitative solvency requirements for reinsurance undertakings. Two basic possible approaches were discussed:

1. alternatives where solvency requirements for reinsurance undertakings are close to those required for direct insurance
2. alternatives where solvency requirements for reinsurance undertakings are higher than those required for direct insurance.

The Commission has finally decided to set up a regime which is built on the solvency requirements set out in existing insurance Directives. However, in order to take account of the specificities of some types of reinsurance contracts or specific lines of business in non-life reinsurance, the proposal provides for the possibility of increasing the required solvency margin up to 50% for classes other than liability risks. This increasing shall be made by the Commission, in the exercise of its implementing powers, after having consulted the Insurance Committee.

### **3. LEGAL BASIS OF THE PROPOSAL**

This proposal is based on Articles 47(2) and 55 of the Treaty, which are the legal basis to adopt Community measures aimed at achieving the Internal Market in the services sector. The chosen instrument is the Directive, since it appears to be the most appropriate to achieve the objectives pursued. Moreover the legislative action of the European Union to achieve the internal market in insurance has been carried out by means of Directives based on these provisions of the Treaty. Last, the provisions of this Directive do not go beyond what it is necessary to achieve the objectives pursued.

#### 4. COMMENTS ON THE ARTICLES

This Proposal lays down a supervisory regime for reinsurance which is consistent with the existing legal framework for insurance. It is built on the approach followed by the current existing insurance Directives. Some of the provisions of Directives 73/239/EEC, 92/49/EEC and 2002/83/EC which are reproduced in this Directive are long; this is in particular the case of the provisions concerning the conditions of authorisation of a reinsurance undertaking, qualifying holdings, professional secrecy and solvency margin. This often results in complex provisions, which presentation may not be consistent with the current guidelines for drafting Community legislation. It is not necessary for the interpretation that a single article covers an entire aspect of the rules laid down in a legal act. Therefore the provisions of this Proposal are broken down in articles, which are grouped as appropriate in titles, chapters and sections, in order to facilitate their comprehension and clarity.

##### **Article 1: Purpose of the Directive - Scope**

The purpose of this Directive is to lay down the legal framework for prudential supervision of reinsurance activities in the Community. As stated earlier, there is currently no Community legislation dealing with reinsurance supervision. As a result, reinsurance undertakings which conduct only reinsurance business (professional reinsurers) are not subject to any particular Community provisions.

The Directive will thus fill a gap in the Community regime of supervision on insurance. It will apply to reinsurance a supervisory regime based on the same principles applicable to direct insurance, namely, the principles of single license and prudential supervision of the reinsurance undertaking by its home Member State's competent authorities.

This Directive applies to reinsurance undertakings having their head office on the Community which conduct only reinsurance business (professional reinsurers). The Directive does not apply to those insurance undertakings already subject to non-life insurance and life assurance Directives<sup>6</sup>, since their reinsurance activity by means of acceptances is covered by these Directives. In addition, insurance undertakings and bodies which are excluded from the scope of above Directives are also excluded from the scope of the present Directive. However provisions of this Directive concerning the calculation of the required solvency margin (Articles 35-39) may be applicable to insurance undertakings subject to non-life and life directives in respect of their reinsurance acceptances (See Articles 57(5) and 59(8)).

In order to take account of a very special situation that might arise in a Member State where it is not possible to obtain reinsurance cover in the commercial market, the proposal does not apply to the provision of reinsurance cover conducted by a Member State, when it acts as a reinsurer of last resort for reasons of public interest. However this provision does not exempt the Member State from complying with Community provisions concerning competition rules and state aids. An example is the situation that arose in the air insurance sector after the attacks of 11<sup>th</sup> September 2001, where the reinsurance market failed to provide reinsurance cover for some risks. Member States were prompted to provide such a reinsurance cover. The schemes set up were examined under EU law and in particular state aid rules before being authorised.

##### **Article 2: Definitions**

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<sup>6</sup> Directives 73/239/EEC (OJ, L 228, 16.8.1973, p. 3), Directive 92/49/EEC (OJ L 228, 11.8.1992, p. 1), Directive 2002/83/EC (OJ L 345, 19.12.2002, p. 1)

Article 2 contains definitions concerning the essential concepts employed in the proposal, in order to clarify their meaning and hence contribute to a better understanding. Most of these concepts have already been employed in other Community legal acts applicable to insurance, such as the Directives 2002/83/EC on life assurance, 73/239/EEC and 92/49/EEC on non-life insurance, 98/78/EC on the supplementary supervision of insurance undertakings in an insurance group.

A definition of "captive reinsurance undertaking" is given to refer to those reinsurance undertakings which are owned by one or several industrial or commercial firms or by a financial undertaking other than an insurance undertaking or a reinsurance undertaking or a group of insurance or reinsurance. The objective of such undertakings is to provide reinsurance cover *exclusively* concerning the risks of the undertaking or group of undertakings to which the captive reinsurer belongs or to an undertaking or group of undertakings of which the reinsurance captive is part. This definition is necessary since the proposal provides for a special regime for these undertakings in respect of the minimum guarantee fund required in Article 40 to conduct reinsurance business.

### **Articles 3-14: Provisions relating to the taking-up of the business of reinsurance**

The proposal for a Directive follows the approach of the current insurance Directives with regard the taking-up of reinsurance activities in the Community. The proposal lays down the principles of single license and home country control for the prudential supervision of reinsurance undertakings. This is possible because of the coordination carried out of the essential aspects regarding the supervision of reinsurance undertakings, which permits the mutual recognition of authorisations and prudential supervisory systems of Member States.

Accordingly, a reinsurance undertaking shall be subject to a prior official authorisation that shall be granted by the competent authorities of its home Member State. The proposal lays down the minimum conditions necessary to obtain the official authorisation. The reinsurance undertaking must have a specific legal form, it must submit a scheme of operations providing essential information on the business plan, it has also to possess the minimum guarantee fund provided for in Article 40. The Directive also requires that the reinsurance undertaking be effectively run by managers who have adequate technical qualifications or experience. The reinsurance undertaking must limit its objects to the business of reinsurance and related operations. This requirement may allow a reinsurance undertaking to carry on, for instance, activities such as provision of statistical or actuarial advice, risk analysis or research for its clients. It may also include a holding company function and activities with respect to financial sector activities within the meaning of Article 2 point 8 of Directive 2002/87/EC. The latter activities will be in any case subject to the provisions laid down on supplementary supervision of insurance or reinsurance groups and financial conglomerates laid down by Directives 98/78/EC and 2002/87/EC (Articles 5-11).

Furthermore, before granting the authorisation, the competent authorities must be informed of the identity of the members or shareholders with a qualifying participation in the reinsurance undertaking. The purpose of this provision is to enable the competent authorities to assess the suitability of the shareholders, in order to ensure the sound and prudent management of the reinsurance undertaking. Should they not be satisfied as to these qualifications, they shall not grant the authorisation. Equally, where close links exist between the reinsurance undertaking and other natural or legal persons, the authorisation shall be refused when those links do not enable the competent authorities to exercise effectively their supervisory functions. These requirements pursue a prudential objective, namely to ensure both that there is in place a sound management and that the supervision of the reinsurance undertaking is effective. Other

objectives based on considerations such as industrial or economic policy of the country or market needs are not covered by these provisions and should be prohibited when examining the application for authorisation as they would be in conflict with the principles of the Treaty (Articles 7, 9, 10 and 12).

The application for authorisation has to be considered within a period of six months after it has been submitted by the reinsurance undertaking. The refusal as well as the withdrawal of the authorisation shall be motivated stating the precise grounds for such a rejection. The reinsurance undertaking must have the right to apply to the courts for the legal review of the decision (Article 13).

The authorisation granted is valid for the whole Community. It allows the reinsurance undertaking to conduct business thorough the Community, under the freedom of establishment and the free provision of services, without further formalities (Article 4).

### **Articles 15-31: Conditions governing the business of reinsurance. Principles and methods of prudential supervision.**

A supervisory regime based upon a system of a single authorisation granted by the competent authorities of the Home Member State of the reinsurance undertaking and valid throughout the entire Community calls for devolution of powers to supervision on the competent authorities which granted the authorisation so as to guarantee full compliance with the conditions governing the pursuit of business by the reinsurance undertaking, whether it be by way of establishment or by way of freedom of services.

Article 15 of this proposal sets out the exclusive competence of the home Member State's competent authorities in respect of the financial supervision of the reinsurance undertaking, including the activities it carries on either through branches or by way of freedom of services.

Because of the exclusive competence of the home Member State in respect of supervision of all the financial aspects of a reinsurance undertaking, the competent authorities of a reinsurance undertaking may not refuse a retrocession contract concluded by this reinsurance undertaking with a Community reinsurance undertaking covered by this Directive<sup>7</sup> on the grounds directly related to the financial soundness of that reinsurance (or insurance) undertaking. Such an indirect supervision of these undertakings would mean an interference with the supervisory powers of the competent authorities of these undertakings and would put into question the fundamental principle of the mutual recognition which is at the root of the legal framework laid down by this proposal.

The reinsurance undertaking must have sound administrative and accounting procedures as well as adequate internal control mechanisms. This is needed to ensure an orderly and financially stable pursuit of the activities. The Home Member State shall establish the conditions to ensure that this requirement is met.

Article 16 states the right of the Home Member State's competent authorities to carry out on-the-spot verification of branches of the reinsurance undertaking in other Member States. It

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<sup>7</sup> Or a Community insurance undertaking authorised in accordance with the non-life insurance or life assurance Directives (Directives 73/239/EEC and 2002/83/EC).

lays down the procedure to carry out such verification. This provision is similar to those laid down in the non-life and life insurance Directives<sup>8</sup>.

In order to ensure the efficiency of the supervision carried out over the reinsurance undertaking, the competent authorities must have appropriate powers to make detailed enquiries regarding the reinsurance undertaking, request submission of documents, or take measures, such as sanctions, on the reinsurance undertaking or its directors or managers (Article 17).

Articles 19-23 lay down specific provisions regarding the supervision of qualifying holdings in a reinsurance undertaking. Their purpose is to ensure that the competent authorities are aware of the ownership structure of the reinsurance undertaking. This provision is the corollary of the supervision of qualifying shareholders at the moment of considering the application for the authorisation laid down in Article 12. This regime is the same already applicable to insurance<sup>9</sup> and other financial services.

Articles 24-30 provide for the confidentiality of information held by competent authorities. All persons working or having worked for the competent authorities, included auditors and experts acting on behalf of the competent authorities, shall be bound by the obligation of professional secrecy. The confidential nature of this information does not prevent competent authorities from exchanging information regarding the supervision of reinsurance undertakings, since it aims at ensuring the proper supervision of the reinsurance undertaking. In any case the information exchanged is also subject to the confidentiality requirement and it may only be disclosed with the express consent of the competent authorities which forwarded that information.

Articles 28-30 also sets out the conditions and circumstances under which this information may be disclosed to authorities and bodies other than reinsurance supervisory authorities. The regime laid down is the same applicable to insurance undertakings<sup>10</sup>.

Article 31 provides the duty for auditors to report promptly to the competent authority of the home Member State any fact or decision concerning the reinsurance undertaking, which affect the conditions governing the pursuit of reinsurance business and which they discover during the performance of their tasks in the reinsurance undertaking or in any undertaking having close links with the reinsurance undertaking. The Directive follows the regime already applied to insurance undertakings.<sup>11</sup>

### **Articles 32-34: Rules relating to technical provisions**

Technical provisions are a fundamental part of insurance technique. Indeed they must enable an insurance or reinsurance undertaking to meet its commitments arising out of insurance or reinsurance contracts. For that reason, requiring any insurance (or reinsurance) undertaking to establish adequate technical provisions is a core principle of a supervisory regime for insurance or reinsurance. In a system of single authorisation granted by the home Member State, it is up to the competent authorities of the home Member State to require the insurance

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<sup>8</sup> Directive 73/239/EEC, art. 16, as amended by Directive 92/49/EEC, art. 11 and Directive 2002/83/EC art. 11.

<sup>9</sup> Directive 92/49/EEC, art. 15 and Directive 2002/83/EC, art. 15.

<sup>10</sup> Directive 92/49/EEC, art.16 and Directive 2002/83/EC, art. 16.

<sup>11</sup> Directive 92/49/EEC, art 16a) inserted by Directive 95/26/EC (OJ L 168, 18.7.1995, p. 7) and Directive 2002/83/EC, art. 17.

reinsurance undertaking to establish adequate technical provisions in respect of the whole business of the undertaking, including those carried on under the freedom of establishment and the free provision of services in the Community. Moreover the home Member State must verify compliance with this requirement and have also at its disposal appropriate means to ensure such compliance.

Article 32 lays down the principle of home country control for the definition and calculation of the technical provisions of reinsurance undertakings. The amount of such technical provisions shall be determined in accordance with the rules laid down in Directive 91/674/EEC on the annual accounts of insurance undertakings and consolidated accounts of insurance undertakings<sup>12</sup>. The proposal also provides that, in respect of life reinsurance activities, the Home Member State may also lay down more specific rules for the calculation of the technical provisions in accordance with the principles set up in Article 20 of Directive 2002/83/EC on life assurance. This provision sets out the actuarial principles to be followed to establish the technical provisions for life assurance activities.

The home Member State shall also require its own reinsurance undertakings to set up an equalization reserve in respect of credit reinsurance activities (Article 33). The amount of such reserve shall be calculated in accordance with the rules provided for in Directive 73/239/EEC, in particular the Annex, which sets out four methods regarded as equivalent. The home Member State may exempt reinsurance undertakings for which credit reinsurance does not represent an important part of their activity, from the obligation to set up the equalization reserve.

The home Member State may also require its own reinsurance undertakings to set up equalization reserves for classes of risks other than credit reinsurance, following the rules laid down by that home Member State. This is in line with existing legislation on insurance, in particular Directive 73/239/EEC as well as Directive 91/674/EEC on insurance undertakings annual accounts.

By introducing a supervisory regime for reinsurance undertakings, which so far are not subject to a Community legal framework, the corollary is the abolition of the requirement of pledging of assets used to cover unearned premiums and outstanding claims provisions of a reinsurance undertaking where it is reinsured by a reinsurance undertaking authorised in accordance with this Directive, or an insurance undertaking authorised in accordance with Directives 73/239/EEC (non-life insurance) or 2002/83/EC (life assurance). However a Member State remain competent to impose pledging of assets used to cover the above technical provisions of its own reinsurance undertakings where they are reinsured by non-Community reinsurance undertakings, since these later are not subject to the supervisory regime of single authorisation and mutual recognition of this Directive.

Article 34 proposes a qualitative approach to investment rules. Specificities of reinsurance business make such an approach preferable to the more quantitative method used in the direct insurance field. The article states that the assets should take account of the type of business carried out by the reinsurance entity, the amount and the duration of the expected claims payments in order to secure sufficiency, liquidity, quality, profitability and matching of the investments. For non-life reinsurance, the matching requirement should be seen in the light of business practices and the inherent complexity to determine the duration of the liability cash-

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<sup>12</sup> OJ L 374, 31.12.1991 p.7.

flows. The investments should furthermore be diversified and adequately spread in order to enable response to changing economic circumstances.

### **Articles 35-41: Solvency margin of reinsurance undertakings**

A solvency margin is an important element of prudential supervision. This proposal lays down solvency requirements for reinsurance undertakings which are based on the current rules for insurance undertakings. As it has been pointed out earlier, insurance and reinsurance are related activities and consequently the solvency requirements for the two activities should be similar.

With regard to non-life reinsurance business, the proposal applies the requirements set out in the non-life insurance Directive 73/239/EEC (Article 37). However, due to the particular nature of some types of reinsurance contracts or specific lines of business, the proposal contains the possibility of increasing the required solvency margin. Already the non-life insurance Directive provides for an increase of 50% for liability insurances, because they are subject to a particularly volatile risk profile. The proposal provides for an increasing up to 50% of the solvency margin in respect of specific types or classes of business other than liability classes. The adjustment of the solvency margin shall be made by the Commission, after consulting the Insurance Committee, in the exercise of its implementing powers conferred on by the Treaty. These measures should be adopted following the regulatory procedure provided for in Article 5 of Decision 1999/648/EC (Article 55). This enhancement of the solvency margin will be only used after detailed analysis and extensive consultation with interested parties.

In order to ensure a level playing field between reinsurance undertakings and insurance undertakings carrying on reinsurance activities, the proposal provides for the subsequent adaptations to the non-life insurance Directive 73/239/EEC and life assurance Directive 2002/83/EC. Accordingly, insurance undertakings which conduct reinsurance by way of acceptance activities shall be subject to the provisions of the reinsurance directive in respect of the required solvency margin, where the volume of their reinsurance activities represents a significant part of their entire business (Articles 57(5) and 59(8)). These provisions will be applicable when the decision adjusting the required solvency margin for non-life reinsurance activities has been adopted by the Commission (Article 43).

