

Official Journal

of the European Union

L 323

English edition

Legislation

Volume 48

9 December 2005

Contents

I Acts whose publication is obligatory

- ★ **Directive 2005/68/EC of the European Parliament and of the Council of 16 November 2005 on reinsurance and amending Council Directives 73/239/EEC, 92/49/EEC as well as Directives 98/78/EC and 2002/83/EC ⁽¹⁾** 1
- ★ **Directive 2005/69/EC of the European Parliament and of the Council of 16 November 2005 amending for the 27th time Council Directive 76/769/EEC on the approximation of the laws, regulations and administrative provisions of the Member States relating to restrictions on the marketing and use of certain dangerous substances and preparations (polycyclic aromatic hydrocarbons in extender oils and tyres)** 51
- ★ **Directive 2005/75/EC of the European Parliament and of the Council of 16 November 2005 correcting Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts** 55

II Acts whose publication is not obligatory

European Parliament and Council

2005/865/CE:

- ★ **Recommendation of the European Parliament and of the Council of 16 November 2005 on film heritage and the competitiveness of related industrial activities** 57

⁽¹⁾ Text with EEA relevance.

I

(Acts whose publication is obligatory)

DIRECTIVE 2005/68/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
of 16 November 2005
on reinsurance and amending Council Directives 73/239/EEC, 92/49/EEC as well as Directives
98/78/EC and 2002/83/EC
(Text with EEA relevance)

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,

Having regard to the opinion of the European Economic and Social Committee ⁽¹⁾,

After consulting the Committee of the Regions,

Acting in accordance with the procedure laid down in Article 251 of the Treaty ⁽²⁾,

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 ⁽³⁾, 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 ⁽⁴⁾ and Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance ⁽⁵⁾ 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 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 that 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 plays a fundamental role in financial stability, since it is an essential element in ensuring the financial soundness and the stability of direct insurance markets as well as the financial system as a whole, because it involves major financial intermediaries and institutional investors.

(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 ⁽⁶⁾ has removed the restrictions on 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

⁽¹⁾ OJ C 120, 20.5.2005, p. 1.

⁽²⁾ Opinion of the European Parliament of 7 June 2005 (not yet published in the Official Journal) and Decision of the Council of 17 October 2005.

⁽³⁾ OJ L 228, 16.8.1973, p. 3. Directive as last amended by Directive 2005/1/EC of the European Parliament and of the Council (OJ L 79, 24.3.2005, p. 9).

⁽⁴⁾ OJ L 228, 11.8.1992, p. 1. Directive as last amended by Directive 2005/1/EC.

⁽⁵⁾ OJ L 345, 19.12.2002, p. 1. Directive as last amended by Directive 2005/1/EC.

⁽⁶⁾ OJ 56, 4.4.1964, p. 878.

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 the various Member States in which they conduct business or an indirect supervision of the various aspects of a reinsurance undertaking by the competent authorities of direct insurance undertakings.

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 pledge assets in order to cover its part of the cedant'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 does not fulfil the conditions laid down in this Directive.

- (6) The Action Plan for Financial Services has identified reinsurance as a sector which requires 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 IAIS.
- (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 in its territory 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 performed by the

- (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 either a financial undertaking other than an insurance or reinsurance undertaking or a group of insurance or reinsurance undertakings to which Directive 98/78/EC of the European Parliament and of the Council of 27 October 1998 on the supplementary supervision of insurance undertakings in an insurance group⁽¹⁾ applies, or by one or several non-financial undertakings, the purpose of which is to provide reinsurance cover exclusively for the risks of the undertakings to which they belong. When in this Directive reference is made to reinsurance undertakings, it should include captive reinsurance undertakings, except where special provision is made for captive reinsurance undertakings. Captive reinsurance undertakings do not cover risks deriving from the external direct insurance or reinsurance business of an insurance or reinsurance undertaking belonging to the group. Furthermore, insurance or reinsurance undertakings belonging to a financial conglomerate may not own a captive undertaking.
- (12) This Directive should however not apply to insurance undertakings which are already subject to Directives 73/239/EEC or 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 those activities is duly taken into account by the capital requirements of those insurance undertakings, the provisions relating to the solvency margin of reinsurance undertakings contained in this Directive should apply to reinsurance business of those insurance undertakings, if the volume of their reinsurance activities represents a significant part of their entire business.
- (13) This Directive should not apply to the provision of reinsurance cover carried out or fully guaranteed by a Member State for reasons of substantial public interest, in the capacity of reinsurer of last resort, in particular where because of a specific situation in a market, it is not feasible to obtain adequate commercial cover; in this

⁽¹⁾ OJ L 330, 5.12.1998, p. 1. Directive as last amended by Directive 2005/1/EC.

regard, a lack of 'adequate commercial cover' should mainly mean a market failure which is characterised by an evident lack of a sufficient range of insurance offers, although excessive premiums should not per se imply inadequacy of that commercial cover. Article 1(2)(d) of this Directive also applies to arrangements between insurance undertakings to which Directives 73/239/EEC or 2002/83/EC apply and which aim to pool financial claims ensuing from major risks such as terrorism.

- (14) Reinsurance undertakings are to limit their 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 of the European Parliament and of the Council of 16 December 2002 on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate ⁽¹⁾. In any case, this requirement does not allow the carrying on of unrelated banking and financial activities.
- (15) 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 equalisation reserves and the covering of those provisions and reserves by quality assets.
- (16) 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 penalties aimed at preventing irregularities and infringements of the provisions on reinsurance supervision.
- (17) The provisions governing transfers of portfolios should be in line with the single authorisation provided for in this Directive. They should apply to the various kinds of transfers of portfolios between reinsurance undertakings, such as transfers of portfolios resulting from mergers between reinsurance undertakings or other instruments of company law or transfers of portfolios of outstanding losses in run-off to another reinsurance undertaking. Moreover, the provisions governing transfers of

portfolios should include provisions specifically concerning the transfer to another reinsurance undertaking of the portfolio of contracts concluded under the right of establishment or the freedom to provide services.

- (18) 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 laid down 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 with a view to 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.
- (19) For the purposes of strengthening the prudential supervision of reinsurance undertakings, it should be laid down that an auditor has 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.
- (20) 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 this Directive.

⁽¹⁾ OJ L 35, 11.2.2003, p. 1. Directive as amended by Directive 2005/1/EC.

- (21) 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 Council Directive 91/674/EEC of 19 December 1991 on the annual accounts and consolidated accounts of insurance undertakings ⁽¹⁾ 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.
- (22) 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 equalisation reserve which does not form part of the solvency margin; that reserve should be calculated according to one of the methods laid down in Directive 73/239/EEC and which are recognised as equivalent; furthermore, this Directive should allow the home Member State also to require reinsurance undertakings whose head office is situated within its territory to set up equalisation reserves for classes of risks other than credit reinsurance, following the rules laid down by that home Member State. Following the introduction of the International Financial Reporting Standards (IFRS 4), this Directive should clarify the prudential treatment of equalisation reserves established in accordance with this Directive. However, since supervision of reinsurance needs to be reassessed under the Solvency II project, this Directive does not pre-empt any future reinsurance supervision under Solvency II.
- (23) A reinsurance undertaking should have assets to cover technical provisions and equalisation reserves which should take account of the type of business that it carries out in particular the nature, amount and duration of the expected claims payments, in such a way as to secure the sufficiency, liquidity, security, quality, profitability and matching of its investments, which the undertaking should ensure are diversified and adequately spread and which gives the undertaking the possibility of responding adequately to changing economic circumstances, in particular developments in the financial markets and real estate markets or major catastrophic events.
- (24) 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 is to 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.
- (25) In the light of the similarities between life reinsurance covering mortality risk and non-life reinsurance, in particular the cover of insurance risks and the duration of the life reinsurance contracts, the required solvency margin for life reinsurance should be determined in accordance with the provisions laid down in this Directive for the calculation of the required solvency margin for non-life reinsurance; the home Member State should however be allowed to apply the rules provided for in Directive 2002/83/EC for the establishment of the required solvency margin in respect of life reinsurance activities which are linked to investment funds or participating contracts.
- (26) 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 European Insurance and Occupational Pensions Committee, set up by Commission Decision 2004/9/EC ⁽²⁾ in the exercise of its implementing powers conferred by the Treaty.
- (27) 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 ⁽³⁾.
- (28) 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.
- (29) Reinsurance undertakings should also possess a guarantee fund in order to ensure that they possess adequate resources when they are set up and that in the subsequent course of business the solvency margin in no event falls 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 for captive reinsurance undertakings at a lower amount.

⁽¹⁾ OJ L 374, 31.12.1991, p. 7. Directive as amended by Directive 2003/51/EC of the European Parliament and of the Council (OJ L 178, 17.7.2003, p. 16).

⁽²⁾ OJ L 3, 7.1.2004, p. 34.

⁽³⁾ OJ L 184, 17.7.1999, p. 23.

