

DIRECTIVE 2002/12/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
of 5 March 2002
amending Council Directive 79/267/EEC as regards the solvency margin requirements for life
assurance undertakings

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 Article 55 thereof,

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

Having regard to the opinion of the Economic and Social Committee ⁽²⁾,

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

Whereas:

- (1) The financial services action plan, as endorsed by the European Council meetings in Cologne on 3 and 4 June 1999 and in Lisbon on 23 and 24 March 2000, recognises the importance of the solvency margin for insurance undertakings to protect policyholders in the single market by ensuring that insurance undertakings have adequate capital requirements in relation to the nature of their risks.
- (2) First Council Directive 79/267/EEC of 5 March 1979 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of direct life assurance ⁽⁴⁾ requires insurance undertakings to have solvency margins.
- (3) The requirement that insurance undertakings establish, over and above the technical provisions to meet their underwriting liabilities, a solvency margin to act as a buffer against adverse business fluctuations is an important element in the system of prudential supervision for the protection of insured persons and policyholders.
- (4) The existing solvency margin rules as established by Directive 79/267/EEC have been substantially unchanged by subsequent Community legislation and Council Directive 92/96/EEC of 10 November 1992 on the coordination of laws, regulations and administrative provisions relating to direct life assurance (third life assurance Directive) ⁽⁵⁾ required the Commission to submit a report to the Insurance Committee set up by

Council Directive 91/675/EEC ⁽⁶⁾ on the need for further harmonisation of the solvency margin.

- (5) The Commission has prepared that report in the light of the recommendations of the report on the solvency of insurance undertakings prepared by the Conference of the Insurance Supervisory Authorities of the Member States of the European Union.
- (6) While the report concluded that the simple, robust nature of the current system has operated satisfactorily and is based on sound principles benefiting from wide transparency, certain weaknesses have been identified in specific cases.
- (7) There is a need to increase the existing minimum guarantee fund, in particular as a result of inflation in claim levels and operational expenses since that requirement was originally adopted.
- (8) To improve the quality of the solvency margin, the possibility of including future profits in the available solvency margin should be limited and subject to conditions and should in any case cease after 2009.
- (9) To avoid major and sharp increases in the amount of the minimum guarantee fund in the future, a mechanism should be established providing for its increase in line with the European index of consumer prices.
- (10) In specific situations where policyholders' rights are threatened, there is 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 insurance 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 insurance undertaking has a sufficient solvency margin.
- (11) In the light of market developments in the nature of reinsurance cover purchased by primary insurers, there is a need for the competent authorities to be empowered to decrease the reduction to the solvency margin requirement in certain circumstances.

⁽¹⁾ OJ C 96 E, 27.3.2001, p. 123.

⁽²⁾ OJ C 193, 10.7.2001, p. 21.

⁽³⁾ Opinion of the European Parliament of 4 July 2001 (not yet published in the Official Journal) and Decision of the Council of 14 February 2002.

⁽⁴⁾ OJ L 63, 13.3.1979, p. 1. Directive as last amended by Directive 95/26/EC of the European Parliament and of the Council (OJ L 168, 18.7.1995, p. 7).

⁽⁵⁾ OJ L 360, 9.12.1992, p. 1. Directive as last amended by Directive 2000/64/EC of the European Parliament and of the Council (OJ L 290, 17.11.2000, p. 27).

⁽⁶⁾ OJ L 374, 31.12.1991, p. 32.

- (12) This Directive should lay down minimum standards for the solvency margin requirements and home Member States should be able to lay down stricter rules for insurance undertakings authorised by their own competent authorities.
- (13) Directive 79/267/EEC should be amended accordingly,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Amendments to Directive 79/267/EEC

Directive 79/267/EEC is hereby amended as follows:

1. in Article 3, point 2 shall be replaced by the following:

‘2. mutual associations, where:

- the articles of association contain provisions for calling up additional contributions or reducing their benefits or claiming assistance from other persons who have undertaken to provide it, and
- the annual contribution income for the activities covered by this Directive does not exceed EUR 5 million for three consecutive years. If this amount is exceeded for three consecutive years this Directive shall apply with effect from the fourth year.

Nevertheless, the provisions of this Article shall not prevent a mutual assurance undertaking from applying, or continuing, to be licensed under this Directive’;

2. Articles 18, 19 and 20 shall be replaced by the following:

Article 18

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

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

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

advance and can prohibit the payment within that period;

- (iii) the relevant provisions of the memorandum and articles of association may be amended only after the competent authorities have declared that they have no objection to the amendment, without prejudice to the criteria stated in points (i) and (ii);

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

(c) the profit or loss brought forward after deduction of dividends to be paid;

(d) in so far as authorised under national law, profit reserves appearing in the balance sheet where they may be used to cover any losses which may arise and where they have not been made available for distribution to policy holders.

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

3. The available solvency margin may also consist of:

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

Subordinated loan capital must also fulfil the following conditions:

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

required for early repayment. In the latter event the assurance undertaking must notify the competent authorities at least six months before the date of the proposed repayment, specifying the available solvency margin and the required solvency margin both before and after that repayment. The competent authorities shall authorise repayment only if the assurance undertaking's available solvency margin will not fall below the required level;

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

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

- (a) until 31 December 2009 an amount equal to 50 % of the undertaking's future profits, but not exceeding 25 % of the lesser of the available solvency margin and the required solvency margin. 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 6. 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 point 1 of Article 1.