As far as life reinsurance is concerned, the required solvency margin shall be calculated in accordance with the rules laid down in the life insurance Directive 2002/83/EC (Article 38).

Where a reinsurance undertaking conducts simultaneously life and non-life reinsurance business, the required solvency margin shall cover the total sum of required solvency margins in respect of both non-life and life reinsurance activities (Article 39).

The available solvency margin shall be represented by the assets listed in Article 36. The assets allowed are those already authorised by non-life and life insurance Directives to represent the solvency margin.

Article 40 refers to the minimum guarantee fund required to conduct reinsurance activities. The guarantee fund refers to the minimum capital requirement that a reinsurance undertaking must permanently have in order to engage in reinsurance business with the appropriate financial soundness. The proposal fixes a guarantee fund which may not be less than EUR 3 million. However, in respect of captive reinsurance undertakings, the home Member State may set the guarantee fund as to EUR 1 million. This provision aims at taking account of the

special characteristics of captive reinsurance undertakings, and in particular the fact that they usually are medium/small size undertakings and their activity is confined exclusively to the cover risks concerning the undertakings to which the captive reinsurer belongs.

#### **Articles 42-44: Reinsurance undertakings in difficulty - Withdrawal of the authorisation**

The competent authorities of a reinsurance undertaking should have the appropriate powers to take action against a reinsurance undertaking where its financial situation deteriorates, for instance, where it does not establish adequate technical provisions or the solvency margin does not attain the required level. In such cases, the competent authorities shall have the power to require a financial plan, a restoration plan a financial recovery plan or to prohibit the free disposal of assets of the reinsurance undertaking.

Likewise, it is essential to provide that the authorisation granted to the reinsurance undertaking may be withdrawn in certain specific cases (*i.e.* non fulfilment of the conditions for authorisation, serious failure to comply with the conditions and regulations to conduct business, etc.).

The rules laid down in this proposal are identical to those already applied to insurance undertakings.

#### **Articles 45-46: Reinsurance activities conducted by means of the freedom of establishment and the free provision of services**

A reinsurance undertaking duly authorised by the competent authorities of the home Member State is entitled to carry on reinsurance business throughout the entire Community, under either the right of establishment or the freedom to provide services (Article 4(1)).

Article 45 sets out provisions concerning the case where a reinsurance undertaking, acting under the freedom of establishment or the free provision of services, does not comply with the legal provisions applicable in the host Member State. The regime proposed, which is also inspired by the regime laid down in insurance directives, is rooted in the cooperation between the competent authorities of the home and the host Member States.

Article 46 establishes the principle of equality of treatment of all reinsured creditors in the event of the winding-up of a reinsurance undertaking, without any distinction being made on grounds relating to the manner in which reinsurance contracts were underwritten; *i.e.* freedom of establishment or free provision of services. However this provision does not introduce a co-ordination of national rules on winding-up. Such a co-ordination in respect of insurance undertaking has been carried out by Directive 2001/17/EC (insurance winding-up Directive)<sup>13</sup>. The insurance winding-up Directive may also need to be adapted, after careful examination, at a later stage in order to bring into its scope reinsurance undertakings.

#### **Articles 47-50: Third country reinsurance undertakings.**

Reinsurance undertakings which have their head office in a third country and which conduct reinsurance business in a Member State shall not be applied a treatment which is more favourable than that afforded to reinsurance undertakings which have their head office in that Member State (Article 47).

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<sup>13</sup> OJ L L 110, 20.04.2001 p.28.

Article 48 provides for the possibility to conclude agreements with third countries regarding the supervision of reinsurance undertakings. The purpose of these international agreements is, in particular, the exchange of information between competent authorities of the EU and the third countries concerned in respect of reinsurance undertakings as well as to provide for mutual recognition of supervisory rules and practices on reinsurance between the EU and the third countries. This provision would be of significant importance in order to tackle regulatory barriers to reinsurance which hinder the entry of Community reinsurance undertakings into third countries.

**Articles 51-54: Rights acquired by existing reinsurance undertakings - Reinsurance undertakings in cessation of activities.**

A reinsurance undertaking which was entitled or authorised to conduct reinsurance business in accordance with the provisions of its home Member State before the date of implementation of this Directive may continue to do so without requesting an authorisation. However, the reinsurance undertaking shall be subject to the provisions of the Directive, in particular the requirements regarding the financial soundness of the reinsurance undertaking (technical provisions, solvency margin and guarantee fund), the professional capacity and good repute of the managers or the suitability of the qualifying shareholders. The directive allows Member States to grant a transitional period of two years in order to avoid that existing reinsurance undertakings run into financial trouble because of the effort to comply with these requirements (Article 51).

On the other hand, the Directive does not apply to reinsurance undertakings which at the time of implementation of the directive have stopped underwriting new reinsurance contracts and exclusively administer their existing portfolio in order to terminate their activity. However, as these undertakings shall not be subject to the single authorisation regime laid down in the Directive, it is essential for the sake of transparency and legal certainty, that Member States draw up the list of the reinsurance undertakings concerned and communicate to all Member States (Article 52).

Lastly Article 53 provides the right for a reinsurance undertaking to apply for judicial review of any decision taken in respect of it by competent authorities when applying their national rules adopted in implementation of this Directive.

**Articles 55-56: Implementing powers of the Commission to make technical adjustments to the directive.**

The proposal lays down the possibility to make technical adjustments to specific rules of the Directive. The Directive confers on the Commission implementing powers in respect of the provisions expressly listed in Article 56. In the exercise of its implementing powers the Commission is assisted by the Insurance Committee laid down by Directive 91/675/EEC. The measures to be adopted by the Commission shall be subject to the procedure laid down in Article 5(6) of Decision 1999/648/EC which lays down the procedures for the exercise of implementing powers conferred on the Commission.

Implementing powers shall be in particular used to enhance the required solvency margin for specific types or contracts or activities in classes of business other than liability classes (Article 37(3) and (4)).

## Articles 57-60: Technical adaptations to Non-life, Life and Insurance Groups Directives

The introduction of a Community regulatory framework for reinsurance has an impact on the existing directives on insurance (non-life, life and insurance groups)<sup>14</sup>. To the extent that the present proposal once adopted shall complete this legislative framework for insurance sector, it appears necessary to take account of it in order to ensure a consistent regulatory framework. Accordingly, the existing insurance directives need to be adapted. This is the case, for instance, of the indirect supervision of a reinsurance undertaking carried out by the competent authorities of the insurance undertaking who has concluded a reinsurance contract with Community reinsurer subject to this Directive<sup>15</sup>. The competent authority of the insurance undertaking may not refuse such a reinsurance contract on the grounds directly related to the financial soundness of that reinsurer.

The proposal also provides for the abolition of the requirement of pledging of assets used to cover unearned premiums and outstanding claims provisions of an insurance undertaking where it is reinsured by a reinsurance undertaking authorised in accordance with this Directive, or an insurance undertaking authorised in accordance with Directives 73/239/EEC (non-life insurance) or 2002/83/EC (life assurance).

These adaptations are also prompted by the purpose of submitting direct insurance undertakings accepting reinsurance to the solvency requirements which would be laid down for reinsurance undertakings and ensuring a level playing field amongst different undertakings writing inwards reinsurance business.

The insurance groups Directive 98/78/EC is also adapted in order to take account of the fact that EU reinsurance undertakings shall be subject to supervision<sup>16</sup>. A subsequent adaptation of Directive 2002/87/EC relating the financial conglomerates<sup>17</sup> will also be necessary.

Furthermore the Directive 2001/17/EC may also need to be adapted in order to bring into its scope reinsurance undertaking since they are not currently subject to the insurance winding-up Directive. Further work is necessary in this respect in order to identify the issues that need to be considered in order to make appropriate adaptations.

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<sup>14</sup> Non-Life: Directives 73/239/EEC, 88/357/EEC, 92/49/EEC; Life: Directive 2002/83/EEC; Insurance Groups: Directive 98/78/EEC (OJ L 330, 5.12.1998, p. 1).

<sup>15</sup> Or a Community insurance undertaking authorised in accordance with the non-life insurance or life assurance Directives (Directives 73/239/EEC and 2002/83/EC).

<sup>16</sup> OJ L 330, 5.12.1998, p. 1.

<sup>17</sup> OJ L 35, 11.2.2003, p. 1.

Proposal for a

**DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**on reinsurance and amending Council Directives 73/239/EEC, 92/49/EEC and Directives 98/78/EC and 2002/83/EC**

**(Text with EEA relevance)**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 47(2) and 55 thereof,

Having regard to the proposal from the Commission<sup>18</sup>,

Having regard to the opinion of the European Economic and Social Committee<sup>19</sup>,

Having regard to the opinion of the Committee of the Regions<sup>20</sup>,

Acting in accordance with the procedure laid down in Article 251 of the Treaty<sup>21</sup>,

Whereas:

- (1) Council Directive 73/239/EEC of 24 July 1973 on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance<sup>22</sup>, Council Directive 92/49/EEC of 18 June 1992 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and amending Directives 73/239/EEC and 88/357/EEC<sup>23</sup> and 2002/83/EEC of the European Parliament and of the Council of 5 November 2002 concerning life assurance<sup>24</sup> have laid down the provisions relating to the taking-up and pursuit of direct insurance in the Community.
- (2) Those Directives provide for the legal framework for insurance undertakings to conduct insurance business in the internal market, from the point of view both of the right of establishment and of the freedom to provide services, in order to make it easier for insurance undertakings with head offices in the Community to cover commitments situated within the Community and to make it possible for policy holders to have recourse not only to insurers established in their own country, but also to insurers

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<sup>18</sup> OJ C , , p. .

<sup>19</sup> OJ C , , p. .

<sup>20</sup> OJ C , , p. .

<sup>21</sup> OJ C , , p. .

<sup>22</sup> OJ L 228, 16.8.1973, p.3.

<sup>23</sup> OJ L 228, 11.8.1992 p. 1. 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)

<sup>24</sup> OJ L 345, 19.12.2002, p. 1.

which have their head office in the Community and are established in other Member States.

- (3) The regime laid down by those Directives applies to direct insurance undertakings in respect of their entire business carried on, both direct insurance activities as well as reinsurance activities by way of acceptances; however reinsurance activities conducted by specialised reinsurance undertakings are neither subject to this regime nor any other regime provided for by Community law.
- (4) Reinsurance is a major financial activity as it allows direct insurance undertakings, by facilitating a wider distribution of risks at worldwide level, to have a higher underwriting capacity to engage in insurance business and provide insurance cover and also to reduce their capital costs; furthermore reinsurance also plays a fundamental role in financial stability, since it is an essential element to ensure the strength of the financial soundness and the stability of direct insurance markets as well as the financial system as a whole, because of its role of a major financial intermediary and institutional investor.
- (5) Council Directive 64/225/EEC of 25 February 1964 on the abolition of restrictions on freedom of establishment and freedom to provide services in respect of reinsurance and retrocession<sup>25</sup> has removed the restrictions to the right of establishment and the freedom to provide services related to the nationality or residence of the provider of reinsurance. It has not however removed restrictions caused by divergences between national provisions as regards prudential regulation of reinsurance. This situation has resulted in significant differences in the level of supervision of reinsurance undertakings in the Community, which create barriers to the pursuit of reinsurance business, such as the obligation for the reinsurance undertaking to pledge assets in order to cover its part of the technical provisions of the direct insurance undertaking, as well as the compliance by reinsurance undertakings with different supervisory rules in different Member States in which they conduct business or an indirect supervision of the different aspects of a reinsurance undertaking by the competent authorities of direct insurance undertakings.
- (6) The Action Plan for Financial Services has identified reinsurance as a sector which needs an action at Community level in order to complete the internal market for financial services. Moreover, major financial fora such as the International Monetary Fund and the International Association of Insurance Supervisors (IAIS) have highlighted the lack of harmonised reinsurance supervision rules at Community level as an important gap in the financial services regulatory framework that should be filled.
- (7) This Directive aims at establishing a prudential regulatory framework for reinsurance activities in the Community. It forms part of the body of Community legislation in the field of insurance aimed at establishing the Internal Market in the insurance sector.
- (8) This Directive is consistent with major international work carried out on reinsurance prudential rules, in particular the Insurance Association of Insurance Supervisors (IAIS).

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<sup>25</sup> OJ 56, 4.4.1964 p.878.

- (9) This Directive follows the approach of Community legislation adopted in respect of direct insurance by carrying out the harmonisation which is essential, necessary and sufficient to ensure the mutual recognition of authorisations and prudential control systems, thereby making it possible to grant a single authorisation valid throughout the Community and apply the principle of supervision by the home Member State.
- (10) As a result, the taking up and the pursuit of the business of reinsurance are subject to the grant of a single official authorisation issued by the competent authorities of the Member State in which a reinsurance undertaking has its head office. Such authorisation enables an undertaking to carry on business throughout the Community, under the right of establishment or the freedom to provide services. The Member State of the branch or of the provision of services may not require a reinsurance undertaking which wishes to carry on reinsurance business there and which has already been authorised in its home Member State to seek fresh authorisation. Furthermore a reinsurance undertaking which has already been authorised in its home Member State should not be subject to additional supervision or checks related to its financial soundness which are performed by the competent authorities of an insurance undertaking which is reinsured by that reinsurance undertaking. In addition, Member States should not be allowed to require a reinsurance undertaking authorised in the Community to post collateral of assets in order to cover its part of the cedent's technical provisions. The conditions for the granting or withdrawal of such authorisation should be defined. The competent authorities should not authorise or continue the authorisation of a reinsurance undertaking which do not fulfil the conditions laid down in this Directive.
- (11) This Directive should apply to reinsurance undertakings which conduct exclusively reinsurance business and do not engage in direct insurance business; it should also apply to the so-called "captive" reinsurance undertakings created or owned by industrial, commercial or financial firms other than undertakings to which Directive 98/78/EC of the European Parliament and of the Council on the supplementary supervision of insurance undertakings in an insurance group<sup>26</sup> applies, the purpose of which is to provide reinsurance cover exclusively to the risks of the firms to which they belong.
- (12) This Directive should however not apply to insurance undertakings which are already subject to Directives 73/239/EEC and 2002/83/EC; however in order to ensure the financial soundness of insurance undertakings which also carry on reinsurance business and that the specific characteristics of these activities is duly taken into account by the capital requirements of these insurance undertakings, the provisions relating the solvency margin of reinsurance undertakings contained in this directive should apply to reinsurance business of these insurance undertakings, if the volume of their reinsurance activities represents a significant part of their entire business.
- (13) This Directive should clarify the powers and means of supervision vested in the competent authorities. The competent authorities of the reinsurance undertaking's home Member State should be responsible for monitoring the financial health of reinsurance undertakings, including their state of solvency, the establishment of adequate technical provisions and the covering of those provisions by quality assets.

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<sup>26</sup> OJ L 330, 5.12.1998, p. 1. Directive as last amended by Directive 2002/87/EC (OJ L 35, 11.2.2003, p 1).

- (14) The competent authorities of the Member States should have at their disposal such means of supervision as are necessary to ensure the orderly pursuit of business by reinsurance undertakings throughout the Community whether carried on under the right of establishment or the freedom to provide services. In particular, they should be able to introduce appropriate safeguards or impose sanctions aimed at preventing irregularities and infringements of the provisions on reinsurance supervision.
- (15) Provision should be made for the exchange of information between the competent authorities and authorities or bodies which, by virtue of their function, help to strengthen the stability of the financial system. In order to preserve the confidential nature of the information forwarded, the list of addressees should remain within strict limits. It is therefore necessary to specify the conditions under which the abovementioned exchanges of information are authorised; moreover, where it is stipulated that information may be disclosed only with the express agreement of the competent authorities, these may, where appropriate, make their agreement subject to compliance with strict conditions. In this regard, and in view of ensuring the proper supervision of reinsurance undertakings by the competent authorities, this Directive should provide for rules enabling Member States to conclude agreements on exchange of information with third countries provided that the information disclosed is subject to appropriate guarantees of professional secrecy.
- (16) For the purposes of strengthening the prudential supervision of reinsurance undertakings, it should be stipulated that an auditor must have a duty to report promptly to the competent authorities, wherever, as provided for by this Directive, he/she becomes aware, while carrying out his/her tasks, of certain facts which are liable to have a serious effect on the financial situation or the administrative and accounting organisation of a reinsurance undertaking. Having regard to the aim in view, it is desirable for Member States to provide that such a duty should apply in all circumstances where such facts are discovered by an auditor during the performance of his/her tasks in an undertaking which has close links with a reinsurance undertaking. The duty of auditors to communicate, where appropriate, to the competent authorities certain facts and decisions concerning a reinsurance undertaking which they discover during the performance of their tasks in a non-reinsurance undertaking does not in itself change the nature of their tasks in that undertaking nor the manner in which they must perform those tasks in that undertaking.
- (17) Provision should be made to define the application of this Directive to existing reinsurance undertakings which were already authorised or entitled to conduct reinsurance business in accordance with the provisions of the Member States before the application of the Directive.
- (18) In order to allow a reinsurance undertaking to meet its commitments, the home Member State should require a reinsurance undertaking to establish adequate technical provisions. The amount of such technical provisions should be determined in accordance with Directive 91/674/EEC of 19 December 1991 on the annual accounts and consolidated accounts of insurance undertakings<sup>27</sup> and, in respect of life reinsurance activities, the home Member State should also be allowed to lay down more specific rules in accordance with Directive 2002/83/EC.