- (30) 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.
- (31) This Directive should be applicable to finite reinsurance activities; therefore, a definition of finite reinsurance for the purposes of this Directive is necessary; owing to the special nature of this line of reinsurance activity, the home Member State should be given the option of laying down specific provisions for the pursuit of finite reinsurance activities. These provisions could differ from the general regime laid down in this Directive on a number of specific points.
- (32) This Directive should provide for rules concerning those special purpose vehicles that assume risks from insurance and reinsurance undertakings. The special nature of such special purpose vehicles, which are not insurance or reinsurance undertakings, calls for the establishment of specific provisions in Member States. Furthermore, this Directive should provide that the home Member State should lay down more detailed rules in order to set the conditions under which outstanding amounts from a special purpose vehicle can be used as assets covering technical provisions by an insurance or a reinsurance undertaking. This Directive should also provide that recoverable amounts from a special purpose vehicle may be considered as amounts deductible under reinsurance or retrocession contracts within the limits set out in this Directive, subject to an application by the insurance undertaking or reinsurance undertaking to the competent authority and after agreement by that authority.
- (33) 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.
- (34) 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 right of establishment and the freedom to provide services complies with the provisions applicable to it in the host Member State.
- (35) Provision should be made for the right to apply to the courts should an authorisation be refused or withdrawn.
- (36) It is important to provide that reinsurance undertakings whose head office is situated outside the Community and which conduct reinsurance business in the Community should not be subject to provisions which result in treatment more favourable than that provided to reinsurance undertakings having their head office in a Member State.
- (37) 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 which conduct business in the territory of each contracting party.
- (38) 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 should provide for procedures for negotiating with third countries.
- (39) 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.
- (40) 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, it is necessary to abolish the current provisions enabling Member States to require pledging of assets covering the technical provisions of an insurance undertaking, whatever form this requirement might take, when the insurer is reinsured by a reinsurance undertaking authorised pursuant to this Directive or by an insurance undertaking. Finally, provision should be made for the solvency margin required for insurance undertakings conducting reinsurance activities, when such activities represent a significant part of their business, to be 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.

- (41) 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.
- (42) The Council, in accordance with paragraph 34 of the Interinstitutional agreement on better law-making⁽¹⁾, should encourage Member States to draw up, for themselves and in the interest of the Community, their own tables, illustrating, as far as possible, the correlation between this Directive and the transposition measures, and to make them public.
- (43) Since the objective of this Directive, 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 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.

- (44) 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 or 2002/83/EC apply;
 - (b) activities and bodies referred to in Articles 2 and 3 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 or fully guaranteed 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, including in circumstances where such a role is required by a situation in the market in which it is not feasible to obtain adequate 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 or by another reinsurance undertaking. In the case of the association of underwriters known as Lloyd's, reinsurance also means the activity consisting in accepting risks, ceded by any member of Lloyd's, by an insurance or reinsurance undertaking other than the association of underwriters known as Lloyd's;
 - (b) 'captive reinsurance undertaking' means a reinsurance undertaking owned either by a financial undertaking other than an insurance or a reinsurance undertaking or a group of insurance or reinsurance undertakings to which Directive 98/78/EC applies, or by a non-financial undertaking, the purpose of which is to provide reinsurance cover exclusively for the risks of the undertaking or undertakings to which it belongs or of an undertaking or undertakings of the group of which the captive reinsurance undertaking is a member;
 - (c) 'reinsurance undertaking' means an undertaking which has received official authorisation in accordance with Article 3;
 - (d) 'branch' means an agency or a branch of a reinsurance undertaking;
 - (e) 'establishment' means the head office or a branch of a reinsurance undertaking, account being taken of point (d);

⁽¹⁾ OJ C 321, 31.12.2003, p. 1.

- (f) 'home Member State' means the Member State in which the head office of the reinsurance undertaking is situated;
- (g) 'Member State of the branch' means the Member State in which the branch of a reinsurance undertaking is situated;
- (h) 'host Member State' means the Member State in which a reinsurance undertaking has a branch or provides services;
- (i) 'control' means the relationship between a parent undertaking and a subsidiary, as defined in Article 1 of Directive 83/349/EEC ⁽¹⁾, or a similar relationship between any natural or legal person and an undertaking;
- (j) '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;
- (k) 'parent undertaking' means a parent undertaking as defined in Articles 1 and 2 of Directive 83/349/EEC;
- (l) 'subsidiary' means a subsidiary undertaking as defined in Articles 1 and 2 of Directive 83/349/EEC;
- (m) 'competent authorities' means the national authorities which are empowered by law or regulation to supervise reinsurance undertakings;
- (n) '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
 - (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;
- (o) 'financial undertaking' means one of the following entities:
- (i) a credit institution, a financial institution or an ancillary banking services undertaking within the meaning of Article 1(5) and (23) of Directive 2000/12/EC ⁽²⁾,
 - (ii) an insurance undertaking, a reinsurance undertaking or an insurance holding company within the meaning of Article 1(i) of Directive 98/78/EC,
 - (iii) an investment firm or a financial institution within the meaning of point 1 of Article 4(1) of Directive 2004/39/EC ⁽³⁾,
 - (iv) a mixed financial holding company within the meaning of Article 2(15) of Directive 2002/87/EC;
- (p) 'special purpose vehicle' means any undertaking, whether incorporated or not, other than an existing insurance or reinsurance undertaking, which assumes risks from insurance or reinsurance undertakings and which fully funds its exposure to such risks through the proceeds of a debt issuance or some other financing mechanism where the repayment rights of the providers of such debt or other financing mechanism are subordinated to the reinsurance obligations of such a vehicle;
- (q) 'finite reinsurance' means reinsurance under which the explicit maximum loss potential, expressed as the maximum economic risk transferred, arising both from a significant underwriting risk and timing risk transfer, exceeds the premium over the lifetime of the contract by a limited but significant amount, together with at least one of the following two features:
- (i) explicit and material consideration of the time value of money,
 - (ii) contractual provisions to moderate the balance of economic experience between the parties over time to achieve the target risk transfer.

⁽¹⁾ Seventh Council Directive 83/349/EEC of 13 June 1983 based on the Article 54(3)(g) of the Treaty on consolidated accounts (OJ L 193, 18.7.1983, p. 1). Directive as last amended by Directive 2003/51/EC.

⁽²⁾ Directive 2000/12/EC of the European Parliament and of the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions (OJ L 126, 26.5.2000, p. 1). Directive as last amended by Directive 2005/1/EC.

⁽³⁾ Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments (OJ L 145, 30.4.2004, p. 1).

2. For the purposes of paragraph 1(a) of this Article, the provision of cover by a reinsurance undertaking to an institution for occupational retirement provision falling under the scope of Directive 2003/41/EC ⁽¹⁾ where the law of the institution's home Member State permits such provision, shall also be considered as an activity falling under the scope of this Directive.

For the purposes of paragraph 1(d), any permanent presence of a reinsurance 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(j) of this Article, and in the context of Articles 12 and 19 to 23 and of the other levels of holding referred to in Article 19 to 23, the voting rights referred to in Article 92 of Directive 2001/34/EC ⁽²⁾ shall be taken into account.

For the purposes of paragraph 1(l), 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(n):

- any subsidiary undertaking of a subsidiary undertaking shall be considered a subsidiary of the parent undertaking which is at the head of those undertakings;
- 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 AND 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:

- (a) any 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 reinsurance activities other 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 to 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.

⁽¹⁾ Directive 2003/41/EC of the European Parliament and of the Council of 3 June 2003 on the activities and supervision of institutions for occupational retirement provision (OJ L 235, 23.9.2003, p. 10).

⁽²⁾ Directive 2001/34/EC of the European Parliament and of the Council of 28 May 2001 on the admission of securities to official stock exchange listing and on information to be published on those securities (OJ L 184, 6.7.2001, p. 1). Directive as last amended by Directive 2005/1/EC.

A reinsurance undertaking may also adopt the form of a European Company (SE), as defined in Regulation (EC) No 2157/2001⁽¹⁾.

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;
- (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.

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.

2. 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.

3. 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.

⁽¹⁾ Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE) (OJ L 294, 10.11.2001, p. 1). Regulation as amended by Regulation (EC) No 885/2004 (OJ L 168, 1.5.2004, p. 1).

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 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 retroceding 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.

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

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.

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.

Article 12

Shareholders and members with qualifying holdings

The competent authorities of the home Member State shall not grant to an undertaking an 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.

2. The competent authority of a Member State involved, which 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

Article 16

Principles and methods of financial supervision**Supervision of branches established in another Member State**

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 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.

The Member State of the branch shall provide that, where a 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.

4. In particular, the competent authorities shall be enabled to:

- (a) make detailed enquiries regarding a 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 paragraph 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 qualifications of the person referred to in the first paragraph. 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 acquire such 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 shall 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

Qualifying 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, penalties against directors and managers, or suspension of the exercise of the voting rights attaching to the shares held by the shareholders or members in question.

Similar measures shall apply to natural or legal persons failing to comply with the 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 penalties 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, and without prejudice to cases covered by criminal law, 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.

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

Cooperation agreements with third countries

Member States may conclude cooperation agreements providing for exchange of information with the competent authorities of third countries or with authorities or bodies of third countries as defined in Article 28(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 shall 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 penalties,
- (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 and 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 schemes 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 to 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 to 27, Member States may, with the aim of strengthening the stability, including the 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 laid down in the second subparagraph.

In order to implement point (c) of the second subparagraph, the authorities or bodies referred to in the first subparagraph shall communicate to the 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 Article 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 Directive 84/253/EEC ⁽¹⁾, performing in a reinsurance undertaking the task described in Article 51 of Directive 78/660/EEC ⁽²⁾, Article 37 of Directive 83/349/EEC or Article 31 of Directive 85/611/EEC ⁽³⁾ 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/she 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.

