Proposal for a Directive of the European Parliament and of the Council amending Council Directive 73/239/EEC as regards the solvency margin requirements for non-life insurance undertakings

(2001/C 96 E/04)

(Text with EEA relevance)

COM(2000) 634 final — 2000/0251(COD)

(Submitted by the Commission on 25 October 2000)

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 Economic and Social Committee,

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

Whereas:

(1) The Financial Services Action Plan, as endorsed by Heads of State and Government at 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 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 (1) 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 other policyholders.

(4) The existing solvency margin rules as established by Directive 73/239/EEC have been substantially unchanged by subsequent Community legislation and Council Directive 92/49/EEC of 18 June 1992 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and amending Directives 73/239/EEC and 88/357/EEC (Third Non-Life Insurance Directive) (2) required the Commission to submit a report to the Insurance Committee set up by Council Directive 91/675/EEC (3), on the need for further harmonisation of the solvency margin.

(5) The Commission has prepared that report (4) 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, particularly for sensitive risk profiles.

(7) There is a need to simplify and increase the existing minimum guarantee funds, in particular as a result of inflation in claim levels and operational expenses since their original adoption. The thresholds above which the lower percentage rate applies for the determination of the solvency margin requirement on the premiums and claims basis should also be increased accordingly.

(8) To avoid major and sharp increases in the amount of the minimum guarantee funds and the thresholds in the future, a mechanism should be established providing for their increase in line with the European Index of Consumer Prices.

(9) 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.

(1) OJ L 228, 16.8.1973, p. 3; Directive as last amended by Directive 2000/26/EC of the European Parliament and of the Council (OJ L 181, 20.7.2000, p. 65).

(2) OJ L 228, 11.8.1992, p. 1 (Article 25); Directive as amended by European Parliament and Council Directive 95/26/EC (OJ L 168, 18.7.1995, p. 7).

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

(4) COM(97) 398 final.

(10) 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.

(11) Where an insurer substantially reduces or ceases the writing of new business, there is a need to establish an adequate solvency margin in respect of the residual liabilities for existing business as reflected by the level of technical provisions.

(12) For specific classes of non-life business which are subject to a particularly volatile risk profile, the existing solvency margin requirement should be substantially increased so that the required solvency margin is better matched to the true risk profile of the business.

(13) To reflect the impact of differing accounting and actuarial approaches, it is appropriate to make corresponding adjustments to the methodology for the calculation of the solvency margin requirement so that this is calculated in a coherent and consistent manner, thus placing insurance undertakings on an equal footing.

(14) 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.

(15) Directive 73/239/EEC should be amended accordingly,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Amendments to Directive 73/239/EEC

Directive 73/239/EEC is amended as follows:

1. In Article 3, paragraph 1 is replaced by the following:

'1. This Directive does not apply to mutual associations in so far as they fulfil all the following conditions:

(a) the articles of association must contain provisions for calling up additional contributions or reducing their benefits;

(b) their business does not cover liability risks or credit and suretyship risks unless these constitute ancillary cover within the meaning of subparagraph (c) of the Annex;

(c) the annual contribution income for the activities covered by this Directive must not exceed EUR 5 million; and

(d) at least half of the contribution income from the activities covered by this Directive must come from persons who are members of the mutual association.

Upon notification by an insurance undertaking to the competent authority of the home Member State, however, and with the agreement of that competent authority, this undertaking shall be concerned by this Directive, once it fulfils the provisions of Articles 16, 16a and 17.'

2. Article 16 is replaced by the following:

'*Article 16*

1. Each Member State shall require of every insurance undertaking whose head office is situated in its territory an adequate available solvency margin in respect of its entire business at all times.

2. The available solvency margin shall consist of the assets of the insurance undertaking free of any foreseeable liabilities, less any intangible items. In particular the following shall be included:

(a) the paid-up share capital or, in the case of a mutual insurance 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 reserves and free reserves) not corresponding to underwriting liabilities;

(c) the financial result brought forward after deduction of dividends to be paid in respect of the last financial year.

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

For those insurance undertakings which discount or reduce their technical provisions for claims outstanding to take account of investment income as permitted by Article 60(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, except for risks listed under classes 1 and 2. For classes other than 1 and 2, no adjustment need be made in respect of the discounting of annuities included in technical provisions.

3. The solvency margin may consist of:

(a) cumulative preferential share capital and subordinated loan capital up to 50 % of the lesser of the available and 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 insurance 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 insurance 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 insurance 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 insurance undertaking must notify the competent authorities at least six months before the date of the proposed repayment, specifying the available and required solvency margin both before and after that repayment. The competent authorities shall authorise repayment only if the insurance 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 insurance 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 and 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 insurance undertaking to defer the payment of interest on the loan;

(iii) the lender's claims on the insurance 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 insurance 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 solvency margin may 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 lesser of the available and required solvency margin.

(b) in the case of 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 lesser of the available solvency margin and the required solvency margin.