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<sup>27</sup> OJ L 374, 31.12.1991, p. 7. Directive amended by Directive 2003/51/EC of the European Parliament and of the Council (OJ L 178, 17.7.2003, p. 16).

- (19) A reinsurance undertaking conducting reinsurance business in respect of credit insurance, whose credit reinsurance business amounts to more than a small proportion of its total business should be required to set up an equalization reserve which does not form part of the solvency margin; this reserve should be calculated according to the one of the methods laid down in Directive 73/239/EEC and which are recognized as equivalent; furthermore this Directive should allow the home Member State to also require reinsurance undertakings whose head office is situated within its territory to set up equalization reserves for classes of risks other than credit reinsurance, following the rules laid down by that home Member State.
- (20) The reinsurance undertaking should have assets to cover technical provisions which shall take account of the type of business carried out by a reinsurance undertaking, in particular the nature, amount and duration of the expected claims payments, in such a way as to secure sufficiency, liquidity, security, quality, profitability and matching of its investments, which the undertaking shall ensure are diversified and adequately spread and which gives the undertaking the possibilities to respond adequately to changing economic circumstances, in particular developments in the financial markets and real estate markets or large impact catastrophic events.
- (21) It is necessary that, over and above technical provisions, reinsurance undertakings should possess a supplementary reserve, known as the solvency margin, represented by free assets and, with the agreement of the competent authority, by other implicit assets, which shall act as a buffer against adverse business fluctuations. This requirement is an important element of prudential supervision. Pending the revision of the existing solvency margin regime, which the Commission is carrying on under the so-called "Solvency II project", in order to determine the required solvency margin of reinsurance undertakings the rules provided for in existing legislation in the field of direct insurance should be applicable;
- (22) In order to take account of the particular nature of some types of reinsurance contracts or specific lines of business, provision should be made to make adjustments to the calculation of the required solvency margin; these adjustments should be made by the Commission, after consulting the Insurance Committee, set up by Council Directive 91/675/EEC<sup>28</sup> in the exercise of its implementing powers conferred on by the Treaty. These measures should be adopted by the use of the regulatory procedure provided for in Article 5 of Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission<sup>29</sup>.
- (23) The list of items eligible to represent the available solvency margin laid down by this Directive should be that provided for in Directives 73/239/EEC and 2002/83/EC.
- (24) Reinsurance undertakings should also possess a guarantee fund in order to ensure they possess adequate resources when they are set up and that in the subsequent course of business the solvency margin shall in no event fall below a minimum of security; however in order to take account of the specificities of captive reinsurance undertakings, provision should be made to allow the home Member State to set the minimum guarantee fund required to captive reinsurance undertakings at a lower amount.

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<sup>28</sup> OJ L 374, 31.12.1991, p. 32.

<sup>29</sup> OJ L 184, 17.7.1999 p. 23.

- (25) Certain provisions of this Directive define minimum standards. A home Member State should be able to lay down stricter rules for reinsurance undertakings authorised by its own competent authorities, in particular with respect to solvency margin requirements.
- (26) It is necessary to provide for measures in cases where the financial position of the reinsurance undertaking becomes such that it is difficult for it to meet its underwriting liabilities. In specific situations, there is also a need for the competent authorities to be empowered to intervene at a sufficiently early stage, but in the exercise of those powers, competent authorities should inform the reinsurance undertakings of the reasons motivating such supervisory action, in accordance with the principles of sound administration and due process. As long as such a situation exists, the competent authorities should be prevented from certifying that the reinsurance undertaking has a sufficient solvency margin.
- (27) It is necessary to make provision for cooperation between the competent authorities of the Member States in order to ensure that a reinsurance undertaking carrying on its activities under the freedom of establishment and the free provision of services complies with the provisions applicable to it in the host Member State.
- (28) Provision should be made for the right to apply to the courts should an authorisation be refused or withdrawn.
- (29) It is important to provide that reinsurance undertakings whose head office is situated outside the Community and conduct reinsurance business in the Community should not be subject to a treatment which results in a more favourable than that provided to reinsurance undertakings having their head office in a Member State.
- (30) In order to take account of the international aspects of reinsurance, provision should be made to enable the conclusion of international agreements with a third country aimed at defining the means of supervision over reinsurance entities who conduct business in the territory of each contracting party.
- (31) A provision should be made for a flexible procedure to make it possible to assess prudential equivalence with third countries on a Community basis, so as to improve liberalisation of reinsurance services in third countries, be it through establishment or cross-border provision of services. To that end, this Directive provides for procedures for negotiating with third countries.
- (32) The Commission should be empowered to adopt implementing measures provided that these do not modify the essential elements of this Directive. These implementing measures should enable the Community to take account of the future development of reinsurance. The measures necessary for implementation of this Directive should be adopted in accordance with Decision 1999/468/EC
- (33) The existing Community legal framework for insurance should be adapted in order to take account of the new supervisory regime for reinsurance undertakings laid down, by this Directive and in order to ensure a consistent regulatory framework for the whole insurance sector. In particular, the existing provisions which permit “indirect supervision” of reinsurance undertakings by the authorities competent for the supervision of direct insurance undertakings should be adapted. Furthermore the current provisions enabling Member States to require pledging of assets covering the technical provisions of an insurance undertaking when the insurer is reinsured by a

reinsurance undertaking authorised pursuant to this Directive or by an insurance undertaking should be abolished. Finally, it should be provided that the solvency margin required to insurance undertakings conducting reinsurance activities, when such activities represent a significant part of their business, is subject to the solvency rules provided for reinsurance undertakings in this Directive. Directives 73/239/EEC, 92/49/EEC and 2002/83/EC should therefore be amended accordingly.

- (34) Directive 98/78/EC should be amended in order to guarantee that reinsurance undertakings in an insurance or a reinsurance group are subject to supplementary supervision in the same manner as insurance undertakings which are currently part of an insurance group.
- (35) Since the objective of the proposed action, namely the establishment of a legal framework for the taking up and pursuit of reinsurance activities, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and the effects of the action, be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve this objective. Since this Directive defines minimum standards, Member States may lay down stricter rules.

HAVE ADOPTED THIS DIRECTIVE:

## **TITLE I – SCOPE AND DEFINITIONS**

### *Article 1 – Scope*

1. This Directive lays down rules for the taking up and pursuit of the self-employed activity of reinsurance carried on by reinsurance undertakings, which conduct only reinsurance activities, and which are established in a Member State or wish to become established therein.
2. This Directive shall not apply to the following:
  - a) insurance undertakings to which Directives 73/239/EEC and 2002/83/EC apply;
  - b) activities and bodies referred to in Article 3(1) and (2) of Directive 73/239/EEC;
  - c) activities and bodies referred to in Article 3 of Directive 2002/83/EC;
  - d) the activity of reinsurance conducted by the government of a Member State when this is acting, for reasons of substantial public interest, in the capacity of reinsurer of last resort in circumstances where such a role is required by a situation in the market in which it is objectively impossible to obtain commercial cover.

## Article 2 – Definitions

1. For the purposes of this Directive the following definitions shall apply:

- (a) reinsurance means the activity consisting in accepting risks ceded by an insurance undertaking, by another reinsurance undertaking or by an institution for occupational retirement provision falling under the scope of Directive 2003/41/EC of the European Parliament and of the Council<sup>30</sup>.
- (b) reinsurance undertaking means an undertaking which has received official authorisation in accordance with Article 3;
- (c) branch means an agency or a branch of a reinsurance undertaking;
- (d) establishment means the head office, branch of a reinsurance undertaking, account being taken of point c);
- (e) home Member State means the Member State in which the head office of the reinsurance undertaking is situated;
- (f) Member State of the branch means the Member State in which the branch of a reinsurance undertaking is situated;
- (g) host Member State means the Member State in which a reinsurance undertaking has a branch or provides services.
- (h) control means the relationship between a parent undertaking and a subsidiary, as defined in Article 1 of Council Directive 83/349/EEC<sup>31</sup>, or a similar relationship between any natural or legal person and an undertaking;
- (i) qualifying holding means a direct or indirect holding in an undertaking which represents 10% or more of the capital or of the voting rights or which makes it possible to exercise a significant influence over the management of the undertaking in which a holding subsists;
- (j) parent undertaking means a parent undertaking as defined in Articles 1 and 2 of Directive 83/349/EEC;
- (k) subsidiary means a subsidiary undertaking as defined in Articles 1 and 2 of Directive 83/349/EEC;
- (l) competent authorities means the national authorities which are empowered by law or regulation to supervise reinsurance undertakings;
- (m) close links means a situation in which two or more natural or legal persons are linked by:
  - (i) *participation*, which shall mean the ownership, direct or by way of control, of 20% or more of the voting rights or capital of an undertaking, or

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<sup>30</sup> OJ L 235, 23.9.2003, p. 10.

<sup>31</sup> OJ L 193, 18.7.1983, p. 1.

(ii) *control*, in all the cases referred to in Article 1(1) and (2) of Directive 83/349/EEC or a similar relationship between any natural or legal person and an undertaking;

(n) captive reinsurance undertaking means a reinsurance undertaking owned either- by a financial undertaking other than an insurance undertaking or a reinsurance undertaking or a group of insurance or reinsurance undertakings to which Directive 98/78/EC applies, or by one or several non financial undertakings, the purpose of which is to provide reinsurance cover exclusively to the risks of the undertaking or undertakings to which it belongs or to an undertaking or undertakings of the group of which the captive reinsurance undertaking makes part.

2. For the purposes of paragraph 1(c) any permanent presence of an undertaking in the territory of a Member State shall be treated in the same way as an agency or branch, even if that presence does not take the form of a branch or agency, but consists merely of an office managed by the undertaking's own staff or by a person who is independent but has permanent authority to act for the undertaking as an agency would.

For the purposes of paragraph 1(i) , and in the context of Articles 7 and 14 and of the other levels of holding referred to in Article 14, the voting rights referred to in Article 92 of Directive 2001/34/EC<sup>32</sup> shall be taken into account.

For the purposes of paragraph 1(k), any subsidiary of a subsidiary undertaking shall also be regarded as a subsidiary of the undertaking which is those undertakings' ultimate parent undertaking.

For the purposes of paragraph 1(m), any subsidiary undertaking of a subsidiary undertaking shall be considered a subsidiary of the parent undertaking which is at the head of those undertakings.

For the purposes of paragraph 1(m) a situation in which two or more natural or legal persons are permanently linked to one and the same person by a control relationship shall also be regarded as constituting a close link between such persons.

3. Wherever this Directive refers to the euro, the conversion value in national currency to be adopted shall, as from 31 December of each year, be that of the last day of the preceding month of October for which euro conversion values are available in all the Community currencies.

## **TITLE II – THE TAKING-UP OF THE BUSINESS OF REINSURANCE AUTHORISATION OF THE REINSURANCE UNDERTAKING**

### *Article 3 – Principle of authorisation*

The taking up of the business of reinsurance shall be subject to prior official authorisation.

Such authorisation shall be sought from the competent authorities of the home Member State by:

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<sup>32</sup> OJ L 184, 6.7.2001 p. 66

- (a) any reinsurance undertaking which establishes its head office in the territory of that State;
- (b) any reinsurance undertaking which, having received the authorisation, extends its business to other reinsurance activities than those already authorised.

#### *Article 4 – Scope of authorisation*

1. An authorisation pursuant to Article 3 shall be valid for the entire Community. It shall permit a reinsurance undertaking to carry on business there, under either the right of establishment or the freedom to provide services.

2. Authorisation shall be granted for non-life reinsurance activities, life reinsurance activities or all kinds of reinsurance activities, according to the request made by the applicant.

It shall be considered in the light of the scheme of operations to be submitted pursuant Articles 6(b) and 11 and the fulfilment of the conditions laid down for authorisation by the Member State from which the authorisation is sought.

#### *Article 5 – Form of the reinsurance undertaking*

1. The home Member State shall require every reinsurance undertaking for which authorisation is sought to adopt one of the forms set out in Annex I.

A reinsurance undertaking may also adopt the form of a European Company (SE) as defined in Council Regulation (EC) No 2157/2001<sup>33</sup>.

2. Member States may, where appropriate, set up undertakings in any public-law form provided that such bodies have as their objects reinsurance operations under conditions equivalent to those under which private-law undertakings operate.

#### *Article 6 – Conditions*

The home Member State shall require every reinsurance undertaking for which authorisation is sought to:

- a) limit its objects to the business of reinsurance and related operations; this requirement may include a holding company function and activities with respect to financial sector activities within the meaning of Article 2 point 8 of Directive 2002/87/EC<sup>34</sup>;
- b) submit a scheme of operations in accordance with Article 11;
- c) possess the minimum guarantee fund provided for in Article 40(2);
- d) be effectively run by persons of good repute with appropriate professional qualifications or experience.

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<sup>33</sup> OJ L 294, 10.11.2001.p.1

<sup>34</sup> OJ L 35, 11.02.2003 p. 1

### *Article 7 – Close links*

1. Where close links exist between the reinsurance undertaking and other natural or legal persons, the competent authorities shall grant authorisation only if those links do not prevent the effective exercise of their supervisory functions.

The competent authorities shall refuse authorisation if the laws, regulations or administrative provisions of a non-member country governing one or more natural or legal persons with which the reinsurance undertaking has close links, or difficulties involved in their enforcement, prevent the effective exercise of their supervisory functions.

2. The competent authorities shall require reinsurance undertakings to provide them with the information they require to monitor compliance with the conditions referred to in paragraph 1 on a continuous basis.

### *Article 8 – Head office of the reinsurance undertaking*

Member States shall require that the head offices of reinsurance undertakings be situated in the same Member State as their registered offices

### *Article 9 – Policy conditions and scales of premiums*

1. This Directive shall not prevent Member States from maintaining in force or introducing laws, regulations or administrative provisions requiring approval of the memorandum and articles of association and communication of any other documents necessary for the normal exercise of supervision.

2. However, Member States may not, however, adopt provisions requiring the prior approval or systematic notification of general and special policy conditions, scales of premiums and forms and other printed documents which a reinsurance undertaking intends to use in its dealings with ceding or retro-ceding undertakings.

### *Article 10 - Economic requirements of the market*

Member States may not require that any application for authorisation be considered in the light of the economic requirements of the market.

### *Article 11 – Scheme of operations*

1. The scheme of operations referred to in Article 6(b) shall include particulars or evidence of:

- (a) the nature of the risks which the reinsurance undertaking proposes to cover;
- (b) the kinds of reinsurance arrangements which the reinsurance undertaking proposes to make with ceding undertakings;
- (c) the guiding principles as to retrocession;
- (d) the items constituting the minimum guarantee fund;

(e) estimates of the costs of setting up the administrative services and the organisation for securing business and the financial resources intended to meet those costs.

2. In addition to the requirements in paragraph 1, the scheme of operations shall for the first three financial years contain:

(a) estimates of management expenses other than installation costs, in particular current general expenses and commissions;

(b) estimates of premiums or contributions and claims;

(c) a forecast balance sheet;

(d) estimates of the financial resources intended to cover underwriting liabilities and the solvency margin.

#### *Article 12 – Shareholders and members with qualifying holdings*

The competent authorities of the home Member State shall not grant an undertaking authorisation to take up the business of reinsurance before they have been informed of the identities of the shareholders or members, direct or indirect, whether natural or legal persons, who have qualifying holdings in that undertaking and of the amounts of those holdings.

The same authorities shall refuse authorisation if, taking into account the need to ensure the sound and prudent management of a reinsurance undertaking, they are not satisfied as to the qualifications of the shareholders or members.