⁽¹⁾ Eighth Council Directive 84/253/EEC of 10 April 1984 based on Article 54(3)(g) of the Treaty on the approval of persons responsible for carrying out the statutory audits of accounting documents (OJ L 126, 12.5.1984, p. 20).

⁽²⁾ Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies (OJ L 222, 14.8.1978, p. 11). Directive as last amended by Directive 2003/51/EC.

⁽³⁾ Council Directive 85/611/EEC of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (OJ L 375, 31.12.1985, p. 3). Directive as last amended by Directive 2005/1/EC.

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 of this Article 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 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 set the conditions for accepting such claims.

Article 33

Equalisation reserves

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

2. The equalisation 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 equalisation 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 equalisation reserves for classes of risks other than credit reinsurance. The equalisation reserves shall be calculated according to the rules laid down by the home Member State.

Article 34

Assets covering technical provisions

1. The home Member State shall require every reinsurance undertaking to invest the assets covering the technical provisions and the equalisation reserve referred to in Article 33 in accordance with the following rules:

- (a) the assets 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 the sufficiency, liquidity, security, quality, profitability and matching of its investments;
- (b) the reinsurance undertaking shall ensure that the assets are diversified and adequately spread and allow the undertaking to respond adequately to changing economic circumstances, in particular developments in the financial markets and real estate markets or major catastrophic events. The undertaking shall assess the impact of irregular market circumstances on its assets and shall diversify the assets in such a way as to reduce such impact;
- (c) investment in assets which are not admitted to trading on a regulated financial market shall in any event be kept to prudent levels;
- (d) investment in derivative instruments shall be possible insofar as they contribute to a reduction of investment risks or facilitate efficient portfolio management. They shall be valued on a prudent basis, taking into account the underlying assets, and included in the valuation of the institution's assets. The institution shall also avoid excessive risk exposure to a single counterparty and to other derivative operations;

- (e) the assets shall be properly diversified in such a way as to avoid excessive reliance on any one particular asset, issuer or group of undertakings and accumulations of risk in the portfolio as a whole. Investments in assets issued by the same issuer or by issuers belonging to the same group shall not expose the undertaking to excessive risk concentration.

Member States may decide not to apply the requirements referred to in point (e) to investment in government bonds.

2. Member States shall not require reinsurance undertakings situated in their territory to invest in particular categories of assets.

3. Member States shall not subject the investment decisions of a reinsurance undertaking situated in their territory or its investment manager to any kind of prior approval or systematic notification requirements.

4. Notwithstanding paragraphs 1 to 3, the home Member State may, for every reinsurance undertaking whose head office is situated in its territory, lay down the following quantitative rules, provided that they are prudentially justified:

- (a) investments of gross technical provisions in currencies other than those in which technical provisions are set should be limited to 30 %;
- (b) investments of gross technical provisions in shares and other negotiable securities treated as shares, bonds and debt securities which are not admitted to trading on a regulated market should be limited to 30 %;
- (c) the home Member State may require every reinsurance undertaking to invest no more than 5 % of its gross technical provisions in shares and other negotiable securities treated as shares, bonds, debt securities and other money and capital market instruments from the same undertaking, and no more than 10 % of its total gross technical provisions in shares and other negotiable securities treated as shares, bonds, debt securities and other money and capital market instruments from undertakings which are members of the same group.

5. Furthermore, the home Member State shall lay down more detailed rules setting the conditions for the use of amounts outstanding from a special purpose vehicle as assets covering technical provisions pursuant to this Article.

CHAPTER 3

Rules relating to the solvency margin and to the guarantee fund

Section 1

Available solvency margin

Article 35

General rule

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

Article 36

Eligible items

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

- (a) the paid-up share capital or, in the case of a mutual reinsurance undertaking, the effective initial fund plus any members' accounts which meet all the following criteria:
 - (i) the memorandum and articles of association shall stipulate that payments may be made from those accounts to members only in so far as this does not cause the available solvency margin to fall below the required level, or, after the dissolution of the undertaking, if all the undertaking's other debts have been settled;
 - (ii) the memorandum and articles of association shall stipulate, with respect to any payments referred to in point (i) for reasons other than the individual termination of membership, that the competent authorities must be notified at least one month in advance and can prohibit the payment within that period;

- (iii) the relevant provisions of the memorandum and articles of association may be amended only after the competent authorities have declared that they have no objection to the amendment, without prejudice to the criteria stated in points (i) and (ii);
- (b) statutory and free reserves which neither correspond to underwriting liabilities nor are classified as equalisation reserves;
- (c) the profit or loss brought forward after deduction of dividends to be paid.

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

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

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

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

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

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

⁽¹⁾ Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field (OJ L 141, 11.6.1993, p. 27). Directive as last amended by Directive 2002/87/EC of the European Parliament and of the Council (OJ L 35, 11.2.2003, p. 1).

⁽²⁾ Council Directive 93/6/EEC of 15 March 1993 on the capital adequacy of investments firms and credit institutions (OJ L 141, 11.6.1993, p. 1). Directive as last amended by Directive 2005/1/EC.

deduct the items referred to in (a) and (b) of the third subparagraph which are held in credit institutions, investment firms, financial institutions, insurance or reinsurance undertakings or insurance holding companies which are included in the supplementary supervision.

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

3. The available solvency margin may also consist of:

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

Subordinated loan capital shall also fulfil the following conditions:

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

solvency margin and the required solvency margin both before and after that repayment. The competent authorities shall authorise repayment only if the reinsurance undertaking's available solvency margin will not fall below the required level;

- (iv) the loan agreement shall not include any clause providing that in specified circumstances, other than the winding-up of the reinsurance undertaking, the debt will become repayable before the agreed repayment dates;
- (v) the loan agreement may be amended only after the competent authorities have declared that they have no objection to the amendment;
- (b) securities with no specified maturity date and other instruments, including cumulative preferential shares other than those referred to in point (a), up to 50 % of the available solvency margin or the required solvency margin, whichever is the smaller, for the total of such securities and the subordinated loan capital referred to in point (a) provided that they fulfil the following:
 - (i) they may not be repaid on the initiative of the bearer or without the prior consent of the competent authority;
 - (ii) the contract of issue shall enable the reinsurance undertaking to defer the payment of interest on the loan;
 - (iii) the lender's claims on the reinsurance undertaking shall rank entirely after those of all non-subordinated creditors;
 - (iv) the documents governing the issue of the securities shall provide for the loss-absorption capacity of the debt and unpaid interest, while enabling the reinsurance undertaking to continue its business;
 - (v) only fully paid-up amounts may be taken into account.

4. Upon application, with supporting evidence, by the reinsurance undertaking to the competent authority of the home Member State and with the agreement of that competent authority, the available solvency margin may also consist of:

- (a) one half of the unpaid share capital or initial fund, once the paid-up part amounts to 25 % of that share capital or fund, up to 50 % of the available solvency margin or the required solvency margin, whichever is the smaller;

(b) in the case of a non-life mutual or mutual-type association with variable contributions, any claim which it has against its members by way of a call for supplementary contribution, within the financial year, up to one half of the difference between the maximum contributions and the contributions actually called in, and subject to a limit of 50 % of the available solvency margin or the required solvency margin, whichever is the smaller. The competent national authorities shall establish guidelines laying down the conditions under which supplementary contributions may be accepted;

(c) any hidden net reserves arising out of the valuation of assets, in so far as such hidden net reserves are not of an exceptional nature.

5. In addition, with respect to life reinsurance activities, the available solvency margin may, upon application, with supporting evidence, by the reinsurance undertaking to the competent authority of the home Member State and with the agreement of that competent authority, consist of:

(a) until 31 December 2009, an amount equal to 50 % of the undertaking's future profits, but not exceeding 25 % of the available solvency margin or the required solvency margin, whichever is the smaller; the amount of the future profits shall be obtained by multiplying the estimated annual profit by a factor which represents the average period left to run on policies; the factor used may not exceed six; the estimated annual profit shall not exceed the arithmetical average of the profits made over the last five financial years in the activities listed in Article 2(1) of Directive 2002/83/EC.

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

- (i) when an actuarial report is submitted to the competent authorities substantiating the likelihood of emergence of these profits in the future; and
 - (ii) insofar as that part of future profits emerging from hidden net reserves referred to in paragraph 4(c) has not already been taken into account;
- (b) where Zillmerising is not practised or where, if practised, it is less than the loading for acquisition costs included in the premium, the difference between a non-Zillmerised or partially Zillmerised mathematical provision and a mathematical provision Zillmerised at a rate equal to the loading for acquisition costs included in the premium; this figure may not, however, exceed 3,5 % of the sum of the differences between the relevant capital sums of life reinsurance activities and the mathematical provisions for all policies for which Zillmerising is possible; the

difference shall be reduced by the amount of any undepreciated acquisition costs entered as an asset.

6. Amendments to paragraphs 1 to 5 of this Article to take into account developments that justify a technical adjustment of the elements eligible for the available solvency margin shall be adopted in accordance with the procedure laid down in Article 55(2).

Section 2

Required solvency margin

Article 37

Required solvency margin for non-life reinsurance activities

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

and 23 % of these portions respectively shall be calculated and added together.