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

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.'

3. The following Article 16a is inserted:

'*Article 16a*

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

In the case, however, of insurance 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 the provisions of Article 17, the amount of the minimum required solvency margin shall be equal to the higher of the two results as set out in paragraphs 3 and 4:

3. The premium basis shall be calculated using the higher of gross written premiums or contributions, 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 shall be increased by 50 per cent.

The premiums or contributions (inclusive of charges ancillary to premiums or contributions) due in respect of direct business in the last financial year shall be aggregated.

To this sum there shall be added the amount of premiums accepted for all reinsurance in the last financial year.

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

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

The sum so obtained shall be multiplied by the ratio existing in respect of the sum of the last three financial years between the amount of claims remaining to be borne by the undertaking after deduction of amounts recoverable under reinsurance and the gross amount of claims; this ratio may in no case be less than 50 %.

With the approval of the competent authorities, statistical methods may be used to allocate the premiums or contributions in respect of the classes 11, 12 and 13.

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, claims, provisions and recoveries increased by 50 per cent.

The amounts of claims paid in respect of direct business (without any deduction of claims borne by reinsurers and retrocessionaires) in the periods specified in paragraph 1 shall be aggregated.

To this sum there shall be added the amount of claims paid in respect of reinsurances or retrocessions accepted during the same periods.

To this sum there shall be added the amount of provisions for claims outstanding established at the end of the last financial year both for direct business and for reinsurance acceptances.

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

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

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

The sum so obtained shall be multiplied by the ratio existing in respect of the sum of the last three financial years between the amount of claims remaining to be borne by the undertaking after deduction of amounts recoverable under reinsurance and the gross amount of claims; this ratio may in no case be less than 50 %.

With the approval of the competent authorities, statistical methods may be used to allocate the claims, provisions and recoveries in respect of the classes 11, 12 and 13. In the case of the risks listed under class 18 in point A of the Annex, the amount of claims paid used to calculate the claims basis shall be the costs borne by the insurance undertaking in respect of assistance given. Such costs shall be calculated in accordance with the national provisions of the home Member State.

5. If the required solvency margin as calculated in paragraphs 2, 3 and 4 is lower than the required solvency margin of the year before, the required solvency margin shall be at least equal to the required solvency margin of the year before multiplied by the ratio of the amount of the technical provisions for claims outstanding at the end of the last financial year and the amount of the technical provisions for claims outstanding at the beginning of the last financial year.

6. The fractions applicable to the portions referred to in the sixth subparagraph of paragraph 3 and the seventh subparagraph of paragraph 4 shall each be reduced to a third in the case 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 or the business is conducted on a group basis;

(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.'

4. Article 17 is replaced by the following:

'*Article 17*

1. One third of the minimum required solvency margin as specified in Article 16a shall constitute the guarantee fund. This fund shall consist of the items listed in Article 16(2), (3) and (4)(c).

2. The guarantee fund may not be less than EUR 2 million. Where, however, all or some of the risks included in one of the classes 10 to 15 listed in point A of the Annex are covered, it shall be EUR 3 million.

Any Member State may provide for a one-fourth reduction of the minimum guarantee fund in the case of mutual associations and mutual-type associations.'

5. The following Article 17a is inserted:

'*Article 17a*

1. The amounts in euro as laid down in Article 16a (3) and (4) and Article 17(2) shall be reviewed annually starting (18 months after the entry into force of this Directive), in order to take account of changes in the European Index of Consumer Prices comprising all Member States as published by Eurostat.

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

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

2. The Commission shall inform annually the European Parliament and the Insurance Committee of the review and the adapted amounts.'

6. In Article 20(2), the term 'Article 16(3)' is replaced by the term 'Article 16a'.

7. The following Article 20a is inserted:

'*Article 20a*

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 may 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, Member States shall ensure that the competent authorities have the power to oblige insurance undertakings to have a higher required solvency margin than provided for under national law, 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 the 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 power to decrease the reduction to the solvency margin as determined in accordance with Article 16a where:

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

(b) there is no or insignificant risk transfer under the reinsurance programme.'

Article 2

Transitional period

1. Member States may allow insurance undertakings which at the entry into force of this Directive provide insurance in their territories in one or more of classes referred to in the Annex to Directive 73/239/EEC, a period of five years, commencing with the date of entry into force of the present Directive, in order to comply with the requirements set out in Article 1 of the present 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 20 of Directive 73/239/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 (18 months after the entry into force of this Directive) at the latest the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith inform the Commission thereof.

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

2. Member States shall provide that the provisions referred to in paragraph 1 shall first apply to the supervision of accounts for financial years beginning on 1 January (of the year following the date in paragraph 1) 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 (three years after the date in paragraph 2) the Commission shall submit to the Insurance Committee a report on the application of this Directive and, if necessary, on the need for further harmonisation.

Article 4

Entry into force

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

Article 5

Addressees

This Directive is addressed to the Member States.