#### *Article 13 - Refusal of authorisation*

Any decision to refuse an authorisation shall be accompanied by the precise grounds for doing so and notified to the undertaking in question.

Each Member State shall make provision for a right to apply to the courts, pursuant to Article 53, should there be any refusal.

Such provision shall also be made with regard to cases where the competent authorities have not dealt with an application for an authorisation upon the expiry of a period of six months from the date of its receipt.

#### *Article 14 - Prior consultation with the competent authorities of other Member States*

1. The competent authorities of the other Member State involved shall be consulted prior to the granting of an authorisation to a reinsurance undertaking, which is:

a) a subsidiary of an insurance or reinsurance undertaking authorised in another Member State; or

b) a subsidiary of the parent undertaking of an insurance or reinsurance undertaking authorised in another Member State; or

c) controlled by the same person, whether natural or legal, who controls an insurance or reinsurance undertaking authorised in another Member State.

2. The competent authority of a Member State involved, who is responsible for the supervision of credit institutions or investment firms shall be consulted prior to the granting of an authorisation to a reinsurance undertaking which is:

a) a subsidiary of a credit institution or investment firm authorised in the Community; or

b) a subsidiary of the parent undertaking of a credit institution or investment firm authorised in the Community; or

c) controlled by the same person, whether natural or legal, who controls a credit institution or investment firm authorised in the Community.

3. The relevant competent authorities referred to in paragraphs 1 and 2 shall in particular consult each other when assessing the suitability of the shareholders and the reputation and experience of directors involved in the management of another entity of the same group. They shall inform each other of any information regarding the suitability of shareholders and the reputation and experience of directors which is of relevance to the other competent authorities involved for the granting of an authorisation as well as for the ongoing assessment of compliance with operating conditions.

### **TITLE III – CONDITIONS GOVERNING THE BUSINESS OF REINSURANCE**

#### **Chapter 1 – Principles and methods of financial supervision**

#### **SECTION 1- COMPETENT AUTHORITIES AND GENERAL RULES**

##### *Article 15 – Competent authorities and object of supervision*

1. The financial supervision of a reinsurance undertaking, including that of the business it carries on either through branches or under the freedom to provide services, shall be the sole responsibility of the home Member State.

If the competent authorities of the host Member State have reason to consider that the activities of a reinsurance undertaking might affect its financial soundness, they shall inform the competent authorities of the reinsurance undertaking's home Member State. The latter authorities shall determine whether the reinsurance undertaking is complying with the prudential rules laid down in this Directive.

2. The financial supervision pursuant to paragraph 1 shall include verification, with respect to the reinsurance undertaking's entire business, of its state of solvency, of the establishment of technical provisions and of the assets covering them in accordance with the rules laid down or practices followed in the home Member State under provisions adopted at Community level.

3. The Home Member State of the reinsurance undertaking shall not refuse a retrocession contract concluded by the reinsurance undertaking with a reinsurance undertaking authorised in accordance with this Directive or an insurance undertaking authorised in accordance with

Directives 73/239/EEC or 2002/83/EC on the grounds directly related to the financial soundness of that reinsurance undertaking or that insurance undertaking.

4. The competent authorities of the home Member State shall require every reinsurance undertaking to have sound administrative and accounting procedures and adequate internal control mechanisms.

*Article 16 – Supervision of branches established in another Member State*

The Member State of the branch shall provide that where an reinsurance undertaking authorised in another Member State carries on business through a branch the competent authorities of the home Member State may, after having first informed the competent authorities of the Member State of the branch, carry out themselves or through the intermediary of persons they appoint for that purpose, on-the-spot verification of the information necessary to ensure the financial supervision of the undertaking. The authorities of the Member State of the branch may participate in that verification.

*Article 17 – Accounting, prudential and statistical information: Supervisory powers*

1) Each Member State shall require every reinsurance undertaking whose head office is situated in its territory to produce an annual account, covering all types of operation, of its financial situation and of its solvency.

2) Member States shall require reinsurance undertakings with head offices within their territories to render periodically the returns, together with statistical documents, which are necessary for the purposes of supervision. The competent authorities shall provide each other with any documents and information that are useful for the purposes of supervision.

3) Every Member State shall take all steps necessary to ensure that the competent authorities have the powers and means necessary for the supervision of the business of reinsurance undertakings with head offices within their territories, including business carried on outside those territories,

In particular, the competent authorities must be enabled to:

(a) make detailed enquiries regarding an reinsurance undertaking's situation and the whole of its business, *inter alia*, by gathering information or requiring the submission of documents concerning its reinsurance and retrocession business, and by carrying out on-the-spot investigations at the reinsurance undertaking's premises;

(b) take any measures with regard to a reinsurance undertaking, its directors or managers or the persons who control it, that are appropriate and necessary to ensure that that reinsurance undertaking's business continues to comply with the laws, regulations and administrative provisions with which the reinsurance undertaking must comply in each Member State;

(c) ensure that those measures are carried out, if need be by enforcement and where appropriate through judicial channels.

Member States may also make provision for the competent authorities to obtain any information regarding contracts which are held by intermediaries.

### *Article 18 – Transfer of portfolio*

Under the conditions laid down by national law, each Member State shall authorise reinsurance undertakings with head offices within its territory to transfer all or part of their portfolios of contracts, including those concluded either under the right of establishment or the freedom to provide services, to an accepting office established within the Community, if the competent authorities of the home Member State of the accepting office certify that, after taking the transfer into account, the latter possesses the necessary solvency margin referred to in Chapter 3.

## **SECTION 2- QUALIFYING HOLDINGS**

### *Article 19 – Acquisitions*

Member States shall require any natural or legal person who proposes to hold, directly or indirectly, a qualifying holding in a reinsurance undertaking first to inform the competent authorities of the home Member State, indicating the size of his intended holding. That person must likewise inform the competent authorities of the home Member State if he proposes to increase his qualifying holding so that the proportion of the voting rights or of the capital he holds would reach or exceed 20%, 33% or 50% or so that the reinsurance undertaking would become his subsidiary.

The competent authorities of the home Member State shall have up to three months from the date of the notification provided for in the first subparagraph to oppose such a plan if, in view of the need to ensure sound and prudent management of the reinsurance undertaking in question, they are not satisfied as to the qualification of the person referred to in the first subparagraph. If they do not oppose the plan in question, they may fix a maximum period for its implementation.

### *Article 20 – Acquisitions by financial undertakings*

If the acquirer of the holdings referred to in Article 19 is an insurance undertaking, a reinsurance undertaking, a credit institution or an investment firm authorised in another Member State, or the parent undertaking of such an entity, or a natural or legal person controlling such an entity, and if, as a result of that acquisition, the undertaking in which the acquirer proposes to hold a holding would become a subsidiary or subject to the control of the acquirer, the assessment of the acquisition must be subject to the prior consultation referred to in Article 14.

### *Article 21 - Disposals*

Member States shall require any natural or legal person who proposes to dispose, directly or indirectly, of a qualifying holding in a reinsurance undertaking first to inform the competent authorities of the home Member State, indicating the size of his intended holding.

Such a person must likewise inform the competent authorities if he proposes to reduce his qualifying holding so that the proportion of the voting rights or of the capital he holds would fall below 20%, 33% or 50% or so that the reinsurance undertaking would cease to be his subsidiary.

*Article 22 – Information to the competent authority by the  
reinsurance undertaking*

On becoming aware of them, reinsurance undertakings shall inform the competent authorities of their home Member States of any acquisitions or disposals of holdings in their capital that cause holdings to exceed or fall below any of the thresholds referred to in Articles 19 and 21.

They shall also, at least once a year, inform them 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 23 – Qualified holdings:  
Powers of the competent authority*

Member States shall require that, where the influence exercised by the persons referred to in Article 19 is likely to operate against the prudent and sound management of a reinsurance undertaking, the competent authorities of the home Member State shall take appropriate measures to put an end to that situation. Such measures may consist, for example, in injunctions, sanctions 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 obligation to provide prior information imposed pursuant to Article 19. If a holding is acquired despite the opposition of the competent authorities, the Member States shall, regardless of any other sanctions to be adopted, provide either for exercise of the corresponding voting rights to be suspended, or for the nullity of votes cast or for the possibility of their annulment.

**SECTION 3 –PROFESSIONAL SECRECY AND  
EXCHANGES OF INFORMATION**

*Article 24 – Obligation*

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

Pursuant to that obligation no confidential information which they may receive while performing their duties may be divulged to any person or authority whatsoever, except in summary or aggregate form, such that individual reinsurance undertakings cannot be identified, without prejudice to cases covered by criminal law.

2. However, where a 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 25 – Exchange of information  
between competent authorities of Member States*

Article 24 shall not prevent the competent authorities of different Member States from exchanging information in accordance with the directives applicable to reinsurance undertakings. Such information shall be subject to the conditions of professional secrecy laid down in Article 24.

*Article 26 – Co-operation agreements with  
third countries*

Member States may conclude co-operation agreements providing for exchange of information with the competent authorities of third countries or with authorities or bodies of third countries as defined in Articles 28, paragraphs 1 and 2 only if the information 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 the authorities or bodies mentioned.

Where the information originates in another Member State, it may not be disclosed without the express agreement of the competent authorities which have disclosed it and, where appropriate, solely for the purposes for which those authorities gave their agreement.

*Article 27 – Use of confidential information*

Competent authorities receiving confidential information under Articles 24 and 25 may use it only in the course of their duties:

- (a) To check that the conditions governing the taking up of the business of reinsurance are met and to facilitate monitoring of the conduct of such business, especially with regard to the monitoring of technical provisions, solvency margins, administrative and accounting procedures and internal control mechanisms,
- (b) to impose sanctions,
- (c) in administrative appeals against decisions of the competent authorities, or
- (d) in court proceedings initiated under Article 53 or under special provisions provided for in this Directive and other Directives adopted in the field of insurance and reinsurance undertakings.

*Article 28 – Exchange of information with  
other authorities*

1. Articles 24-27 shall not preclude the exchange of information within a Member State, where there are two or more competent authorities in the same Member State, or, between Member States, between competent authorities and:

- a) Authorities responsible for the official supervision of credit institutions and other financial organisations and the authorities responsible for the supervision of financial markets,

b) Bodies involved in the liquidation and bankruptcy of insurance and reinsurance undertakings and in other similar procedures, and

c) Persons responsible for carrying out statutory audits of the accounts of insurance undertakings, reinsurance undertakings and other financial institutions,

in the discharge of their supervisory functions, or the disclosure to bodies which administer compulsory winding-up proceedings or guarantee funds of information necessary to the performance of their duties. The information received by those authorities, bodies and persons shall be subject to the conditions of professional secrecy laid down in Article 24.

2. Notwithstanding Articles 24-27, Member States may authorise exchanges of information between the competent authorities and:

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

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

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

Member States which have recourse to the option provided for in the first subparagraph shall require at least that the following conditions are met:

a) this exchange of information shall be for the purpose of carrying out the overseeing or legal supervision referred to in the first subparagraph;

b) information received in this context shall be subject to the conditions of professional secrecy imposed in Article 24;

c) where the information originates in another Member State, it may not be disclosed without the express agreement of the competent authorities which have disclosed it and, where appropriate, may only be disclosed for the purposes for which those authorities gave their 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 this paragraph.

3. Notwithstanding Articles 24-27, Member States may, with the aim of strengthening the stability, including integrity, of the financial system, authorise the exchange of information between the competent authorities and the authorities or bodies responsible under the law for the detection and investigation of breaches of company law.

Member States which have recourse to the option provided for in the first subparagraph shall require at least that the following conditions are met:

a) the information shall be for the purpose of performing the task referred to in the first subparagraph;

b) information received in this context shall be subject to the conditions of professional secrecy imposed in Article 24;

c) where the information originates in another Member State, it may not be disclosed without the express agreement of the competent authorities which have disclosed it and, where appropriate, solely for the purposes for which those authorities gave their 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, in view of their specific competence, of persons appointed 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 stipulated in the second subparagraph.

In order to implement the final indent of the second subparagraph, the authorities or bodies referred to in the first subparagraph shall communicate to the competent authorities which have disclosed the information the names and precise responsibilities of the persons to whom it is to be sent.

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

*Article 29 – Transmission of information to  
central banks and monetary authorities*

This Section shall not prevent a competent authority from transmitting to central banks and other bodies with a similar function in their capacity as monetary authorities, and where appropriate, to other public authorities responsible for overseeing payment systems, information intended for the performance of their task. Nor shall it prevent such authorities or bodies from communicating to the competent authorities such information as they may need for the purposes of Article 27 .

Information received in this context shall be subject to the conditions of professional secrecy imposed in this Section.

*Article 30 - Disclosure of information to  
government administrations  
responsible for financial legislation*

Notwithstanding Articles 24 and 27, Member States may, under provisions laid down by law, authorise 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.

However, such disclosures may be made only where necessary for reasons of prudential control.

Member States shall, however, provide that information received under Articles 25 and 28 (1) and that obtained by means of the on-the-spot verification referred to in Article 16 may never be disclosed in the cases referred to in this paragraph except with the express consent of the

competent authorities which disclosed the information or of the competent authorities of the Member State in which on-the-spot verification was carried out.

## **SECTION 4 – DUTIES OF AUDITORS**

### *Article 31 – Duties of auditors*

1. Member States shall provide at least that any person authorised in accordance with Council Directive 84/253/EEC<sup>35</sup>, performing in a reinsurance undertaking the task described in Article 51 of Council Directive 78/660/EEC<sup>36</sup>, Article 37 of Council Directive 83/349/EEC or Article 31 of Council Directive 85/611/EEC<sup>37</sup> or any other statutory task, shall have a duty to report promptly to the competent authorities any fact or decision concerning that undertaking of which he has become aware while carrying out that task which is liable to:

- a) constitute 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 or reinsurance undertakings, or
- b) affect the continuous functioning of the reinsurance undertaking, or
- c) lead to refusal to certify the accounts or to the expression of reservations;

That person shall also have a duty to report any facts and decisions of which he/she becomes aware in the course of carrying out a task as described in the first subparagraph in an undertaking having close links resulting from a control relationship with the reinsurance undertaking within which he/she is carrying out the abovementioned task.

2) The disclosure to the competent authorities, by persons authorised in accordance with Directive 84/253/EEC, of any relevant 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.

## **Chapter 2 – Rules relating to technical provisions**

### *Article 32 – Establishment of technical provisions*

1) The home Member State shall require every reinsurance undertaking to establish adequate technical provisions in respect of its entire business.

The amount of such technical provisions shall be determined in accordance with the rules laid down in Directive 91/674/EEC. Where applicable the home Member State may lay down more specific rules in accordance with Article 20 of Directive 2002/83/EC.

2) Member States shall not retain or introduce a system with gross reserving which requires pledging of assets to cover unearned premiums and outstanding claims provisions if

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<sup>35</sup> OJ L 126, 12.5.1984, p. 20.

<sup>36</sup> OJ L 222, 14.8.1978, p. 11.

<sup>37</sup> OJ L 375, 31.12.1985, p. 3.

the reinsurer is a reinsurance undertaking authorised in accordance with this Directive or an insurance undertaking authorised in accordance with Directives 73/239/EEC or 2002/83/EC.

3) When the home Member State allows any technical provisions to be covered by claims against reinsurers who are not authorised in accordance with this Directive or insurance undertakings which are not authorised in accordance with Directives 73/239/EEC or 2002/83/EC, it shall fix the percentage so allowed.

#### *Article 33 – Equalization reserves*

1. The home Member State shall require every reinsurance undertaking which reinsures risks included in class 14 in point A of the Annex to Directive 73/239/EEC to set up an equalization reserve for the purpose of offsetting any technical deficit or above-average claims ratio arising in that class in any financial year.

2. The equalization reserve for credit reinsurance shall be calculated in accordance with the rules laid down by the home Member State in accordance with one of the four methods set out in point D of the Annex to Directive 73/239/EEC, which shall be regarded as equivalent.

3. The home Member State may exempt reinsurance undertakings from the obligation to set up equalization reserves for reinsurance of credit insurance business where the premiums or contributions receivable in respect of reinsurance of credit insurance are less than 4% of the total premiums or contributions receivable by them and less than EUR 2 500 000.

4. The home Member State may require every reinsurance undertaking to set up equalization reserves for classes of risks other than credit reinsurance. The equalization reserves shall be calculated according to the rules laid down by the home Member State.

#### *Article 34 – Assets covering technical provisions*

The assets covering the technical provisions shall take account of the type of business carried out by a reinsurance undertaking, in particular the nature, the amount and the duration of the expected claims payments, in such a way as to secure sufficiency, liquidity, security, quality, profitability and matching of its investments, which the undertaking shall ensure are diversified and adequately spread and which gives the undertaking the possibilities to respond adequately to changing economic circumstances, in particular developments in the financial markets and real estate markets or large impact catastrophic events.