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

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

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

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

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

Article 38

Required solvency margin for life reinsurance activities

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

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

Article 39

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

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

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

Section 3

Guarantee fund

Article 40

Amount of the guarantee fund

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

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

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

Article 41

Review of the amount of the guarantee fund

1. The amounts in euro as laid down in Article 40(2) shall be reviewed annually as from 10 December 2007 in order to

take account of changes in the European index of consumer prices comprising all Member States as published by Eurostat.

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

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

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

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 shall, as a minimum, include particulars or proof for the next three financial years concerning:

- (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 those 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 a limited 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 of this Article, 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 the said 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 FINITE REINSURANCE AND SPECIAL PURPOSE VEHICLES

Article 45

Finite reinsurance

1. The home Member State may lay down specific provisions concerning the pursuit of finite reinsurance activities regarding:

- mandatory conditions for inclusion in all contracts issued;
- sound administrative and accounting procedures, adequate internal control mechanisms and risk management requirements;
- accounting, prudential and statistical information requirements;
- the establishment of technical provisions to ensure that they are adequate, reliable and objective;
- investment of assets covering technical provisions in order to ensure that they take account of the type of business carried on by the reinsurance undertaking, in particular the nature, amount and duration of the expected claims payments, in such a way as to secure the sufficiency, liquidity, security, profitability and matching of its assets;
- rules relating to the available solvency margin, required solvency margin and the minimum guarantee fund that the reinsurance undertaking shall maintain in respect of finite reinsurance activities.

2. In the interests of transparency, Member States shall communicate the text of any measures laid down by their national law for the purposes of paragraph 1 to the Commission without delay.

Article 46

Special purpose vehicles

1. Where a Member State decides to allow the establishment within its territory of special purpose vehicles within the meaning of this Directive, it shall require prior official authorisation thereof.

2. The Member State where the special purpose vehicle is established shall lay down the conditions under which the activities of such an undertaking shall be carried on. In particular, that Member State shall lay down rules regarding:

- scope of authorisation;
- mandatory conditions for inclusion in all contracts issued;
- the good repute and appropriate professional qualifications of persons running the special purpose vehicle;
- fit and proper requirements for shareholders or members having a qualifying holding in the special purpose vehicle;
- sound administrative and accounting procedures, adequate internal control mechanisms and risk management requirements;

- accounting, prudential and statistical information requirements;
- the solvency requirements of special purpose vehicles.

3. In the interests of transparency, Member States shall communicate the text of any measures laid down by their national law for the purposes of paragraph 2, to the Commission without delay.

TITLE V

PROVISIONS RELATING TO RIGHT OF ESTABLISHMENT AND FREEDOM TO PROVIDE SERVICES

Article 47

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.

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 shall be properly reasoned and communicated to the reinsurance undertaking concerned.

Article 48

Winding-up

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 penalise further infringements, including, insofar as is strictly

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 VI

REINSURANCE UNDERTAKINGS WHOSE HEAD OFFICES ARE OUTSIDE THE COMMUNITY AND CONDUCTING REINSURANCE ACTIVITIES IN THE COMMUNITY

Article 49

Principle and conditions for conducting reinsurance business

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

Article 50

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 to ensure that:

(a) the competent authorities of the Member States are able to obtain the information necessary for the supervision of reinsurance undertakings which have their head

offices 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 which have their head offices situated within their territories and conduct business in the Community.

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

TITLE VII

SUBSIDIARIES OF PARENT UNDERTAKINGS GOVERNED BY THE LAWS OF A THIRD COUNTRY AND ACQUISITIONS OF HOLDINGS BY SUCH PARENT UNDERTAKINGS

Article 51

Information from Member States to the Commission

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

- (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.

When an authorisation as referred to in point (a) is granted to the direct or indirect subsidiary of one or more parent undertakings governed by the laws of a third country, the structure of the group shall be specified in the notification which the competent authorities shall address to the Commission.

Article 52

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 in a third country.

2. The Commission shall, periodically, 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 VIII

OTHER PROVISIONS

*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***Cooperation 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 European Insurance and Occupational Pensions Committee.

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 set at 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,
- (b) clarification of the items constituting the solvency margin listed in Article 36 to take account of the creation of new financial instruments,
- (c) increase by up to 50 % of 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 classes 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 those 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 IX

AMENDMENTS TO EXISTING DIRECTIVES

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

Directive 73/239/EEC is hereby amended as follows:

1. In Article 12a, paragraphs 1 and 2 shall be 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 subparagraph shall be 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 2005/68/EC of the European Parliament and of the Council of 16 November 2005 on reinsurance (*) or an insurance undertaking authorised in accordance with this Directive or Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance (**), on grounds directly related to the financial soundness of the reinsurance undertaking or the insurance undertaking.

(*) OJ L 323, 9.12.2005, p. 1.

(**) OJ L 345, 19.12.2002, p. 1. Directive as last amended by Directive 2005/1/EC (OJ L 79, 24.3.2005, p. 9).'

3. In Article 15, paragraphs 2 and 3 shall be replaced by the following:

'2. The home Member State shall require every insurance undertaking to cover the technical provisions and the equalisation reserve referred to in Article 15a of this Directive by matching assets in accordance with Article 6 of Directive 88/357/EEC. In respect of risks situated within the Community, those assets must be localised within the Community. Member States shall not require insurance undertakings to localise their assets in any particular Member State. The home Member State

may, however, allow the rules on the localisation of assets to be relaxed.

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 2005/68/EC 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 which is neither a reinsurance undertaking authorised in accordance with Directive 2005/68/EC nor an insurance undertaking authorised in accordance with this Directive or Directive 2002/83/EC, it shall set the conditions for accepting such claims.'

4. Article 16(2) is hereby amended as follows:

- (a) point (b) of the first subparagraph shall be replaced by the following:

'(b) reserves (statutory and free reserves) which neither correspond to underwriting liabilities nor are classified as equalisation reserves;'

- (b) the introductory wording and point (a) of the fourth subparagraph shall be 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 2005/68/EC 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.

5. Article 16a is hereby amended as follows:

- (a) in paragraph 3, the seventh subparagraph shall be replaced by the following:

‘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 reinsurance and the gross amount of claims; that ratio may in no case be less than 50 %. Upon application, with supporting evidence, by the insurance undertaking to the competent authority of the home Member State and with the agreement of that authority, amounts recoverable from special purpose vehicles referred to in Article 46 of Directive 2005/68/EC may be deducted as reinsurance.’;

- (b) in paragraph 4, the seventh subparagraph shall be replaced by the following:

‘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 reinsurance and the gross amount of claims; that ratio may in no case be less than 50 %. Upon application, with supporting evidence, by the insurance undertaking to the competent authority of the home Member State and with the agreement of that authority, amounts recoverable from special purpose vehicles referred to in Article 46 of Directive 2005/68/EC may be deducted as reinsurance.’

6. The following Article shall be inserted:

‘Article 17b

1. Each Member State shall require that an insurance undertaking whose head office is situated within its territory and which conducts reinsurance activities establishes, in respect of its entire business, a minimum

guarantee fund in accordance with Article 40 of Directive 2005/68/EC, where one of the following conditions is met:

- (a) the reinsurance premiums collected exceed 10 % of its total premium;
- (b) the reinsurance premiums collected exceed EUR 50 000 000;
- (c) the technical provisions resulting from its reinsurance acceptances exceed 10 % of its total technical provisions.

2. Each Member State may choose to apply to such insurance undertakings as are referred to in paragraph 1 of this Article and whose head office is situated within its territory the provisions of Article 34 of Directive 2005/68/EC in respect of their reinsurance acceptance activities, where one of the conditions laid down in the said paragraph 1 is met.

In that case, the relevant Member State shall require that all assets employed by the insurance undertaking to cover the technical provisions corresponding to its reinsurance acceptances shall be ring-fenced, managed and organised separately from the direct insurance activities of the insurance undertaking, without any possibility of transfer. In such a case, and only as far as their reinsurance acceptance activities are concerned, insurance undertakings shall not be subject to Articles 20, 21 and 22 of Directive 92/49/EEC (*) and Annex I to Directive 88/357/EEC.

Each Member State shall ensure that their competent authorities verify the separation provided for in the second subparagraph.

3. If the Commission decides, pursuant to Article 56(c) of Directive 2005/68/EC to increase 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 such insurance undertakings as are referred to in paragraph 1 of this Article the provisions of Articles 35 to 39 of that Directive in respect of their reinsurance acceptance activities.

(*) 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 (third non-life insurance Directive) (OJ L 228, 11.8.1992, p. 1). Directive as last amended by Directive 2005/1/EC.’

7. In Article 20a, paragraph 4 shall be replaced by the following:

‘4. Member States shall ensure that the competent authorities have the power to decrease the reduction, based on reinsurance, to the solvency margin as determined in accordance with Article 16a where:

- (a) the nature or quality of reinsurance contracts has changed significantly since the last financial year;
- (b) there is no, or a limited, risk transfer under the reinsurance contracts.’

Article 58

Amendments to Directive 92/49/EEC

Directive 92/49/EEC is hereby amended as follows:

1. In Article 15, paragraph 1a shall be replaced by the following:

‘1a. If the acquirer of the holdings referred to in paragraph 1 of this Article 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 shall be subject to the prior consultation referred to in Article 12a of Directive 73/239/EEC’.