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

- (i) when an actuarial report is submitted to the competent authorities substantiating the likelihood of emergence of these profits in the future; and
 - (ii) in so far as that part of future profits emerging from hidden net reserves referred to in point (c) has not already been taken into account;
- (b) where zillmerising is not practised or where, if practised, it is less than the loading for acquisition costs included in the premium, the difference between a non-zillmerised or partially zillmerised mathematical provision and a mathematical provision zillmerised at a rate equal to the loading for acquisition costs included in the premium. This figure may not, however, exceed 3,5 % of the sum of the differences between the relevant capital sums of life assurance activities and the mathematical provisions for all policies for which zillmerising is possible. The difference shall be reduced by the amount of any undepreciated acquisition costs entered as an asset;
- (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;
- (d) 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 lesser of the available and required solvency margin.

5. 5. Amendments to paragraphs 2, 3 and 4 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 2 of Directive 91/675/EEC (*).

(*) OJ L 374, 31.12.1991, p. 32.

Article 19

1. Subject to Article 20, the required solvency margin shall be determined as laid down in paragraphs 2 to 7 according to the classes of assurance underwritten.

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

- (a) first result:

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

(b) second result:

for policies on which the capital at risk is not a negative figure, 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 %.

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

3. For the supplementary insurance referred to in Article 1(1)(c), the required solvency margin shall be equal to the required solvency margin for insurance undertakings as laid down in Article 16a of Directive 73/239/EEC, excluding the provisions of Article 17 of that Directive.

4. For permanent health insurance not subject to cancellation referred to in Article 1(1)(d), the required solvency margin shall be equal to:

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

(b) the required solvency margin for insurance undertakings as laid down in Article 16a of Directive 73/239/EEC, excluding the provisions of Article 17 of that Directive. However, the condition contained in Article 16a(6)(b) of that Directive that a provision be set up for increasing age may be substituted by a requirement that the business be conducted on a group basis.

5. For capital redemption operations referred to in Article 1(2)(b), the required solvency margin shall be equal to a 4 % fraction of the mathematical provisions calculated in compliance with paragraph 2(a) of this Article.

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

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

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

(b) in so far as the undertaking bears no investment risk but the allocation to cover management expenses is fixed for a period exceeding five years, a 1 % fraction

of the technical provisions, calculated in compliance with paragraph 2(a) of this Article;

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

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

Article 20

1. One third of the required solvency margin as specified in Article 19 shall constitute the guarantee fund. This fund shall consist of the items listed in Article 18(2), (3) and, with the agreement of the competent authority of the home Member State, (4)(c).

2. The guarantee fund may not be less than a minimum of EUR 3 million.

Any Member State may provide for a reduction of one-quarter of the minimum guarantee fund in the case of mutual associations and mutual-type associations and tontines;

3. the following Article shall be inserted:

'Article 20a

1. The amount in euro as laid down in Article 20(2) shall be reviewed annually starting 20 September 2003, in order to take account of changes in the European index of consumer prices comprising all Member States as published by Eurostat.

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

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

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

4. the following Article shall be inserted:

'Article 24a

1. Member States shall ensure that the competent authorities have the power to require a financial recovery plan for those insurance undertakings where competent authorities consider that policyholders' rights are threatened. The financial recovery plan must as a minimum include particulars or proof concerning for the next three financial years:

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

- (b) a plan setting out detailed estimates of income and expenditure in respect of direct business, 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 reinsurance policy.

2. Where policyholders' rights are threatened because the financial position of the undertaking is deteriorating, Member States shall ensure that the competent authorities have the power to oblige insurance undertakings to have a higher required solvency margin, in order to ensure that the insurance 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.

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

4. Member States shall ensure that the competent authorities have the powers to decrease the reduction, based on reinsurance, to the solvency margin as determined in accordance with Article 19 where:

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

5. If the competent authorities have required a financial recovery plan for the insurance undertaking in accordance with paragraph 1, they shall refrain from issuing a certificate in accordance with Article 10(3)(2) of this Directive, Article 14(1)(a) of Council Directive 90/619/EEC (*) (second life assurance Directive) and Article 11(2) of Council Directive 92/96/EEC (**) (third life assurance Directive) as long as they consider that policyholders' rights are threatened within the meaning of paragraph 1.

(*) OJ L 330, 29.11.1990, p. 50. Directive as last amended by Directive 92/96/EEC (OJ L 360, 9.12.1992, p. 1).

(**) OJ L 360, 9.12.1992, p. 1. Directive as last amended by Directive 2000/64/EC of the European Parliament and of the Council (OJ L 290, 17.11.2000, p. 27).'

Article 2

Transitional period

1. Member States may allow assurance undertakings which at the entry into force of this Directive provide assurance in their territories in one or more of the classes referred to in the Annex to Directive 79/267/EEC, a period of five years, commencing with the date of entry into force of this Directive, in order to comply with the requirements set out in Article 1 of this Directive.

2. Member States may allow any undertakings referred to in paragraph 1, which upon the expiry of the five-year period have not fully established the required solvency margin, a further period not exceeding two years in which to do so provided that such undertakings have, in accordance with Article 24 of Directive 79/267/EEC, submitted for the approval of the competent authorities, the measures which they propose to take for such purpose.

Article 3

Transposition

1. Member States shall adopt by 20 September 2003 the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith inform the Commission thereof.

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

2. Member States shall provide that the measures referred to in paragraph 1 shall first apply to the supervision of accounts for financial years beginning on 1 January 2004 or during that calendar year.

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

4. Not later than 1 January 2007 the Commission shall submit to the European Parliament and the Council a report on the application of this Directive and, if necessary, on the need for further harmonisation. The report shall indicate how Member States have made use of the possibilities in this Directive and, in particular, whether the discretionary powers afforded to the national supervisory authorities have resulted in major supervisory differences in the single market.

Article 4

Entry into force

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

*Article 5***Addressees**

This Directive is addressed to the Member States.

Done at Brussels, 5 March 2002.

For the European Parliament

The President

P. COX

For the Council

The President

R. DE RATO Y FIGAREDO