### **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 in 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 must stipulate that payments may be made from these 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 must 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);

(b) statutory and free reserves not corresponding to underwriting liabilities;

(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 that Annex. For classes other than 1 and 2 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 subparagraphs 1 and 2, 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 undertaking within the meaning of Article 1(l) 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 Council Directive 93/22/EEC<sup>38</sup> and of Article 2(4) and (7) of Council Directive 93/6/EEC<sup>39</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 fourth subparagraph.

As an alternative to the deduction of the items referred to in (a) and (b) of the fourth 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 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 fourth 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:

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<sup>38</sup> OJ L 141, 11.6.1993, p. 27.

<sup>39</sup> OJ L 141, 11.6.1993, p. 1.

(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 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 must 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 must be at least five years. No later than one year before the repayment date the reinsurance undertaking must 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 application is made by the issuing reinsurance undertaking and its available solvency margin will not fall below the required level;

(iii) loans the maturity of which is not fixed must 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 must 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 must 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;

(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 mentioned 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 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 must enable the reinsurance undertaking to defer the payment of interest on the loan;

(iii) the lender's claims on the reinsurance undertaking must rank entirely after those of all non-subordinated creditors;

(iv) the documents governing the issue of the securities must 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 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 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 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:

(i) when an actuarial report is submitted to the competent authorities substantiating the likelihood of emergence of these profits in the future; and

(ii) in so far as that part of future profits emerging from hidden net reserves referred to in paragraph 5 (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 assurance 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 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) of this Directive.

## **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.

In the case, however, 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.

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 11, 12 and 13 listed in point A of the Annex to Directive 73/239/EEC, may be enhanced 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.

From this 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 million, 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; this ratio may in no case be less than 50%.

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 11, 12 and 13 listed in point A of the Annex to Directive 73/239/EEC, may be enhanced 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 amounts of claims paid, without any deduction of claims borne by retrocessionaires, in the periods specified in paragraph 1 shall be aggregated.

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

From this 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 period of reference 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 period of reference established in paragraph 1, shall be divided into two portions, the first extending up to EUR 35 million 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; this ratio may in no case be less than 50%.

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 of 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 sixth subparagraph of paragraph 3 and the sixth 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. Subject to Article 40, the required solvency margin for life reinsurance activities shall be determined as laid down in paragraphs 2 to 7 according to the classes of reinsurance underwritten.

2. For the kinds of reinsurance referred to in Article 2(1)(a) and (b) of Directive 2002/83/EC other than assurances linked to investment funds and for the operations referred to in Article 2(3), the required solvency margin shall be equal to the sum of the following two results:

(a) first result:

4% of the mathematical provisions relating to reinsurance acceptances gross of retro cessions shall be multiplied by the ratio, for the last financial year, of the total mathematical provisions net of retro cessions to the gross total mathematical provisions. That ratio may in no case be less than 85%;

(b) second result:

for policies on which the capital at risk is not a negative figure, 0,3% of such capital underwritten by the reinsurance undertaking shall be multiplied by the ratio, for the last financial year, of the total capital at risk retained as the undertaking's liability after retro cessions to the total capital at risk gross of retro cessions; that ratio may in no case be less than 50%.

For temporary reinsurance on death of a maximum term of three years the fraction shall be 0,1%. For such reinsurance of a term of more than three years but not more than five years the above fraction shall be 0,15%.

3. For reinsurance of supplementary insurance referred to in Article 2(1)(c) of Directive 2002/83/EC the required solvency margin shall be equal to the required solvency margin for reinsurance undertakings as laid down in Article 37 of this Directive.

4. For reinsurance of permanent health insurance not subject to cancellation referred to in Article 2(1)(d) of Directive 2002/83/EC, the required solvency margin shall be equal to:

(a) 4% of the mathematical provisions, calculated in compliance with paragraph 2(a) of this Article; plus

(b) the required solvency margin for reinsurance undertakings as laid down in Article 37 of this Directive. However, the condition contained in Article 37(6)(b) of this Directive that a provision be set up for increasing age may be replaced by a requirement that the business be conducted on a group basis.

5. For reinsurance of capital redemption operations referred to in Article 2(2)(b) of Directive 2002/83/EC, the required solvency margin shall be equal to 4% of the mathematical provisions calculated in compliance with paragraph 2(a) of this Article.

6. For reinsurance of tontines, referred to in Article 2(2)(a) of Directive 2002/83/EC, the required solvency margin shall be equal to 1% of their assets.

7. For reinsurance classes of assurances business covered by Article 2(1)(a) and (b) of Directive 2002/83/EC linked to investment funds and for the operations referred to in Article 2(2)(c), (d) and (e) of Directive 2002/83/EC, the required solvency margin shall be equal to the sum of the following:

(a) in so far as the reinsurance undertaking bears an investment risk, 4% of the technical provisions, calculated in compliance with paragraph 2(a) of this Article;

(b) in so far as the reinsurance undertaking bears no investment risk but the allocation to cover management expenses is fixed for a period exceeding five years, 1% of the technical provisions, calculated in compliance with paragraph 2(a) of this Article;

(c) in so far as the reinsurance undertaking bears no investment risk and the allocation to cover management expenses is not fixed for a period exceeding five years, an amount equivalent to 25% of the last financial year's net administrative expenses pertaining to such business;

(d) in so far as the reinsurance undertaking covers a death risk, 0,3% of the capital at risk calculated in compliance with paragraph 2(b) of this Article.

*Article 39 – Required solvency margin for a reinsurance undertaking conducting simultaneously non-life and life reinsurance*

1. The home Member State shall require that every reinsurance undertaking conducting both non-life reinsurance and life reinsurance business shall 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.

2. If the available solvency margin does not reach the level required in paragraph 1, 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 to 39 shall constitute the guarantee fund. This fund shall consist of the items listed in Article 36(1) to (3) and, with the agreement of the competent authority of the home Member State, (4)(c).
2. The guarantee fund may not be less than a minimum of EUR 3 million.

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

### *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 starting [*date of implementation laid down in Article 61(1)*] 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 annually the European Parliament and the Council of the review and the adapted amounts referred to in paragraph 1.

## **Chapter 4 – Reinsurance undertakings in difficulty or in an irregular situation and withdrawal of authorisation**

### *Article 42 – Reinsurance undertakings in difficulty*

1. If a reinsurance undertaking does not comply with Article 32, the competent authority of its home Member State may prohibit the free disposal of its assets after having communicated its intention to the competent authorities of the host Member States.
2. For the purposes of restoring the financial situation of a reinsurance undertaking the solvency margin of which has fallen below the minimum required under Articles 37, 38 and 39, the competent authority of the home Member State shall require that a plan for the restoration of a sound financial situation be submitted for its approval.

In exceptional circumstances, if the competent authority is of the opinion that the financial situation of the reinsurance undertaking will deteriorate further, it may also restrict or prohibit the free disposal of the reinsurance undertaking's assets. It shall inform the authorities of other Member States within the territories of which the reinsurance undertaking carries on business of any measures it has taken and the latter shall, at the request of the former, take the same measures.

3) If the solvency margin falls below the guarantee fund as defined in Article 40, the competent authority of the home Member State shall require the reinsurance undertaking to submit a short-term finance scheme for its approval.

It may also restrict or prohibit the free disposal of the reinsurance undertaking's assets. It shall inform the authorities of all other Member States and the latter shall, at the request of the former, take the same measures.

4) Each Member State shall take the measures necessary to be able, in accordance with its national law, to prohibit the free disposal of assets located within its territory at the request, in the cases provided for in paragraphs 1, 2 and 3, of the reinsurance undertaking's home Member State, which shall designate the assets to be covered by such measures.

#### *Article 43 – Financial recovery plan*

1) Member States shall ensure that the competent authorities have the power to require a financial recovery plan for those reinsurance undertakings where competent authorities consider that their obligations arising out of reinsurance contracts are threatened.

2) The financial recovery plan must, as a minimum, include particulars or proof concerning for the next three financial years:

(a) estimates of management expenses, in particular current general expenses and commissions;

(b) a plan setting out detailed estimates of income and expenditure in respect of reinsurance acceptances and reinsurance cessions;

(c) a forecast balance sheet;

(d) estimates of the financial resources intended to cover underwriting liabilities and the required solvency margin;

(e) the overall retrocession policy.

3) Where the financial position of the reinsurance undertaking is deteriorating and the contractual obligations of the reinsurance undertaking are threatened, Member States shall ensure that the competent authorities have the power to oblige reinsurance undertakings to have a higher required solvency margin, in order to ensure that the reinsurance undertaking is able to fulfil the solvency requirements in the near future. The level of this higher required solvency margin shall be based on a financial recovery plan referred to in paragraph 1.

4) Member States shall ensure that the competent authorities have the power to revalue downwards all elements eligible for the available solvency margin, in particular, where there has been a significant change in the market value of these elements since the end of the last financial year.

5) Member States shall ensure that the competent authorities have the power to decrease the reduction, based on retrocession, to the solvency margin as determined in accordance with Articles 37,38 and 39 where:

- (a) the nature or quality of retrocession contracts has changed significantly since the last financial year;
- (b) there is no or an insignificant risk transfer under the retrocession contracts.

6. If the competent authorities have required a financial recovery plan for the reinsurance undertaking in accordance with paragraph 1, they shall refrain from issuing a certificate in accordance with Article 18, as long as they consider that its obligations arising out of reinsurance contracts are threatened within the meaning of paragraph 1.

#### *Article 44 – Withdrawal of authorisation*

1. Authorisation granted to a reinsurance undertaking by the competent authority of its home Member State may be withdrawn by that authority if that undertaking:

- (a) does not make use of that authorisation within 12 months, expressly renounces it or ceases to carry on business for more than 6 months, unless the Member State concerned has made provision for authorisation to lapse in such cases;
- (b) no longer fulfils the conditions for admission;
- (c) has been unable, within the time allowed, to take the measures specified in the restoration plan or finance scheme referred to in Article 42;
- (d) fails seriously in its obligations under the regulations to which it is subject.

In the event of the withdrawal or lapse of authorisation, the competent authority of the home Member State shall notify the competent authorities of the other Member States accordingly, and they shall take appropriate measures to prevent the reinsurance undertaking from commencing new operations within their territories, under either the right of establishment or the freedom to provide services.

2. Any decision to withdraw an authorisation shall be supported by precise reasons and communicated to the reinsurance undertaking in question.

### **TITLE IV – PROVISIONS RELATING TO RIGHT OF ESTABLISHMENT AND FREEDOM TO PROVIDE SERVICES**

#### *Article 45 – Reinsurance undertakings not complying with the legal provisions*

1. If the competent authorities of the host Member State establish that a reinsurance undertaking with a branch or carrying on business under the freedom to provide services within its territory is not complying with the legal provisions applicable to it in that State, they shall require the reinsurance undertaking concerned to remedy that irregular situation. At the same time, they shall refer those findings to the competent authority of the home Member State.

If, despite the measures taken by the competent authority of the home Member State or because such measures prove inadequate, the reinsurance undertaking persists in infringing the legal provisions applicable to it in the host Member State, the latter may, after informing

the competent authority of the home Member State, take appropriate measures to prevent or penalize further infringements, including in so far as is strictly necessary, preventing that reinsurance undertaking from continuing to conclude new reinsurance contracts within its territory. Member States shall ensure that within their territories it is possible to serve the legal documents necessary for such measures on reinsurance undertakings.

2) Any measure adopted under paragraph 1 involving penalties or restrictions on the conduct of reinsurance business must be properly reasoned and communicated to the reinsurance undertaking concerned.

#### *Article 46 – Winding-up*

In the event of a reinsurance undertaking's being wound up, commitments arising out of contracts underwritten through a branch or under the freedom to provide services shall be met in the same way as those arising out of that undertaking's other reinsurance contracts.

### **TITLE V – REINSURANCE UNDERTAKINGS WHOSE HEAD OFFICES ARE OUTSIDE THE COMMUNITY AND CONDUCTING REINSURANCE ACTIVITIES IN THE COMMUNITY**

#### *Article 47 – Principle and conditions for conducting reinsurance business*

A Member State shall not apply to reinsurance undertakings having their registered offices outside the Community and commencing or carrying out reinsurance activities in its territory, provisions which result in a more favourable treatment than that accorded to reinsurance undertakings having their head office in that Member State.

#### *Article 48 – Agreements with third countries*

1. The Commission may submit proposals to the Council for the negotiation of agreements with one or more third countries regarding the means of exercising supervision over:

- a) reinsurance undertakings which have their head offices situated in a third country, and conduct reinsurance business in the Community,
- b) reinsurance undertakings which have their head offices in the Community and conduct reinsurance business in the territory of a third country.

2. The agreements referred to in paragraph 1 shall in particular seek to ensure under conditions of equivalence of prudential regulation, effective market access for reinsurance undertakings in the territory of each contracting party and provide for mutual recognition of supervisory rules and practices on reinsurance. They shall also seek that:

- a) the competent authorities of the Member States are able to obtain the information necessary for the supervision of reinsurance undertakings situated in the Community and conduct business in the territory of third countries concerned,

b) the competent authorities of third countries are able to obtain the information necessary for the supervision of reinsurance undertakings the head offices of which are situated within their territories and conduct business in the Community.

3. Without prejudice to Articles 300(1) and (2) of the Treaty establishing the European Community, the Commission, shall, with the assistance of the Insurance Committee examine the outcome of the negotiations referred to in paragraph 1 and the resulting situation.

#### **TITLE VI – RULES APPLICABLE TO SUBSIDIARIES OF PARENT UNDERTAKINGS GOVERNED BY THE LAWS OF A THIRD COUNTRY AND TO ACQUISITIONS OF HOLDINGS BY SUCH PARENT UNDERTAKINGS**

##### *Article 49 – Information from Member States to the Commission*

The competent authorities of the Member States shall inform the Commission:

(a) of any authorisation of a direct or indirect subsidiary, one or more parent undertakings of which are governed by the laws of a third country.

(b) whenever such a parent undertaking acquires a holding in a Community reinsurance undertaking which would turn the latter into its subsidiary.

The Commission shall inform the Insurance Committee accordingly.

When authorisation is granted to the direct or indirect subsidiary of one or more parent undertakings governed by the law of third countries, the structure of the group shall be specified in the notification which the competent authorities shall address to the Commission.

##### *Article 50 – Third country treatment of Community Reinsurance undertakings*

1. Member States shall inform the Commission of any general difficulties encountered by their reinsurance undertakings in establishing themselves and operating in a third country or carrying on activities to a third country.

2. Periodically, the Commission shall draw up a report examining the treatment accorded to Community reinsurance undertakings in third countries, in the terms referred to in paragraph 3, as regards the establishment of Community reinsurance undertakings in third countries, the acquisition of holdings in third-country reinsurance undertakings, the carrying on of reinsurance activities by such established undertakings and the cross-border provision of reinsurance activities from the Community to third countries. The Commission shall submit those reports to the Council, together with any appropriate proposals or recommendations.

3. Whenever it appears to the Commission, either on the basis of the reports referred to in paragraph 2 or on the basis of other information, that a third country is not granting Community reinsurance undertakings effective market access, the Commission may submit recommendations to the Council for the appropriate mandate for negotiation with a view to obtaining improved market access for Community reinsurance undertakings.

4. Measures taken under this Article shall comply with the Community's obligations under any international agreements, in particular in the World Trade Organisation.

## **TITLE VII OTHER PROVISIONS**

### *Article 51 – Rights acquired by existing reinsurance undertakings*

1. Reinsurance undertakings subject to this Directive, which were authorised or entitled to conduct reinsurance business in accordance with the provisions of the Member States in which they have their head offices before the date of entry into force of this Directive shall be deemed to be authorised, in accordance with Article 3.

However, they shall be subject to fulfilment of the provisions of this Directive concerning the carrying on of the business of reinsurance and to the requirements set out in Articles 6(a), (c), (d), Articles 7, 8 and 12 and Articles 32 to 41 as from the date of implementation referred to in Article 61.

2. Member States may allow reinsurance undertakings referred to in paragraph 1 which at the date of entry into force of this Directive do not comply with Articles 6 (a), 7, 8 and and Articles 32 to 40 a period of [2 years] after the date referred to in Article 61 in order to comply with these requirements.

### *Article 52 – Reinsurance undertakings closing their activity*

1. Reinsurance undertakings which by [date of transposition of this Directive laid down in Article 61(1)] have ceased to conduct new reinsurance contracts and exclusively administer their existing portfolio in order to terminate their activity shall not be subject to this Directive.