2. In Article 16, paragraphs 4, 5 and 6 shall be 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 penalties,
- 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 those 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 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.'

3. Article 21(1) is hereby amended as follows:

- (a) the introductory wording shall be replaced by the following:

'1. The home Member State may not authorise insurance undertakings to cover their technical provisions and equalisation reserves with any assets other than those in the following categories:'

- (b) point (f) of point (B) shall be replaced by the following:

'(f) debts owed by reinsurers, including reinsurers shares of technical provisions, and by the special purpose vehicles referred to in Article 46 of Directive 2005/68/EC of the European Parliament and of the Council of 16 November 2005 on reinsurance (*).

(*) OJ L 323, 9.12.2005, p. 1.'

- (c) the third subparagraph of point (C) shall be replaced by the following:

'The inclusion of any asset or category of assets listed in the first subparagraph shall not mean that all those assets should automatically be accepted as cover for technical provisions. The home Member State shall lay down more detailed rules setting the conditions for the use of acceptable assets.'

4. In Article 22(1), the introductory wording shall be replaced by the following:

'1. As regards the assets covering technical provisions and equalisation reserves, the home Member State shall require every insurance undertaking to invest no more than:'

Article 59

Amendments to Directive 98/78/EC

Directive 98/78/EC is hereby amended as follows:

1. The title shall be 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 hereby amended as follows:

- (a) the points (c), (i), (j) and (k) shall be replaced by the following:

'(c) "reinsurance undertaking" means an undertaking, which has received official authorisation in accordance with Article 3 of Directive 2005/68/EC of the European Parliament and of the Council of 16 November 2005 on reinsurance (*);

(*) OJ L 323, 9.12.2005, p. 1.'

'(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 of 16 December 2002 on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate (*);

(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 35, 11.2.2003, p. 1. Directive as amended by Directive 2005/1/EC (OJ L 79, 24.3.2005, p. 9).;

(b) the following point shall be added:

“(l) “non-member country reinsurance undertaking” means an undertaking which would require authorisation in accordance with Article 3 of Directive 2005/68/EC if it had its head office in the Community;”.

3. Articles 2, 3 and 4 shall be 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 Directive 73/239/EEC, Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance (*) and Directive 2005/68/EC, 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 non-member country reinsurance undertaking, shall be supplemented in the manner prescribed in Articles 5, 6, 8 and 9 of this Directive.

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 2005/68/EC.

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. Directive as last amended by Directive 2005/1/EC.

4. In Article 5, paragraph 1 shall be replaced by the following:

‘1. Member States shall prescribe that the competent authorities are to 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 shall be replaced by the following:

‘Article 6

Access to information

1. Member States shall provide that their competent authorities responsible for exercising supplementary supervision are to 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 of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions (*) or an investment firm as defined in Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field (**), 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 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 (third non-life insurance Directive) (***) and Article 16 of Directive 2002/83/EC and Articles 24 to 30 of Directive 2005/68/EC.

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 undertaking 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. Directive as last amended by Directive 2005/1/EC.

(**) OJ L 141, 11.6.1993, p. 27. Directive as last amended by Directive 2002/87/EC.

(***) OJ L 228, 11.8.1992, p. 1. Directive as last amended by Directive 2005/1/EC.

6. In Article 9, paragraph 3 shall be 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 hereby amended as follows:

- (a) the title shall be replaced by the following:

‘Insurance holding companies, non-member country insurance undertakings and non-member country reinsurance undertakings’;

- (b) paragraphs 2 and 3 shall be 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 that 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 hereby amended as follows:

- (a) in paragraph 1, point (b) shall be 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 shall be 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 to Directive 98/78/EC shall be replaced by Annex II to this Directive.

Article 60

Amendments to Directive 2002/83/EC

Directive 2002/83/EC is hereby amended as follows:

1. In Article 1(1), the following point shall be added:

‘(s) “reinsurance undertaking” shall mean a reinsurance undertaking within the meaning of Article 2 point (c) of Directive 2005/68/EC of the European Parliament and of the Council of 16 November 2005 on reinsurance (*)’

(*) OJ L 323, 9.12.2005, p. 1.

2. The following Article shall be 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 subparagraph shall be 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 2005/68/EC or an insurance undertaking authorised in accordance with Directive 73/239/EEC or this Directive on grounds directly related to the financial soundness of the reinsurance undertaking or the insurance undertaking.'

4. In Article 15, the following paragraph shall be inserted:

'1a. If the acquirer of the holdings referred to in paragraph 1 of this Article 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 hereby amended as follows:

- (a) paragraphs 4, 5 and 6 shall be 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 penalties, 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 those 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 shall be 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) shall be 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 2005/68/EC when the reinsurer is a reinsurance undertaking or an insurance undertaking authorised in accordance with Directive 73/239/EEC or this Directive.

When the home Member State allows any technical provisions to be covered by claims against a reinsurer which is neither a reinsurance undertaking authorised in accordance with Directive 2005/68/EC nor an insurance undertaking authorised in accordance with Directive 73/239/EEC or this Directive, it shall set the conditions for accepting such claims.’

7. Article 23 is hereby amended as follows:

(a) in paragraph 1(B), point (f) shall be replaced by the following:

‘(f) debts owed by reinsurers, including reinsurers’ shares of technical provisions, and by special purpose vehicles referred to in Article 46 of Directive 2005/68/EC;’

(b) in paragraph 3, the first subparagraph shall be replaced by the following:

‘3. The inclusion of any asset or category of assets listed in paragraph 1 shall not mean that all these assets should automatically be accepted as cover for technical provisions. The home Member State shall lay down more detailed rules setting the conditions for the use of acceptable assets.’

8. In Article 27(2), the following subparagraphs shall be 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 of 27 October 1998 on the supplementary supervision of insurance undertakings in an insurance group (*),
- reinsurance undertakings within the meaning of Article 3 of Directive 2005/68/EC or a 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 of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions (**),
- investment firms and financial institutions within the meaning of Article 1(2) of Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field (***) and of Articles 2(4) and 2(7) of Council Directive 93/6/EEC of 15 March 1993 on the capital adequacy of investments firms and credit institutions (****);

- (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 of 16 December 2002 on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate (*****). 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 of this Article 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.

(*) OJ L 330, 5.12.1998, p. 1. Directive as last amended by Directive 2005/1/EC (OJ L 79, 24.3.2005, p. 9).

(**) OJ L 126, 26.5.2000, p. 1. Directive as last amended by Directive 2005/1/EC.

(***) OJ L 141, 11.6.1993, p. 27. Directive as last amended by Directive 2002/87/EC (OJ L 35, 11.2.2003, p. 1).

(****) OJ L 141, 11.6.1993, p. 1. Directive as last amended by Directive 2005/1/EC.

(*****) OJ L 35, 11.2.2003, p. 1. Directive as last amended by Directive 2005/1/EC.’

9. Article 28(2) is hereby amended as follows:

(a) point (a) shall be replaced by the following:

‘(a) first result:

a 4 % fraction of the mathematical provisions relating to direct business and reinsurance acceptances gross of reinsurance cessions shall be multiplied by the ratio, for the last financial year, of the mathematical provisions net of reinsurance cessions to the gross total mathematical provisions. That ratio may in no case be less than 85 %. Upon application, with supporting evidence, by the insurance undertaking to the competent authority of the home Member State and with agreement of that authority, amounts recoverable from the special purpose vehicles referred to in Article 46 of Directive 2005/68/EC may be deducted as reinsurance.’;

(b) in point (b), the first subparagraph shall be replaced by the following:

‘(b) second result:

for policies on which the capital at risk is not a negative figure, a 0,3 % fraction of such capital underwritten by the assurance 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 reinsurance cessions and retrocessions to the total capital at risk gross of reinsurance; that ratio may in no case be less than 50 %. Upon application, with supporting evidence, by the insurance undertaking to the competent authority of the home Member State and with the agreement of that authority, amounts recoverable from the special purpose vehicles referred to in Article 46 of Directive 2005/68/EC may be deducted as reinsurance.’

10. The following Article shall be inserted:

‘Article 28a

Solvency margin for assurance undertakings conducting reinsurance activities

1. Each Member State shall apply to insurance undertakings whose head office is situated within its territory,

the provisions of Articles 35 to 39 of Directive 2005/68/EC in respect of their reinsurance acceptance 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 50 000 000;

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

2. Each Member State may choose to apply to assurance undertakings referred to in paragraph 1 of this Article and whose head office is situated within its territory the provisions of Article 34 of Directive 2005/68/EC in respect of their reinsurance acceptance activities, where one of the conditions laid down in the said paragraph 1 is met.

In that case, the respective Member State shall require that all assets employed by the assurance undertaking to cover the technical provisions corresponding to its reinsurance acceptances shall be ring-fenced, managed and organised separately from the direct assurance activities of the assurance undertaking, without any possibility of transfer. In such a case, and only as far as their reinsurance acceptance activities are concerned, assurance undertakings shall not be subject to Articles 22 to 26.

Each Member State shall ensure that their competent authorities verify the separation provided for in the second subparagraph.’

11. Article 37(4) shall be replaced by the following:

‘4. Member States shall ensure that the competent authorities have the power to decrease the reduction, based on reinsurance, to the solvency margin as determined in accordance with Article 28 where:

(a) the nature or quality of reinsurance contracts has changed significantly since the last financial year;

(b) there is no, or a limited, risk transfer under the reinsurance contracts.’