2. Member States shall draw up the list of the reinsurance undertakings concerned and they shall communicate that list to all the other Member States.

### *Article 53 – Right to apply to the courts*

Member States shall ensure that decisions taken in respect of a reinsurance undertaking under laws, regulations and administrative provisions implementing this Directive are subject to the right to apply to the courts.

### *Article 54 – Co-operation between the Member States and the Commission*

1. Member States shall cooperate with each other for the purpose of facilitating the supervision of reinsurance within the Community and the application of this Directive.

2. The Commission and the competent authorities of the Member States shall collaborate closely for the purpose of facilitating the supervision of reinsurance within the Community and of examining any difficulties which may arise in the application of this Directive.

### *Article 55 – Committee procedure*

1) The Commission shall be assisted by the Insurance Committee instituted by Article 1 of Directive 91/675/EEC.

2) Where reference is made to this paragraph, Articles 5 and 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof.

The period laid down in Article 5(6) of Decision 1999/468/EC shall be three months.

3. The Committee shall adopt its rules of procedure.

#### *Article 56 – Implementing measures*

The following implementing measures to this Directive shall be adopted in accordance with the procedure referred to in Article 55(2):

- a) extension of the legal forms provided for in Annex I to this Directive,
- b) clarification of the items constituting the solvency margin listed in Article 36 to take account of the creation of new financial instruments,
- c) enhancement up to 50% the premiums or claims amounts used for the calculation of the required solvency margin provided for in Article 37(3) and (4), in classes other than 11, 12 and 13 listed in point A of the Annex to Directive 73/239/EEC, for specific reinsurance activities or contract types, to take account of the specificities of these activities or contracts,
- d) alteration of the minimum guarantee fund provided for in Article 40(2) to take account of economic and financial developments,
- e) clarification of the definitions in Article 2 in order to ensure uniform application of this Directive throughout the Community.

### **TITLE VIII - AMENDMENTS TO EXISTING DIRECTIVES**

#### *Article 57 – Amendments to Directive 73/239/EEC*

Directive 73/239/EEC is amended as follows:

(1) In Article 12a paragraphs 1 and 2 are replaced by the following:

"1. The competent authorities of the other Member State involved shall be consulted prior to the granting of an authorisation to a non-life insurance undertaking, which is:

- a) a subsidiary of an insurance or reinsurance undertaking authorised in another Member State; or
- b) a subsidiary of the parent undertaking of an insurance or reinsurance undertaking authorised in another Member State; or
- c) controlled by the same person, whether natural or legal, who controls an insurance or reinsurance undertaking authorised in another Member State.

2. The competent authority of a Member State involved responsible for the supervision of credit institutions or investment firms shall be consulted prior to the granting of an authorisation to a non-life insurance undertaking which is:

- a) a subsidiary of a credit institution or investment firm authorised in the Community; or
- b) a subsidiary of the parent undertaking of a credit institution or investment firm authorised in the Community; or
- c) controlled by the same person, whether natural or legal, who controls a credit institution or investment firm authorised in the Community.”

(2) In Article 13 (2), the following third subparagraph is added:

"The home Member State of the insurance undertaking shall not refuse a reinsurance contract concluded by the insurance undertaking with a reinsurance undertaking authorised in accordance with Directive 200.././EC of the European Parliament and of the Council\* [reinsurance Directive] or an insurance undertaking authorised in accordance with this Directive or Directive 2002/83/EC of the European Parliament and of the Council\*\* on the grounds directly related to the financial soundness of the reinsurance undertaking or the insurance undertaking.

\* *OJL...*

\*\* *OJL 345, 19.12.2002, p. 1*”

(3) In Article 15, paragraph 3 is replaced by the following:

"3. Member States shall not retain or introduce for the establishment of technical provisions a system of gross reserving which requires pledging of assets to cover unearned premiums and outstanding claims provisions by the reinsurer, when the reinsurer is a reinsurance undertaking authorised in accordance with Directive 200.././EC [reinsurance Directive] or an insurance undertaking or an insurance undertaking authorised in accordance with this Directive or Directive 2002/83/EC.

When the home Member State allows any technical provisions to be covered by claims against a reinsurer who is neither a reinsurance undertaking authorised in accordance with Directive 200.././EC nor an insurance undertaking authorised in accordance with this Directive or Directive 2002/83/EC, it shall fix the percentage so allowed."

(4) Article 16(2), the fourth subparagraph is replaced by the following:

"The available solvency margin shall also be reduced by the following items:

(a) participations which the insurance undertaking holds in

- insurance undertakings within the meaning of Article 6 of this Directive, Article 4 of Directive 2002/83/EC, or Article 1(b) of Directive 98/78/EC of the European Parliament and of the Council\*,
- reinsurance undertakings within the meaning of Article 3 of Directive 200.././EC [reinsurance directive] or non-member-country reinsurance undertakings within the meaning of article 1 (l) of Directive 98/78/EC,
- insurance holding companies within the meaning of Article 1(i) of Directive 98/78/EC,

- credit institutions and financial institutions within the meaning of Article 1(1) and (5) of Directive 2000/12/EC of the European Parliament and of the Council\*\*,

- investment firms and financial institutions within the meaning of Article 1(2) of Council Directive 93/22/EEC\*\*\* and of Article 2(4) and (7) of Council Directive 93/6/EEC\*\*\*\*.

\* OJ L 330, 5.12.1998, p. 1

\*\* OJ L 126, 26.5.2000, p. 1

\*\*\* OJ L 141, 11.6.1993, p.27

\*\*\*\* OJ L 141, 11.6.1993, p.1”

(5) The following Article 17b is inserted:

*“Article 17b*

1. If the Commission decides, pursuant to Article 56(c) of Directive 200.././EC of the European Parliament and of the Council\* [*reinsurance directive*] to enhance the amounts used for the calculation of the required solvency margin provided for in Article 37 (3) and (4) of that Directive, each Member State shall apply to insurance undertakings whose head office is situated within its territory the provisions of Articles 35-39 of that Directive in respect of their reinsurance acceptances activities, where one the following conditions is meet:

a) the reinsurance premiums collected exceed 10% of their total premium;

b) the reinsurance premiums collected exceed EUR 500 000;

c) the technical provisions resulting from their reinsurance acceptances exceed 10% of their total technical provisions.

2. An insurance undertaking to which paragraph 1 applies shall establish, in respect of its entire business, a minimum guarantee fund in accordance with Article 40(2) of Directive 200.././EC [*reinsurance Directive*].

\* OJ L.....”

*Article 58 – Amendments to Directive 92/49/EEC*

Directive 92/49/EEC is amended as follows:

(1) In Article 15, paragraph (1a) is replaced by the following:

"*1a* If the acquirer of the holdings referred to in paragraph 1 is an insurance undertaking, a reinsurance undertaking, a credit institution or an investment firm authorised in another Member State, or the parent undertaking of such an entity, or a natural or legal person controlling such an entity, and if, as a result of that acquisition, the undertaking in which the acquirer proposes to hold a holding would become a subsidiary or subject to the control of the acquirer, the assessment of the acquisition must be subject to the prior consultation referred to in Article 12a).of Directive 73/239/EEC"

(2) In Article 16, paragraphs (4), (5) and (5a) are replaced by the following:

"4. Competent authorities receiving confidential information under paragraph 1 or 2 may use it only in the course of their duties:

- to check that the conditions governing the taking up of the business of insurance are met and to facilitate monitoring of the conduct of such business, especially with regard to the monitoring of technical provisions, solvency margins, administrative and accounting procedures and internal control mechanisms,
- to impose sanctions,
- in administrative appeals against decisions of the competent authorities, or
- in court proceedings initiated under Article 53 or under special provisions provided for in this Directive and other Directives adopted in the field of insurance undertakings and reinsurance undertakings.

5. Paragraphs 1 and 4 shall not preclude the exchange of information within a Member State, where there are two or more competent authorities in the same Member State, or, between Member States, between competent authorities and:

- authorities responsible for the official supervision of credit institutions and other financial organisations and the authorities responsible for the supervision of financial markets,
- bodies involved in the liquidation and bankruptcy of insurance undertakings, reinsurance undertakings and in other similar procedures, and
- persons responsible for carrying out statutory audits of the accounts of insurance undertakings, reinsurance undertakings and other financial institutions,

in the discharge of their supervisory functions, and the disclosure, to bodies which administer compulsory winding-up proceedings or guarantee funds, of information necessary to the performance of their duties. The information received by these authorities, bodies and persons shall be subject to the obligation of professional secrecy laid down in paragraph 1.

5a. Notwithstanding paragraphs 1 to 4, Member States may authorise exchanges of information between the competent authorities and:

- the authorities responsible for overseeing the bodies involved in the liquidation and bankruptcy of assurance undertakings, reinsurance undertakings and other similar procedures, or
- 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, or
- 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 have recourse to the option provided for in the first subparagraph shall require at least that the following conditions are met:

- this information shall be for the purpose of carrying out the overseeing or legal supervision referred to in the first subparagraph,
- information received in this context shall be subject to the conditions of professional secrecy imposed in paragraph 1,
- where the information originates in another Member State, it may not be disclosed without the express agreement of the competent authorities which have disclosed it and, where appropriate, solely for the purposes for which those authorities gave their 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 this paragraph."

*Article 59 – Amendments to Directive 2002/83/EC*

Directive 2002/83/EC is amended as follows

(1) In Article 1 (1), the following point (s) is added:

(s) "reinsurance undertaking" shall mean a reinsurance undertaking within the meaning of Article 2 point (b) of Directive 200.././EC of the European Parliament and of the Council\*. [Reinsurance Directive]

\* OJ L...”

(2) The following Article 9a is inserted:

*"Article 9a*

***Prior consultation with the competent authorities of other Member States***

1. The competent authorities of the other Member State involved shall be consulted prior to the granting of an authorisation to a life assurance undertaking, which is:

- a) a subsidiary of an insurance or reinsurance undertaking authorised in another Member State; or
- b) a subsidiary of the parent undertaking of an insurance or reinsurance undertaking authorised in another Member State; or
- c) controlled by the same person, whether natural or legal, who controls an insurance or reinsurance undertaking authorised in another Member State.

2. The competent authority of a Member State involved responsible for the supervision of credit institutions or investment firms shall be consulted prior to the granting of an authorisation to a life assurance undertaking which is:

- a) a subsidiary of a credit institution or investment firm authorised in the Community; or
- b) a subsidiary of the parent undertaking of a credit institution or investment firm authorised in the Community; or

c) controlled by the same person, whether natural or legal, who controls a credit institution or investment firm authorised in the Community.

3. The relevant competent authorities referred to in paragraphs 1 and 2 shall in particular consult each other when assessing the suitability of the shareholders and the reputation and experience of directors involved in the management of another entity of the same group. They shall inform each other of any information regarding the suitability of shareholders and the reputation and experience of directors which is of relevance to the other competent authorities involved for the granting of an authorisation as well as for the ongoing assessment of compliance with operating conditions."

(3) In Article 10(2), the following second subparagraph is added:

"The home Member State of the insurance undertaking shall not refuse a reinsurance contract concluded by the insurance undertaking with a reinsurance undertaking authorised in accordance with Directive 200.../EC [Reinsurance Directive) or an insurance undertaking authorised in accordance with Directive 73/239/EEC or this Directive on the grounds directly related to the financial soundness of the reinsurance undertaking or the insurance undertaking".

(4) In Article 15, the following paragraph (1a) is inserted:

"1a. If the acquirer of the holdings referred to in paragraph 1 is an insurance undertaking, a reinsurance undertaking, a credit institution or an investment firm authorised in another Member State, or the parent undertaking of such an entity, or a natural or legal person controlling such an entity, and if, as a result of that acquisition, the undertaking in which the acquirer proposes to hold a holding would become a subsidiary or subject to the control of the acquirer, the assessment of the acquisition must be subject to the prior consultation referred to in Article 9a)."

(5) Article 16 is amended as follows:

(a) paragraphs 4, 5 and 6 are replaced by the following

"4. Competent authorities receiving confidential information under paragraphs 1 or 2 may use it only in the course of their duties:

- to check that the conditions governing the taking-up of the business of assurance are met and to facilitate monitoring of the conduct of such business, especially with regard to the monitoring of technical provisions, solvency margins, administrative and accounting procedures and internal control mechanisms, or

– to impose sanctions, or

– in administrative appeals against decisions of the competent authority, or

– in court proceedings initiated pursuant to Article 67 or under special provisions provided for in this Directive and other directives adopted in the field of assurance undertakings and reinsurance undertakings.

5. Paragraphs 1 and 4 shall not preclude the exchange of information within a Member State, where there are two or more competent authorities in the same Member State, or, between Member States, between competent authorities and:

- authorities responsible for the official supervision of credit institutions and other financial organisations and the authorities responsible for the supervision of financial markets,
- bodies involved in the liquidation and bankruptcy of assurance undertakings, reinsurance undertakings and in other similar procedures, and
- persons responsible for carrying out statutory audits of the accounts of assurance undertakings, reinsurance undertakings and other financial institutions,

in the discharge of their supervisory functions, and the disclosure, to bodies which administer (compulsory) winding-up proceedings or guarantee funds, of information necessary to the performance of their duties. The information received by these authorities, bodies and persons shall be subject to the obligation of professional secrecy laid down in paragraph 1.

6. Notwithstanding paragraphs 1 to 4, Member States may authorise exchanges of information between the competent authorities and:

- the authorities responsible for overseeing the bodies involved in the liquidation and bankruptcy of assurance undertakings, reinsurance undertakings and other similar procedures, or
- 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, or
- independent actuaries of insurance undertakings and reinsurance undertakings carrying out legal supervision of those undertakings and the bodies responsible for overseeing such actuaries.

Member States which have recourse to the option provided for in the first subparagraph shall require at least that the following conditions are met:

- this information shall be for the purpose of carrying out the overseeing or legal supervision referred to in the first subparagraph,
- information received in this context shall be subject to the conditions of professional secrecy imposed in paragraph 1,
- where the information originates in another Member State, it may not be disclosed without the express agreement of the competent authorities which have disclosed it and, where appropriate, solely for the purposes for which those authorities gave their 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 this paragraph."

(b) paragraph 8 is replaced by the following:

"8. Paragraphs 1 to 7 shall not prevent a competent authority from transmitting

- to central banks and other bodies with a similar function in their capacity as monetary authorities,

- where appropriate, to other public authorities responsible for overseeing payment systems

information intended for the performance of their task, nor shall it prevent such authorities or bodies from communicating to the competent authorities such information as they may need for the purposes of paragraph 4. Information received in this context shall be subject to the conditions of professional secrecy imposed in this Article".

(6) Article 20(4) is replaced by the following:

"4. Member States shall not retain or introduce for the establishment of technical provisions a system of gross reserving which requires pledging of assets to cover unearned premiums and outstanding claims provisions by the reinsurer, authorised in accordance with *Directive 200.././EC [reinsurance Directive]* when the reinsurer is a reinsurance undertaking or an insurance undertaking authorised in accordance with Directives 73/239/EEC or this Directive.

When the home Member State allows any technical provisions to be covered by claims against a reinsurer who is neither a reinsurance undertaking authorised in accordance with Directive 200.././EC nor an insurance undertaking authorised in accordance with Directives 73/239/EEC or this Directive, it shall fix the percentage so allowed."

(7) In Article 27(2), the following second, third, fourth, fifth, sixth and seventh subparagraphs are added:

"The available solvency margin shall also be reduced by the following items:

(a) participations which the assurance undertaking holds, in:

- insurance undertakings within the meaning of Article 4 of this Directive, Article 6 of Directive 73/239/EEC, or Article 1(b) of Directive 98/78/EC of the European Parliament and of the Council\*,
- reinsurance undertakings within the meaning of Article 3 of Directive 200.././EC or a non-member-country reinsurance undertakings within the meaning of Article 1(1) of Directive 98/78/EC,
- insurance holding companies within the meaning of Article 1(i) of Directive 98/78/EC,
- credit institutions and financial institutions within the meaning of Article 1(1) and (5) of Directive 2000/12/EC,
- investment firms and financial institutions within the meaning of Article 1(2) of Directive 93/22/EEC and of Articles 2(4) and 2(7) of Council Directive 93/6/EEC\*\*;

(b) each of the following items which the assurance undertaking holds in respect of the entities defined in point (a) in which it holds a participation:

- instruments referred to in paragraph 3,
- instruments referred to in Article 16(3) of Directive 73/239/EEC,
- 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 in points (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 insurance undertaking holds in credit institutions, investment firms and financial institutions, Member States may allow their insurance undertakings to apply mutatis mutandis methods 1, 2, or 3 of Annex I to Directive 2002/87/EC of the European Parliament and of the Council\*\*\*. 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, insurance 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(g) of Directive 98/78/EC.