TITLE X

TRANSITIONAL AND FINAL PROVISIONS

Article 61

Right 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 10 December 2005 shall be deemed to be authorised in accordance with Article 3.

However, they shall be obliged to comply with the provisions of this Directive concerning the carrying on of the business of reinsurance and with the requirements set out in Article 6(a), (c), (d), Articles 7, 8 and 12 and Articles 32 to 41 as from 10 December 2007.

2. Member States may allow reinsurance undertakings referred to in paragraph 1 which at 10 December 2005 do not comply with Articles 6(a), 7, 8 and Articles 32 to 40 a period until 10 December 2008 in order to comply with such requirements.

Article 62

Reinsurance undertakings closing their activity

1. Reinsurance undertakings which by 10 December 2007 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 63

Transitional period for Articles 57(3) and 60(6)

A Member State may postpone the application of the provisions of Article 57(3) of this Directive amending

Article 15(3) of Directive 73/239/EEC and of the provision of Article 60(6) of this Directive until 10 December 2008.

Article 64

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 10 December 2007. They shall forthwith communicate to the Commission the texts of those measures.

When Member States adopt those measures, 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 65

Entry into force

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

Article 66

Addressees

This Directive is addressed to the Member States.

Done at Strasbourg, 16 November 2005.

For the European Parliament

The President

J. BORRELL FONTELLES

For the Council

The President

Bach of LUTTERWORTH

ANNEX I

Forms 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 Czech Republic: 'akciová společnost';
- 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 Republic of Estonia: 'aktsiaselts';
- 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 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 Republic of Cyprus: 'Εταιρεία Περιορισμένης Ευθύνης με μετοχές' ή 'Εταιρεία Περιορισμένης Ευθύνης με εγγύηση';
- in the case of the Republic of Latvia: 'akciju sabiedrība', 'sabiedrība ar ierobežotu atbildību';
- in the case of the Republic of Lithuania: 'akcinė bendrovė', 'uždaroji akcinė bendrovė';
- in the case of the Grand Duchy of Luxembourg: 'société anonyme', 'société en commandite par actions', 'association d'assurances mutuelles', 'société coopérative';
- in the case of the Republic of Hungary: 'biztosító részvénytársaság', 'biztosító szövetkezet', 'harmadik országbeli biztosító magyarországi fióktelepe';
- in the case of the Republic of Malta: 'limited liability company/kumpannija ta' responsabbiltà limitata';
- in the case of the Kingdom of the Netherlands: 'naamloze vennootschap', 'onderlinge waarborgmaatschappij';
- in the case of the Republic of Austria: 'Aktiengesellschaft', 'Versicherungsverein auf Gegenseitigkeit';
- in the case of the Republic of Poland: 'spółka akcyjna', 'towarzystwo ubezpieczeń wzajemnych';

- in the case of the Portuguese Republic: ‘sociedade anónima’, ‘mútua de seguros’;
 - in the case of the Republic of Slovenia: ‘delniška družba’;
 - in the case of the Slovak Republic: ‘akciová spoločnosť’;
 - in the case of the Republic of Finland: ‘keskinäinen vakuutusyhtiö/ömsesidigt försäkringsbolag’, ‘vakuutusosakeyhtiö/försäkringsaktiebolag’, ‘vakuutusyhdistys/försäkringsförening’;
 - in the case of the Kingdom of Sweden: ‘försäkringsaktiebolag’, ‘ömsesidigt försäkringsbolag’;
 - 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 or incorporated under the Friendly Societies Acts, ‘the association of underwriters known as Lloyd’s’.
-

ANNEX II

Annexes I and II to Directive 98/78/EC shall be 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 that 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 or reinsurance 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, 91/674/EEC, 2002/83/EC and 2005/68/EC for calculating the solvency margin of insurance undertakings or reinsurance undertakings. The value of the assets and liabilities shall be assessed in accordance with the relevant provisions of Directives 73/239/EEC, 91/674/EEC, 2002/83/EC and 2005/68/EC.

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 insurance undertaking or reinsurance 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 a related insurance undertaking, a related reinsurance undertaking, 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 that 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 2005/68/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 2005/68/EC, 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 2005/68/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, 91/674/EEC, 2002/83/EC and 2005/68/EC 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, 91/674/EEC, 2002/83/EC and 2005/68/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 that 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 in accordance with 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 2005/68/EC 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.'

DIRECTIVE 2005/69/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**of 16 November 2005****amending for the 27th time Council Directive 76/769/EEC on the approximation of the laws, regulations and administrative provisions of the Member States relating to restrictions on the marketing and use of certain dangerous substances and preparations (polycyclic aromatic hydrocarbons in extender oils and tyres)**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 95 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social Committee ⁽¹⁾,

Acting in accordance with the procedure laid down in Article 251 of the Treaty ⁽²⁾,

Whereas:

(2) Benzo(a)pyrene (BaP) can be a qualitative and quantitative marker for the presence of PAHs. BaP and other PAHs have been classified as carcinogenic, mutagenic and toxic to reproduction. In addition, due to the presence of these PAHs, several extender oils as such have been classified as carcinogenic, mutagenic and toxic to reproduction.

(3) The Scientific Committee on Toxicity, Ecotoxicity and the Environment (CSTEE) has confirmed the scientific findings which identify the adverse health effects of PAHs.

(4) The emission of BaP and other PAHs into the environment should be reduced as much as possible. In order to provide a high level of protection to human health and the environment and to contribute to the reduction of total annual emissions of PAHs as required in the 1998 Protocol to the 1979 Convention on Long Range Transboundary Air Pollution on Persistent Organic Pollutants, it therefore appears necessary to restrict the placing on the market and the use of PAH-rich extender oils and blends used as extender oils for the production of tyres.

(1) Tyres are produced by using extender oils that may contain various levels of polycyclic aromatic hydrocarbons (PAHs) that are not added intentionally. During the production process PAHs can be incorporated into the rubber matrix. Therefore, they can be present in various amounts in the final product.

(5) Council Directive 76/769/EEC of 27 July 1976 on the approximation of the laws, regulations and administrative provisions of the Member States relating to restrictions on the marketing and use of certain dangerous substances and preparations ⁽³⁾ should therefore be amended accordingly.

⁽¹⁾ OJ C 120, 20.5.2005, p. 30.

⁽²⁾ Opinion of the European Parliament of 9 June 2005 (not yet published in the Official Journal) and Council Decision of 17 October 2005.

⁽³⁾ OJ L 262, 27.9.1976, p. 201. Directive as last amended by Commission Directive 2004/98/EC (OJ L 305, 1.10.2004, p. 63).

- (6) Without prejudice to the requirements of other European provisions, this Directive covers passenger car tyres ⁽¹⁾, light and heavy truck tyres ⁽²⁾, agricultural tyres ⁽³⁾ and motorcycle tyres ⁽⁴⁾.
- (7) In order to meet the necessary safety requirements and in particular to ensure that tyres have a high degree of wet grip performance, a transitory period is necessary during which tyre producers will develop and test new types of tyres produced without high aromatic extender oils. According to the information at present available, the development and testing work will take a considerable amount of time, as producers will have to perform numerous series of test runs before the necessary high level of wet grip performance of the new tyres can be guaranteed. Therefore, this Directive should be applied to economic operators from 1 January 2010.
- (8) The adoption of harmonised test methods is necessary for the application of this Directive as regards the content of PAHs in extender oils and tyres. The adoption of such test methods should not delay the entry into force of this Directive. The test method should preferably be developed at European or international level, where appropriate by the European Committee for Standardisation (CEN) or by the International Organisation for Standardization (ISO). The Commission may publish references to the relevant CEN or ISO standards or establish such methods in accordance with Article 2a of Directive 76/769/EEC, where necessary.
- (9) This Directive does not affect the Community legislation laying down minimum requirements for the protection of workers, such as Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work ⁽⁵⁾, and individual directives based thereon, in particular Directive 2004/37/EC of the European Parliament and of the Council of 29 April

2004 on the protection of workers from the risks related to exposure to carcinogens or mutagens at work (sixth individual Directive within the meaning of Article 16(1) of Council Directive 89/391/EEC ⁽⁶⁾) and Council Directive 98/24/EC of 7 April 1998 on the protection of the health and safety of workers from the risks related to chemical agents at work (14th individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC ⁽⁷⁾).

- (10) It is not the purpose of this Directive to restrict the placing on the market, as defined in Article 2(1)(e) of Council Directive 67/548/EEC of 27 June 1967 on the approximation of laws, regulations and administrative provisions relating to the classification, packaging and labelling of dangerous substances ⁽⁸⁾, of tyres produced before 1 January 2010 and which can thus be sold off from stocks subsequent to this date. The date of production of tyres can be easily recognised by the existing mandatory marking of the 'date of manufacture' on the tyre as stipulated in Directive 92/23/EEC. All tyres retreaded after 1 January 2010 should be retreaded with new tread containing new PAH-low extender oils,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Annex I to Directive 76/769/EEC is hereby amended as set out in the Annex to this Directive.

Article 2

Member States shall adopt and publish the laws, regulations and administrative provisions necessary to comply with this Directive by 29 December 2006. They shall forthwith inform the Commission thereof.

They shall apply those measures from 1 January 2010.

⁽¹⁾ Council Directive 92/23/EEC of 31 March 1992 relating to tyres for motor vehicles and their trailers and to their fitting (OJ L 129, 14.5.1992, p. 95). Directive as last amended by Commission Directive 2005/11/EC (OJ L 46, 17.2. 2005, p. 42).

⁽²⁾ Directive 92/23/EEC.

⁽³⁾ UN/ECE Regulation 106.

⁽⁴⁾ Directive 97/24/EC of the European Parliament and the Council of 17 June 1997 on certain components and characteristics of two or three-wheeled motor vehicles (OJ L 226, 18.8.1997, p. 1). Directive as last amended by Commission Directive 2005/30/EC (OJ L 106, 27.4. 2005, p. 17).

⁽⁵⁾ OJ L 183, 29.6.1989, p. 1. Directive as amended by Regulation (EC) No 1882/2003 of the European Parliament and of the Council (OJ L 284, 31.10.2003, p. 1).

⁽⁶⁾ OJ L 158, 30.4.2004, p. 50. Corrected version in OJ L 229, 29.6.2004, p. 23.

⁽⁷⁾ OJ L 131, 5.5.1998, p. 11. Directive as amended by the 2003 Act of Accession.

⁽⁸⁾ OJ 196, 16.8.1967, p. 1. Directive as last amended by Commission Directive 2004/73/EC (OJ L 152, 30.4.2004, p. 1). Corrected version in OJ L 216, 16.6.2004, p. 3.

When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

Article 3

This Directive shall enter into force on the 20th day following its publication in the *Official Journal of the European Union*.

Article 4

This Directive is addressed to the Member States.

Done at Strasbourg, 16 November 2005.

For the European Parliament

The President

J. BORRELL FONTELLES

For the Council

The President

Bach of LUTTERWORTH

ANNEX

The following point is added to Annex I to Directive 76/769/EEC:

‘50. Polycyclic-aromatic hydrocarbons (PAH) 1. Benzo(a)pyrene (BaP) CAS No 50-32-8 2. Benzo(e)pyren (BeP) CAS No 192-97-2 3. Benzo(a)anthracene (BaA) CAS No 56-55-3 4. Chrysen (CHR) CAS No 218-01-9 5. Benzo(b)fluoranthene (BbFA) CAS No 205-99-2 6. Benzo(j)fluoranthene (BjFA) CAS No 205-82-3 7. Benzo(k)fluoranthene (BkFA) CAS No 207-08-9 8. Dibenzo(a, h)anthracene (DBAhA) CAS No 53-70-3	1. Extender oils may not be placed on the market and used for the production of tyres or parts of tyres, if they contain: — more than 1 mg/kg BaP, or — more than 10 mg/kg of the sum of all listed PAHs. These limits are regarded as kept, if the polycyclic aromatics (PCA) extract is less than 3 % by mass, as measured by the Institute of Petroleum standard IP346: 1998 (Determination of PCA in unused lubricating base oils and asphaltene free petroleum fractions — Dimethyl sulphoxide extraction refractive index method), provided that compliance with the limit values of BaP and of the listed PAHs, as well as the correlation of the measured values with the PCA extract, is controlled by the manufacturer or importer every six months or after each major operational change, whichever is earlier. 2. Furthermore, the tyres and treads for retreading manufactured after 1 January 2010 may not be placed on the market if they contain extender oils exceeding the limits indicated in paragraph 1. These limits are regarded as kept, if the vulcanised rubber compounds do not exceed the limit of 0,35 % Bay protons as measured and calculated by ISO 21461 (Rubber vulcanised — Determination of aromaticity of oil in vulcanised rubber compounds). 3. By way of derogation, paragraph 2 shall not apply to retreaded tyres if their tread does not contain extender oils exceeding the limits indicated in paragraph 1.’
---	--

DIRECTIVE 2005/75/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**of 16 November 2005****correcting Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 47(2) and Articles 55 and 95 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social Committee ⁽¹⁾, After consulting the Committee of the Regions,

After consulting the Committee of the Regions,

Acting in accordance with the procedure laid down in Article 251 of the Treaty ⁽²⁾,

Whereas:

- (1) The threshold applying to contracts for certain services subsidised by more than 50 % should remain aligned with the threshold applying to service contracts awarded by contracting authorities other than central governmental authorities, as had been intended to be provided for with the adoption of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts ⁽³⁾.
- (2) This alignment should also be guaranteed within the framework of the revision of the thresholds provided for in Article 78 of Directive 2004/18/EC.

- (3) Owing to a clerical error, Article 78 of Directive 2004/18/EC does not currently guarantee the desired alignment. Points (b) and (c) of Article 78(2) should therefore be corrected by moving the reference to point (b) of the first paragraph of Article 8 from Article 78(2)(b) to Article 78(2)(c),

HAVE ADOPTED THIS DIRECTIVE:

Article 1

In Article 78(2) of Directive 2004/18/EC, points (b) and (c) shall be replaced by the following:

- '(b) the threshold established in Article 67(1)(a) on the revised threshold applying to public service contracts awarded by the contracting authorities referred to in Annex IV;
- (c) the thresholds established in (b) of the first subparagraph of Article 8 and in Article 67(1)(b) and (c) on the revised threshold applying to public service contracts awarded by contracting authorities other than those referred to in Annex IV.'

Article 2

Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 31 January 2006.

⁽¹⁾ Opinion of 28 September 2005 (not yet published in the Official Journal).

⁽²⁾ Opinion of the European Parliament of 27 September 2005 (not yet published in the Official Journal) and Council Decision of 14 November 2005.

⁽³⁾ OJ L 134, 30.4.2004, p. 114. Directive as amended by Commission Regulation (EC) No 1874/2004 (OJ L 326, 29.10.2004, p. 17).

When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

Article 3

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

Article 4

This Directive is addressed to the Member States.

Done at Strasbourg, 16 November 2005.

For the European Parliament

The President

J. BORRELL FONTELLES

For the Council

The President

Bach of LUTTERWORTH

II

(Acts whose publication is not obligatory)

EUROPEAN PARLIAMENT AND COUNCIL

RECOMMENDATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 16 November 2005

on film heritage and the competitiveness of related industrial activities

(2005/865/CE)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 157 thereof,

Having regard to the proposal from the Commission ⁽¹⁾,

Having regard to the Opinion of the European Economic and Social Committee ⁽²⁾, After consulting the Committee of the Regions,

After consulting the Committee of the Regions,

Acting in accordance with the procedure laid down in Article 251 of the Treaty ⁽³⁾,

Whereas:

- (1) Article 151(4) of the Treaty stipulates that the Community is to take cultural aspects into account in its action under other provisions of the Treaty, in particular in order to respect and to promote the diversity of its cultures.
- (2) Cinematography is an art form contained on a fragile medium, which therefore requires positive action from the public authorities to ensure its preservation. Cinematographic works are an essential component of our cultural heritage and therefore merit full protection.

(3) In addition to their cultural value, cinematographic works are a source of historical information about European society. They are a comprehensive witness to the history of the richness of Europe's cultural identities and the diversity of its people. Cinematographic images are a crucial element for learning about the past and for civic reflection upon our civilisation.

(4) This Recommendation aims to foster better exploitation of the industrial and cultural potential of European film heritage by encouraging policies of innovation, research and technological development in the field of conservation and restoration of cinematographic works. The actions recommended below aim to ensure that the conditions necessary for the competitiveness of the Community's film industry exist and accelerate the development of its competitiveness.

(5) Film heritage is an important component of the film industry and encouraging its conservation, restoration and exploitation can contribute to improving the competitiveness of that industry.

(6) The development of the European film industry is of vital importance for Europe in view of its significant potential in the fields of access to culture, economic development and job creation. This refers not only to the production and showing of films, but also to the collection, cataloguing, preservation and restoration of cinematographic works. The conditions for the competitiveness of these industrial activities related to film heritage need to be improved, especially as regards better use of technological developments such as digitisation.

⁽¹⁾ OJ C 123, 30.4.2004, p. 4.

⁽²⁾ OJ C 74, 23.3.2005, p. 18.

⁽³⁾ Opinion of the European Parliament of 10 May 2005 (not yet published in the Official Journal) and Council Decision of 24 October 2005.