\* OJ L 330, 5.12.1998, p1.

\*\* OJ L 141, 11.6.1993, p.1.

\*\*\* OJ L 35, 11.2.2003, p.1.”

(8) The following Article 28a is inserted:

*“Article 28a*

*Solvency margin for assurance undertakings conducting reinsurance activities*

If the Commission decides, pursuant to Article 56(c) of Directive 200../../EC of the European Parliament and of the Council\* [*reinsurance directive*] to enhance the amounts used for the calculation of the required solvency margin provided for in Article 37(3) and (4), home Member States shall apply the provisions of Articles 35 to 39 of Directive 200../../EC [*Reinsurance Directive*] to assurance undertakings in respect of their reinsurance acceptances activities, where one of the following conditions is met:

a) the reinsurance premiums collected exceed 10% of their total premium;

b) the reinsurance premiums collected exceed EUR 500 000;

c) the technical provisions resulting from their reinsurance acceptances exceed 10% of their total technical provisions.”

*Article 60 – Amendments to Directive 98/78/EC*

Directive 98/78/EC is amended as follows

(1) The title is replaced by the following:

“Directive 98/78/EC of the European Parliament and of the Council of 27 October 1998 on the supplementary supervision of insurance and reinsurance undertakings in an insurance or reinsurance group.”

(2) Article 1 is amended as follows:

(a) The points (c), (i), (j) and (k) are replaced by the following:

“(c) reinsurance undertaking means an undertaking, which has received official authorisation in accordance with Article 3 of Directive 200../../EC of the European Parliament and of the Council\* [*Reinsurance Directive*];

(i) ‘insurance holding company’ means a parent undertaking, the main business of which is to acquire and hold participations in subsidiary undertakings, where those subsidiary undertakings are exclusively or mainly insurance undertakings, reinsurance undertakings or non-member-country insurance undertakings or non-member-country reinsurance undertakings, at least one of such subsidiary undertakings being an insurance undertaking, or a reinsurance undertaking and which is not a mixed financial holding company within the meaning of Directive 2002/87/EC of the European Parliament and of the Council\*\*;

(j) ‘mixed-activity insurance holding company’ means a parent undertaking, other than an insurance undertaking, a non-member country insurance undertaking, a reinsurance undertaking, a non-member country reinsurance undertaking, an insurance holding company or a mixed financial holding company within the meaning of Directive 2002/87/EC, which includes at least one insurance undertaking or a reinsurance undertaking among its subsidiary undertakings;

(k) ‘competent authorities’ means the national authorities which are empowered by law or regulation to supervise insurance undertakings or reinsurance undertakings.

\* OJ L ...

\*\* OJ L 35, 11.2.2003, p. 1”

b) The following point (l) is added

“(l) ‘non-member-country reinsurance undertaking’ means an undertaking which would require authorisation in accordance with Article 3 of Directive 200../../EC [*reinsurance Directive*] if it had its registered office in the Community;”

(3) Articles 2, 3 and 4 are replaced by the following:

*“Article 2  
Cases of application of supplementary supervision  
of insurance undertakings and reinsurance undertakings*

1. In addition to the provisions of Directives 73/239/EEC, 2002/83/EC of the European Parliament and of the Council\* and 200./.../EC [*reinsurance directive*], which lay down the rules for the supervision of insurance undertakings and reinsurance undertakings, Member States shall provide supervision of any insurance undertaking or any reinsurance undertaking, which is a participating undertaking in at least one insurance undertaking, reinsurance undertaking, non-member-country insurance undertaking or a non-member country reinsurance undertaking, shall be supplemented in the manner prescribed in Articles 5, 6, 8 and 9.

2. Every insurance undertaking or reinsurance undertaking the parent undertaking of which is an insurance holding company, a non-member-country insurance or a non-member-country reinsurance undertaking shall be subject to supplementary supervision in the manner prescribed in Articles 5(2), 6, 8 and 10.

3. Every insurance undertaking or reinsurance undertaking the parent undertaking of which is a mixed-activity insurance holding company shall be subject to supplementary supervision in the manner prescribed in Articles 5(2), 6 and 8.

*Article 3  
Scope of supplementary supervision*

1. The exercise of supplementary supervision in accordance with Article 2 shall in no way imply that the competent authorities are required to play a supervisory role in relation to the non-member-country insurance undertaking, the non-member-country reinsurance undertaking, insurance holding company or mixed-activity insurance holding company taken individually.

2. The supplementary supervision shall take into account the following undertakings referred to in Articles 5, 6, 8, 9 and 10:

- related undertakings of the insurance undertaking or of the reinsurance undertaking,
- participating undertakings in the insurance undertaking or in the reinsurance undertaking,
- related undertakings of a participating undertaking in the insurance undertaking or in the reinsurance undertaking,

3. Member States may decide not to take into account in the supplementary supervision referred to in Article 2 undertakings having their registered office in a non-member country where there are legal impediments to the transfer of the necessary information, without prejudice to the provisions of Annex I, point 2.5, and of Annex II, point 4.

Furthermore, the competent authorities responsible for exercising supplementary supervision may in the cases listed below decide on a case-by-case basis not to take an undertaking into account in the supplementary supervision referred to in Article 2:

- if the undertaking which should be included is of negligible interest with respect to the objectives of the supplementary supervision of insurance undertakings or reinsurance undertakings;
- if the inclusion of the financial situation of the undertaking would be inappropriate or misleading with respect to the objectives of the supplementary supervision of insurance undertakings or reinsurance undertakings.

#### *Article 4*

##### *Competent authorities for exercising supplementary supervision*

1. Supplementary supervision shall be exercised by the competent authorities of the Member State in which the insurance undertaking or the reinsurance undertaking has received official authorisation under Article 6 of Directive 73/239/EEC or Article 4 of Directive 2002/83/EC or Article 3 of Directive 200./../EC.... [*reinsurance directive*].

2. Where insurance undertakings or reinsurance undertakings authorised in two or more Member States have as their parent undertaking the same insurance holding company, non-member-country insurance undertaking, non-member-country reinsurance undertaking or mixed-activity insurance holding company, the competent authorities of the Member States concerned may reach agreement as to which of them will be responsible for exercising supplementary supervision.

3. Where a Member State has more than one competent authority for the prudential supervision of insurance undertakings and reinsurance undertakings, such Member State shall take the requisite measures to organise coordination between those authorities.

\*OJ L 345, 19,12,2002, p.1”

(4) In Article 5, paragraph 1 is replaced by the following:

“1. Member States shall prescribe that the competent authorities shall require that every insurance undertaking or reinsurance undertaking subject to supplementary supervision shall have adequate internal control mechanisms in place for the production of any data and information relevant for the purposes of such supplementary supervision.”

(5) Articles 6, 7 and 8 are replaced by the following:

#### *“Article 6*

##### *Access to information*

1. Member States shall provide that their competent authorities responsible for exercising supplementary supervision shall have access to any information which would be relevant for the purpose of supervision of an insurance undertaking or a reinsurance undertaking subject to such supplementary supervision. The competent authorities may address themselves directly to the relevant undertakings referred to in Article 3(2) to obtain the necessary information only if such information has been requested from the insurance undertaking or the reinsurance undertaking and has not been supplied by it.

2. Member States shall provide that their competent authorities may carry out within their territory, themselves or through the intermediary of persons whom they appoint for that purpose, on-the-spot verification of the information referred to in paragraph 1 at:

- the insurance undertaking subject to supplementary supervision,
- the reinsurance undertaking subject to supplementary supervision,
- subsidiary undertakings of that insurance undertaking,
- subsidiary undertakings of that reinsurance undertaking,
- parent undertakings of that insurance undertaking,
- parent undertakings of that reinsurance undertaking,
- subsidiary undertakings of a parent undertaking of that insurance undertaking.
- subsidiary undertakings of a parent undertaking of that reinsurance undertaking.

3. Where, in applying this Article, the competent authorities of one Member State wish in specific cases to verify important information concerning an undertaking situated in another Member State which is a related insurance undertaking, a related reinsurance undertaking, a subsidiary undertaking, a parent undertaking or a subsidiary of a parent undertaking of the insurance undertaking or of the reinsurance undertaking subject to supplementary supervision, they must ask the competent authorities of that other Member State to have that verification carried out. The authorities which receive such a request must act on it within the limits of their jurisdiction by carrying out the verification themselves, by allowing the authorities making the request to carry it out or by allowing an auditor or expert to carry it out.

The competent authority which made the request may, if it so wishes, participate in the verification when it does not carry out the verification itself.

#### *Article 7*

#### *Cooperation between competent authorities*

1. Where insurance undertakings or reinsurance undertakings established in different Member States are directly or indirectly related or have a common participating undertaking, the competent authorities of each Member State shall communicate to one another on request all relevant information which may allow or facilitate the exercise of supervision pursuant to this Directive and shall communicate on their own initiative any information which appears to them to be essential for the other competent authorities.

2. Where an insurance undertaking or a reinsurance undertaking and either a credit institution as defined in Directive 2000/12/EC of the European Parliament and of the Council\* or an investment firm as defined in Directive 93/22/EEC, or both, are directly or indirectly related or have a common participating undertaking, the competent authorities and the authorities with public responsibility for the supervision of those other undertakings shall cooperate closely. Without prejudice to their respective responsibilities, those authorities shall provide one another with any information likely to simplify their task, in particular within the framework of this Directive.

3. Information received pursuant to this Directive and, in particular, any exchange of information between competent authorities which is provided for in this Directive shall be subject to the obligation of professional secrecy defined in Article 16 of Directive 92/49/EEC and Article 16 of Directive 2002/83/EC and Articles 24 to 30 of Directive 200.../EC...[reinsurance directive].

*Article 8*  
*Intra-group transactions*

1. Member States shall provide that the competent authorities exercise general supervision over transactions between:

(a) an insurance undertaking or a reinsurance undertaking and:

- (i) a related undertaking of the insurance undertaking or of the reinsurance undertaking;
- (ii) a participating undertaking in the insurance undertaking or in the reinsurance undertaking;
- (iii) a related undertaking of a participating undertaking in the insurance undertaking or in the reinsurance undertaking;

(b) an insurance undertaking or a reinsurance undertakings and a natural person who holds a participation in:

- (i) the insurance undertaking, the reinsurance undertaking or any of its related undertakings;
- (ii) a participating undertaking in the insurance undertaking or in the reinsurance undertaking;
- (iii) a related undertaking of a participating undertaking in the insurance undertaking or in the reinsurance undertaking.

These transactions concern in particular:

- loans,
- guarantees and off-balance-sheet transactions,
- elements eligible for the solvency margin,
- investments,
- reinsurance and retrocession operations,
- agreements to share costs.

2. Member States shall require insurance undertakings and reinsurance undertakings to have in place adequate risk management processes and internal control mechanisms, including sound reporting and accounting procedures, in order to identify, measure, monitor and control transactions as provided for in paragraph 1 appropriately. Member States shall also require at

least annual reporting by insurance undertakings and reinsurance undertakings to the competent authorities of significant transactions. These processes and mechanisms shall be subject to overview by the competent authorities."

If, on the basis of this information, it appears that the solvency of the insurance undertaking or the reinsurance undertaking is, or may be, jeopardised, the competent authority shall take appropriate measures at the level of the insurance undertaking or of the reinsurance undertaking.

\* OJ L 126, 26.5.2000, p. 1"

(6) In Article 9, paragraph 3 is replaced by the following:

"3. If the calculation referred to in paragraph 1 demonstrates that the adjusted solvency is negative, the competent authorities shall take appropriate measures at the level of the insurance undertaking or the reinsurance undertaking in question."

(7) Article 10 is amended as follows:

(a) the title is replaced by the following:

"Insurance holding companies, non-member-country insurance undertakings and non-member-country reinsurance undertakings"

(b) paragraphs 2 and 3 are replaced by the following:

"2. In the case referred to in Article 2(2), the calculation shall include all related undertakings of the insurance holding company, the non-member-country insurance undertaking or the non-member-country reinsurance undertaking, in the manner provided for in Annex II.

3. If, on the basis of this calculation, the competent authorities conclude that the solvency of a subsidiary insurance undertaking or a reinsurance undertaking of the insurance holding company, the non-member-country insurance undertaking or the non-member-country reinsurance undertaking is, or may be, jeopardised, they shall take appropriate measures at the level of that insurance undertaking or reinsurance undertaking."

(8) Article 10a is amended as follows:

(a) in paragraph 1, point (b) is replaced by the following:

"(b) reinsurance undertakings which have, as participating undertakings, undertakings within the meaning of Article 2 which have their head office situated in a third country;

(c) non-member country insurance undertakings or non-member country reinsurance undertakings which have, as participating undertakings, undertakings within the meaning of Article 2 which have their head office in the Community."

(b) paragraph 2 is replaced by the following:

"2. The agreements referred to in paragraph 1 shall in particular seek to ensure both:

(a) that the competent authorities of the Member States are able to obtain the information necessary for the supplementary supervision of insurance undertakings and reinsurance

undertakings which have their head office in the Community and which have subsidiaries or hold participations in undertakings outside the Community; and

(b) that the competent authorities of third countries are able to obtain the information necessary for the supplementary supervision of insurance undertakings and reinsurance undertakings which have their head office in their territories and which have subsidiaries or hold participations in undertakings in one or more Member States.”

(9) Annexes I and II are replaced by the text set out in Annex II to this Directive.

## **TITLE IX - FINAL PROVISIONS**

### *Article 61 – Transposition*

1) Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive at the latest by.. They shall forthwith communicate to the Commission the texts of those provisions and a correlation table between those provisions and this Directive.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2) Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

### *Article 62 – Entry into force*

This Directive shall enter into force on the day following that of its publication in the *Official Journal of the European Union*.

### *Article 63 - Addressees*

This Directive is addressed to the Member States.

Done at Brussels,

*For the European Parliament*  
*The President*

*For the Council*  
*The President*

## ANNEX I

Form of reinsurance undertakings:

- in the case of the Kingdom of Belgium: 'société anonyme/naamloze vennootschap', 'société en commandite par actions/commanditaire vennootschap op aandelen', 'association d'assurance mutuelle/onderlinge verzekeringsvereniging', 'société coopérative/coöperatieve vennootschap';
- in the case of the Kingdom of Denmark: 'aktieselskaber', 'gensidige selskaber';
- in the case of the Federal Republic of Germany: 'Aktiengesellschaft', 'Versicherungsverein auf Gegenseitigkeit', 'Öffentlich-rechtliches Wettbewerbsversicherungsunternehmen';
- in the case of the French Republic: 'société anonyme', 'société d'assurance mutuelle', 'institution de prévoyance régie par le code de la sécurité sociale', 'institution de prévoyance régie par le code rural' and 'mutuelles régies par le code de la mutualité';
- in the case of Ireland: incorporated companies limited by shares or by guarantee or unlimited;
- in the case of the Italian Republic: 'società per azioni';
- in the case of the Grand Duchy of Luxembourg: 'société anonyme';
- in the case of the Kingdom of the Netherlands: 'naamloze vennootschap', 'onderlinge waarborgmaatschappij';
- in the case of the United Kingdom: incorporated companies limited by shares or by guarantee or unlimited, societies registered under the Industrial and Provident Societies Acts, societies registered under the Friendly Societies Acts, "the association of underwriters known as Lloyd's";
- in the case of the Hellenic Republic: "ανώνυμη εταιρία", "αλληλασφαλιστικός συνεταιρισμός";
- in the case of the Kingdom of Spain: 'sociedad anónima';
- in the case of the Portuguese Republic: 'sociedade anónima', 'mútua de seguros';
- in the case of the Republic of Austria: 'Aktiengesellschaft', 'Versicherungsverein auf Gegenseitigkeit';
- in the case of the Republic of Finland: 'keskinäinen vakuutusyhtiö/ömsesidigt försäkringsbolag', 'vakuutusosake-yhtiö/försäkringsaktiebolag', 'vakuutusyhdistys/försäkrings-förening';
- in the case of Kingdom of Sweden: 'försäkringsaktiebolag', 'ömsesidigt försäkringsbolag',  
”

## ANNEX II

Annexes I and II to Directive 98/78/EC are replaced by the following

"Annex I

### CALCULATION OF THE ADJUSTED SOLVENCY OF INSURANCE UNDERTAKINGS AND REINSURANCE UNDERTAKINGS

#### 1. CHOICE OF CALCULATION METHOD AND GENERAL PRINCIPLES

A. Member States shall provide that the calculation of the adjusted solvency of insurance undertakings and reinsurance undertakings referred to in Article 2(1) shall be carried out according to one of the methods described in point 3. A Member State may, however, provide for the competent authorities to authorise or impose the application of a method set out in point 3 other than that chosen by the Member State.

#### **B. Proportionality**

The calculation of the adjusted solvency of an insurance undertaking or a reinsurance undertaking shall take account of the proportional share held by the participating undertaking in its related undertakings.

'Proportional share' means either, where method 1 or method 2 described in point 3 is used, the proportion of the subscribed capital that is held, directly or indirectly, by the participating undertaking or, where method 3 described in point 3 is used, the percentages used for the establishment of the consolidated accounts.

However, whichever method is used, when the related undertaking is a subsidiary undertaking and has a solvency deficit, the total solvency deficit of the subsidiary has to be taken into account.

However, where, in the opinion of the competent authorities, the responsibility of the parent undertaking owning a share of the capital is limited strictly and unambiguously to that share of the capital, such competent authorities may give permission for the solvency deficit of the subsidiary undertaking to be taken into account on a proportional basis.

Where there are no capital ties between some of the undertakings in an insurance group or a reinsurance group, the competent authority shall determine which proportional share will have to be taken account of.

#### **C. Elimination of double use of solvency margin elements**

##### *C.1. General treatment of solvency margin elements*

Regardless of the method used for the calculation of the adjusted solvency of an insurance undertaking or a reinsurance undertaking, the double use of elements eligible for the solvency margin among the different insurance undertakings or reinsurance undertakings taken into account in that calculation must be eliminated.

For this purpose, when calculating the adjusted solvency of an insurance undertaking or a reinsurance undertaking and where the methods described in point 3 do not provide for it, the following amounts shall be eliminated:

- the value of any asset of that insurance undertaking or reinsurance undertaking which represents the financing of elements eligible for the solvency margin of one of its related insurance undertakings or related reinsurance undertakings,
- the value of any asset of a related insurance undertaking or a related reinsurance undertaking of that insurance undertaking or reinsurance undertaking which represents the financing of elements eligible for the solvency margin of that insurance undertaking or reinsurance undertaking
- the value of any asset of a related insurance undertaking or related reinsurance undertaking of that insurance undertaking or reinsurance undertaking which represents the financing of elements eligible for the solvency margin of any other related insurance undertaking or related reinsurance undertaking of that insurance undertaking or reinsurance undertaking

### *C.2. Treatment of certain elements*

Without prejudice to the provisions of section C.1:

- profit reserves and future profits arising in a related life assurance undertaking [or a related life reinsurance undertaking] of the insurance undertaking or reinsurance undertaking for which the adjusted solvency is calculated, and
- any subscribed but not paid-up capital of a related insurance undertaking or a related reinsurance undertaking of the insurance undertaking or of reinsurance undertaking for which the adjusted solvency is calculated,

may only be included in the calculation in so far as they are eligible for covering the solvency margin requirement of that related undertaking. However, any subscribed but not paid-up capital which represents a potential obligation on the part of the participating undertaking shall be entirely excluded from the calculation.

Any subscribed but not paid-up capital of the participating insurance undertaking or the participating reinsurance undertaking which represents a potential obligation on the part of a related insurance undertaking or of a related reinsurance undertaking shall also be excluded from the calculation.

Any subscribed but not paid-up capital of a related insurance undertaking or a reinsurance undertaking which represents a potential obligation on the part of another related insurance undertaking of the same participating insurance undertaking or reinsurance undertaking shall be excluded from the calculation.

### *C.3. Transferability*

If the competent authorities consider that certain elements eligible for the solvency margin of a related insurance undertaking or a related reinsurance undertaking other than those referred to in section C.2 cannot effectively be made available to cover the solvency margin requirement of the participating insurance undertaking or the participating reinsurance undertaking for which the adjusted solvency is calculated, those elements may be included in the calculation only in so far as they are eligible for covering the solvency margin requirement of the related undertaking.

C.4. The sum of the elements referred to in sections C.2 and C.3 may not exceed the solvency margin requirement of the related insurance undertaking or the related reinsurance undertaking

#### **D. Elimination of the intra-group creation of capital**

When calculating adjusted solvency, no account shall be taken of any element eligible for the solvency margin arising out of reciprocal financing between the insurance undertaking or the reinsurance undertaking and:

- a related undertaking,
- a participating undertaking,
- another related undertaking of any of its participating undertakings.

Furthermore, no account shall be taken of any element eligible for the solvency margin of a related insurance undertaking or a related reinsurance undertaking of the insurance undertaking or reinsurance undertaking for which the adjusted solvency is calculated when the element in question arises out of reciprocal financing with any other related undertaking of that insurance undertaking or reinsurance undertaking.

In particular, reciprocal financing exists when an insurance undertaking or a reinsurance undertaking, or any of its related undertakings, holds shares in, or makes loans to, another undertaking which, directly or indirectly, holds an element eligible for the solvency margin of the first undertakings.

E. The competent authorities shall ensure that the adjusted solvency is calculated with the same frequency as that laid down by Directives 73/239/EEC, 2002/83/EC and 200.././EC (*reinsurance directive*) for calculating the solvency margin of insurance undertakings or reinsurance undertaking. The value of the assets and liabilities shall be assessed according to the relevant provisions of Directives 73/239/EEC, 2002/83/EC, 200.././EC (*reinsurance directive*) and 91/674/EEC.

## **2. APPLICATION OF THE CALCULATION METHODS**

**2.1. Related insurance undertakings and related reinsurance undertakings.** The adjusted solvency calculation shall be carried out in accordance with the general principles and methods set out in this Annex.

In the case of all methods, where the insurance undertaking or reinsurance undertaking has more than one related insurance undertaking or related reinsurance undertaking the adjusted solvency calculation shall be carried out by integrating each of these related insurance undertakings or related reinsurance undertakings.

In cases of successive participations (for example, where an insurance undertaking or a reinsurance undertaking is a participating undertaking in another insurance undertaking or reinsurance undertaking which is also a participating undertaking in an insurance undertaking or a reinsurance undertaking), the adjusted solvency calculation shall be carried out at the level of each participating insurance undertaking or reinsurance undertaking which has at least one related insurance undertaking or one related reinsurance undertaking. Member States may waive calculation of the adjusted solvency of an insurance undertaking or a reinsurance undertaking:

- if the undertaking is a related undertaking of another insurance undertaking or a reinsurance undertaking authorised in the same Member State, and that related undertaking is taken into account in the calculation of the adjusted solvency of the participating insurance undertaking or reinsurance undertaking, or

- if the insurance undertaking or the reinsurance undertaking is a related undertaking of an insurance holding company which has its registered office in the same Member State as the insurance undertaking or the reinsurance undertaking, and both the holding insurance company and the related insurance undertaking or the related reinsurance undertaking are taken into account in the calculation carried out.

Member States may also waive calculation of the adjusted solvency of an insurance undertaking or reinsurance undertaking if it is a related insurance undertaking or a related reinsurance undertaking of another insurance undertaking, a reinsurance undertaking or an insurance holding company which has its registered office in another Member State, and if the competent authorities of the Member States concerned have agreed to grant exercise of the supplementary supervision to the competent authority of the latter Member State.

In each case, the waiver may be granted only if the competent authorities are satisfied that the elements eligible for the solvency margins of the insurance undertakings or the reinsurance undertakings included in the calculation are adequately distributed between those undertakings.

Member States may provide that where the related insurance undertaking or the related reinsurance undertaking has its registered office in a Member State other than that of the insurance undertaking or the reinsurance undertaking for which the adjusted solvency calculation is carried out, the calculation shall take account, in respect of the related undertaking, of the solvency situation as assessed by the competent authorities of that other Member State.

## **2.2. Intermediate insurance holding companies**

When calculating the adjusted solvency of an insurance undertaking or a reinsurance undertaking which holds a participation in an (related) insurance undertaking, a related reinsurance undertaking, or a non-member country insurance undertaking or a non-member country reinsurance undertaking, through an insurance holding company, the situation of the intermediate insurance holding company is taken into account. For the sole purpose of this calculation, to be undertaken in accordance with the general principles and methods described in this Annex, this insurance holding company shall be treated as if it were an insurance undertaking or reinsurance undertaking subject to a zero solvency requirement and were subject to the same conditions as are laid down in Article 16 of Directive 73/239/EEC, in Article 27 of Directive 2002/83/EC or in Article 36 of Directive 200.../.../EC in respect of elements eligible for the solvency margin.

## **2.3. Related non-member country insurance undertakings and related non-member country reinsurance undertakings**

When calculating the adjusted solvency of an insurance undertaking or a reinsurance undertaking which is a participating undertaking in a non-member-country insurance undertaking or in a non-member country reinsurance undertaking, the latter shall be treated solely for the purposes of the calculation, by analogy with a related insurance undertaking or a

related reinsurance undertaking, by applying the general principles and methods described in this Annex.

However, where the non-member-country in which that undertaking has its registered office makes it subject to authorisation and imposes on it a solvency requirement at least comparable to that laid down in Directives 73/239/EEC, 2002/83/EC or 200.././EC (reinsurance directive), taking into account the elements of cover of that requirement, Member States may provide that the calculation shall take into account, as regards that undertaking, the solvency requirement and the elements eligible to satisfy that requirement as laid down by the non-member country in question.

#### **2.4. Related credit institutions, investment firms and financial institutions**

When calculating the adjusted solvency of an insurance undertaking or reinsurance undertaking which is a participating undertaking in a credit institution, investment firm or financial institution, the rules laid down in Article 16 of Directive 73/239/EEC, in Article 27 of Directive 2002/83/EC and in Article 36 of Directive 200.././EC on the deduction of such participations shall apply mutatis mutandis, as well as the provisions on the ability of Member States under certain conditions to allow alternative methods and to allow such participations not to be deducted."

#### **2.5. Non-availability of the necessary information**

Where information necessary for calculating the adjusted solvency of an insurance undertaking or reinsurance undertaking, concerning a related undertaking with its registered office in a Member State or a non-member country, is not available to the competent authorities, for whatever reason, the book value of that undertaking in the participating insurance undertaking or reinsurance undertaking shall be deducted from the elements eligible for the adjusted solvency margin. In that case, the unrealised gains connected with such participation shall not be allowed as an element eligible for the adjusted solvency margin.

### **3. CALCULATION METHODS**

#### ***Method 1: Deduction and aggregation method***

The adjusted solvency situation of the participating insurance undertaking or the participating reinsurance undertaking is the difference between:

(i) the sum of:

(a) the elements eligible for the solvency margin of the participating insurance undertaking or the participating reinsurance undertaking, and

b) the proportional share of the participating insurance undertaking or the participating reinsurance undertaking in the elements eligible for the solvency margin of the related insurance undertaking or the related reinsurance undertaking

and

(ii) the sum of:

(a) the book value in the participating insurance undertaking or the participating reinsurance undertaking of the related insurance undertaking or the related reinsurance undertaking, and

(b) the solvency requirement of the participating insurance undertaking or the participating reinsurance undertaking, and

(c) the proportional share of the solvency requirement of the related insurance undertaking or the related reinsurance undertaking.

Where the participation in the related insurance undertaking or the related reinsurance undertaking consists, wholly or in part, of an indirect ownership, then item (ii)(a) shall incorporate the value of such indirect ownership, taking into account the relevant successive interests; and items (i)(b) and (ii)(c) shall include the corresponding proportional shares of the elements eligible for the solvency margin of the related insurance undertaking or the related reinsurance undertaking.

#### **Method 2: Requirement deduction method**

The adjusted solvency of the participating insurance undertaking or the participating reinsurance undertaking is the difference between:

(i) the sum of the elements eligible for the solvency margin of the participating insurance undertaking or the participating reinsurance undertaking

and

(ii) the sum of:

(a) the solvency requirement of the participating insurance undertaking or the participating reinsurance undertaking, and

(b) the proportional share of the solvency requirement of the related insurance undertaking or the related reinsurance undertaking.

When valuing the elements eligible for the solvency margin, participations within the meaning of this Directive are valued by the equity method, in accordance with the option set out in Article 59(2)(b) of Directive 78/660/EEC.

#### **Method 3: Accounting consolidation-based method**

The calculation of the adjusted solvency of the participating insurance undertaking or the participating reinsurance undertaking shall be carried out on the basis of the consolidated accounts. The adjusted solvency of the participating insurance undertaking or the participating reinsurance undertaking is the difference between:

the elements eligible for the solvency margin calculated on the basis of consolidated data, and

(a) either the sum of the solvency requirement of the participating insurance undertaking or the participating reinsurance undertaking and of the proportional shares of the solvency requirements of the related insurance undertakings or the related reinsurance undertaking, based on the percentages used for the establishment of the consolidated accounts,

(b) or the solvency requirement calculated on the basis of consolidated data.

The provisions of Directives 73/239/EEC, 2002/83/EC, 200../..EC (*reinsurance directive*) and 91/674/EEC shall apply for the calculation of the elements eligible for the solvency margin and of the solvency requirement based on consolidated data.

## ANNEX II

### SUPPLEMENTARY SUPERVISION FOR INSURANCE UNDERTAKINGS AND REINSURANCE UNDERTAKINGS THAT ARE SUBSIDIARIES OF AN INSURANCE HOLDING COMPANY, A NON-MEMBER-COUNTRY INSURANCE UNDERTAKING OR A NON-MEMBER COUNTRY REINSURANCE UNDERTAKING

1. In the case of two or more insurance undertakings or reinsurance undertakings referred to in Article 2(2) which are the subsidiaries of an insurance holding company, a non-member-country insurance undertaking or a non-member-country reinsurance undertaking and which are established in different Member States, the competent authorities shall ensure that the method described in this Annex is applied in a consistent manner.

The competent authorities shall exercise the supplementary supervision with the same frequency as that laid down by Directives 73/239/EEC, 2002/83/EC and 200../..EC for calculating the solvency margin of insurance undertakings and reinsurance undertakings.

2. Member States may waive the calculation provided for in this Annex with regard to an insurance undertaking or a reinsurance undertaking:

- if that insurance undertaking or reinsurance undertaking is a related undertaking of another insurance undertaking or reinsurance undertaking and if it is taken into account in the calculation provided for in this Annex carried out for that other undertaking,

- if that insurance undertaking or reinsurance undertaking and one or more other insurance undertakings or reinsurance undertakings authorised in the same Member State have as their parent undertaking the same insurance holding company, non-member-country insurance undertaking, or non-member-country reinsurance undertaking and the insurance undertaking or reinsurance undertaking is taken into account in the calculation provided for in this Annex carried out for one of these other undertakings,

- if that insurance undertaking or reinsurance undertaking and one or more other insurance undertakings or reinsurance undertakings authorised in other Member States have as their parent undertaking the same insurance holding company, non-member-country insurance undertaking or non-member-country reinsurance undertaking, and an agreement granting exercise of the supplementary supervision covered by this Annex to the supervisory authority of another Member State has been concluded in accordance with Article 4(2).

In the case of successive participations (for example: an insurance holding company or a non-member-country insurance or reinsurance undertaking, which is itself owned by another insurance holding company or a non-member-country insurance or reinsurance undertaking), Member States may apply the calculations provided for in this Annex only at the level of the ultimate parent undertaking of the insurance undertaking or reinsurance undertaking which is an insurance holding company, a non-member-country insurance undertaking or a non-member-country reinsurance undertaking.

3. The competent authorities shall ensure that calculations analogous to those described in Annex I are carried out at the level of the insurance holding company, non-member-country insurance undertaking or non-member-country reinsurance undertaking.

The analogy shall consist in applying the general principles and methods described in Annex I at the level of the insurance holding company, non-member-country insurance undertaking or non-member-country reinsurance undertaking.

For the sole purpose of this calculation, the parent undertaking shall be treated as if it were an insurance undertaking or reinsurance undertaking subject to:

- a zero solvency requirement where it is an insurance holding company,

- a solvency requirement determined according to the principles of section 2.3 of Annex I, where it is a non-member-country insurance undertaking or a non-member country-reinsurance undertaking,

and is subject to the same conditions as laid down in Article 16 of Directive 73/239/EEC in Article 27 of Directive 2002/83/EC and in Article 36 of Directive 200/./EC [*reinsurance directive*] as regards the elements eligible for the solvency margin.

#### **4. Non-availability of the necessary information**

Where information necessary for the calculation provided for in this Annex, concerning a related undertaking with its registered office in a Member State or a non-member country, is not available to the competent authorities, for whatever reason, the book value of that undertaking in the participating undertaking shall be deducted from the elements eligible for the calculation provided for in this Annex. In that case, the unrealised gains connected with such participation shall not be allowed as an element eligible for the calculation.”