- (7) Full achievement of this potential requires the existence of a successful and innovative film industry in the Community. This can be facilitated by improving the conditions of conservation, restoration and exploitation of film heritage and by removing obstacles to the development and full competitiveness of the industry, in particular by the collection, cataloguing, preservation and restoration of the film heritage and by making it accessible for educational, cultural, research or other non-commercial uses of a similar nature, in all cases in compliance with copyright and related rights.
- (8) The general competitiveness of the film industry will improve through the development of an environment that favours cooperation between designated bodies, which could be European, national or regional archives, film institutes or similar institutions, on matters concerning the conservation and protection of film heritage.
- (9) Council Resolution of 26 June 2000 on the conservation and enhancement of European cinema heritage ⁽¹⁾ called on Member States to cooperate in the restoration and conservation of cinema heritage, including through recourse to digital technologies, to exchange good practice in this sector, to encourage progressive networking of European archival data and to consider the possible use of these collections for educational purposes.
- (10) The European Convention for the Protection of the Audiovisual Heritage provides that each Party has to introduce, by legislative or other appropriate means, the obligation to deposit moving-image material forming part of its audiovisual heritage and having been produced or co-produced in the territory of the Party concerned.
- (11) The Commission Communication of 26 September 2001 on certain legal aspects relating to cinematographic and other audiovisual works ⁽²⁾ examined the legal deposit of audiovisual works at national or regional level as one of the possible ways of conserving and safeguarding the European audiovisual heritage and launched a stock-taking exercise of the situation regarding the deposit of cinematographic works in the Member States.
- (12) At the Council (Cultural/Audiovisual Affairs) of 5 November 2001, the President of the Council noted that the content of the Commission Communication had been favourably received by the Council.
- (13) In its Resolution of 2 July 2002 ⁽³⁾ on the Commission Communication, the European Parliament underlined the importance of safeguarding the cinematographic heritage and supported the approach of the European Convention for the Protection of the Audiovisual Heritage, which is an important reference in times of intensive technological changes. The gradual switchover to digital technologies will allow for greater competitiveness of the European film industry and contribute in the longer term to a reduction in costs in cataloguing, depositing, conserving and restoring audiovisual works. At the same time, it will create new opportunities for innovation in the field of protection of film heritage.
- (14) Council Resolution of 24 November 2003 on the deposit of cinematographic works in the European Union ⁽⁴⁾ invited Member States to put in place an efficient system of deposit and preservation of the cinematographic works forming part of their audiovisual heritage in their national archives, film institutes or similar institutions, if such systems do not yet exist.
- (15) All Member States already have systems in place for collecting and preserving cinematographic works forming part of their audiovisual heritage. Four-fifths of these systems are based on a legal or contractual obligation to deposit all films, or at least those films that have received public funding.
- (16) 'Moving-image material' means any set of moving images recorded by whatever means and on whatever medium, whether or not accompanied by sound, capable of conveying an impression of movement.
- (17) 'Cinematographic work' means moving-image material of any length, in particular cinematographic works of fiction, cartoons and documentaries, which is intended to be shown in cinemas.
- (18) 'Cinematographic works forming part of their audiovisual heritage' means film productions including co-productions with other Member States and/or third countries, qualified as such by Member States or bodies designated by them, on the basis of objective, transparent and non-discriminatory criteria. The audiovisual heritages of the Member States taken together constitute the European audiovisual heritage.

⁽¹⁾ OJ C 193, 11.7.2000, p. 1.

⁽²⁾ OJ C 43, 16.2.2002, p. 6.

⁽³⁾ OJ C 271 E, 12.11.2003, p. 176.

⁽⁴⁾ OJ C 295, 5.12.2003, p. 5.

- (19) In order to ensure that the European film heritage is passed down to future generations, it has to be systematically collected, catalogued, preserved and restored in all cases in compliance with copyright and related rights.
- (20) European film heritage should be made more accessible for educational, cultural, research or other non-commercial uses of a similar nature, in all cases in compliance with copyright and related rights.
- (21) Transferring the possession of cinematographic works to archiving bodies does not imply transferring copyright and related rights to them.
- (22) Article 5(2)(c) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society ⁽¹⁾ stipulates that Member States may provide for an exception or limitation in respect of specific acts of reproduction made by publicly accessible libraries or by archives which are not for direct or indirect economic or commercial advantage,

TAKE NOTE OF THE COMMISSION'S INTENTION:

1. to consider making it compulsory for the beneficiaries of EU funding to deposit a copy of European films that have obtained EU funding in at least one national archive;
2. to support cooperation between designated bodies;
3. to consider the funding of research projects in the fields of long-term preservation and restoration of films;
4. to promote European standardisation on film cataloguing, with the purpose of improving the interoperability of databases, including by co-financing standardisation projects and by enhancing the exchange of best practices, while respecting linguistic diversity;
5. to facilitate the negotiation of a standard contract at European level between designated bodies and rights-holders stipulating the conditions under which designated bodies may make deposited cinematographic works accessible to the public;
6. to monitor and assess the extent to which the measures set out in this Recommendation are working effectively, and to consider the need for further action.

HEREBY RECOMMEND THAT MEMBER STATES improve conditions of conservation, restoration and exploitation of film heritage and remove obstacles to the development and full competitiveness of the European film industry by:

1. fostering an enhanced exploitation of the industrial and cultural potential of the European film heritage through systematic conservation and restoration measures by encouraging policies of innovation, research and technological development in the field of conservation and restoration of cinematographic works;
2. adopting, by 16 November 2007^{16 November 2007}, legislative, administrative or other appropriate measures to ensure that cinematographic works forming part of their audiovisual heritage are systematically collected, catalogued, preserved, restored and made accessible for educational, cultural, research or other non-commercial uses of a similar nature, in all cases in compliance with copyright and related rights;
3. designating the appropriate bodies to carry out the tasks of public interest described in point 2 with independence and professionalism, ensuring that they are provided with the best available financial and technical resources;
4. encouraging the designated bodies to specify, in agreement or by contract with rights-holders, the conditions under which deposited cinematographic works may be made available to the public;
5. considering, notably with a view to promoting film heritage, establishing or supporting national film academies or similar bodies;
6. adopting appropriate measures to increase the use of digital and new technologies in the collection, cataloguing, preservation and restoration of cinematographic works;

Collection

7. undertaking the systematic collection of cinematographic works forming part of their audiovisual heritage through a mandatory legal or contractual deposit of at least one high quality copy of such cinematographic works with designated bodies. When setting the conditions for the

⁽¹⁾ OJ L 167, 22.6.2001, p. 10.

deposit, Member States should ensure that:

- (a) during a transitional period they cover those productions or co-productions that have received public funding at national or regional level; after this transitional period has elapsed, they should cover, as far as practicable, all productions, including those which did not receive any public funding,
- (b) the deposited cinematographic works are of good technical quality, so as to facilitate preservation and reproducibility, with accompanying metadata in standardised form, as appropriate,
- (c) deposit takes place when the film is made available to the public, and in any case not more than two years later;

- (a) the reproduction of films on new storage mediums,
- (b) the preservation of equipment for showing cinematographic works on different mediums;

Restoration

- 13. introducing all appropriate measures in order to permit, within their legislation, the reproduction of deposited cinematographic works for the purpose of restoration while allowing rights-holders to benefit from the improved industrial potential of their works resulting from that restoration on the basis of an agreement between all interested parties;
- 14. encouraging projects for the restoration of old films or films with high cultural or historical value;

Cataloguing and creation of databases

- 8. adopting appropriate measures (which might eventually lead to an archiving code of film production) to promote the cataloguing and indexing of deposited cinematographic works and to encourage the creation of databases containing information about the films, making use of European and international standards;
- 9. promoting European standardisation and interoperability of databases of filmography and their availability to the public, for instance, through the Internet, especially through the active involvement of designated bodies;
- 10. exploring the possibility of establishing a network of databases encompassing the European audiovisual heritage together with the relevant organisations, in particular the Council of Europe (Eurimages and the European Audiovisual Observatory);
- 11. inviting archiving bodies to give value to stocks by organising them in collections at EU level, for instance, by theme, author and period;

Making deposited cinematographic works accessible for educational, cultural, research or other non-commercial uses of a similar nature

- 15. adopting the necessary legislative or administrative measures to allow designated bodies to make deposited cinematographic works accessible for educational, cultural, research or other non-commercial uses of a similar nature, in all cases in compliance with copyright and related rights;
- 16. taking appropriate measures to ensure access for people with disabilities to deposited cinematographic works, in all cases in compliance with copyright and related rights;

Professional training and media literacy

- 17. promoting professional training in all fields related to film heritage to foster an enhanced exploitation of the industrial potential of film heritage;

Preservation

- 12. adopting legislation or using other methods in accordance with national practices in order to ensure preservation of deposited cinematographic works. Preservation measures should include, in particular:

- 18. promoting the use of film heritage as a way of strengthening the European dimension in education and promoting cultural diversity;
- 19. fostering and promoting visual education, film studies and media literacy in education at all levels, professional training programmes and European programmes;

20. promoting close cooperation between producers, distributors, broadcasters and film institutes for educational purposes while respecting copyright and related rights;

Deposit

21. considering the putting in place of a system of voluntary or mandatory deposit of:
- (a) ancillary and publicity material related to cinematographic works forming part of the national audiovisual heritage,
 - (b) cinematographic works forming part of national audiovisual heritages from other countries,
 - (c) moving-image material other than cinematographic works,
 - (d) cinematographic works of the past;

Cooperation between designated bodies

22. encouraging, and supporting designated bodies for the purpose of exchanging information and coordinating their activities at national and European levels in order for example, to:

- (a) ensure the coherence of collection and conservation methods and the interoperability of databases,
- (b) release, for example on DVDs, archival material with subtitles in as many European Union languages as possible, in all cases in compliance with copyright and related rights,
- (c) compile a European filmography,
- (d) develop a common standard for electronic information exchange,
- (e) produce common research and educational projects, while promoting the development of European networks of cinema schools and museums;

Follow-up to this Recommendation

23. informing the Commission every two years of action taken in response to this Recommendation.

Done at Strasbourg, 16 November 2005.

For the European Parliament

The President

J. BORRELL FONTELLES

For the Council

The President

Bach of LUTTERWORTH
