

COMMISSION OF THE EUROPEAN COMMUNITIES

COM(86) 768 final/2

REVISED VERSION

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Proposal for a
COUNCIL DIRECTIVE

on the coordination of laws, regulations and administrative provisions
relating to the compulsory winding-up of direct
insurance undertakings

(presented by the Commission)

COM(86) 768 final/2

I. Introduction

The coordination of the provisions relating to the compulsory winding-up of insurance undertakings can be seen as complementary to the two first coordination directives concerning the business of direct insurance⁽¹⁾.

This directive lays down the twofold principle of the unity of the procedure and the universality of its effects. On the basis of that principle, it concentrates on the aspects peculiar to insurance undertakings, to their specific business and to their supervisory system, and makes subject to the law of the Member State of the head office everything which it does not otherwise regulate. This method offers a twofold advantage. Firstly, it makes it possible to take full account of those aspects peculiar to insurance undertakings, in particular the fact that this business is characterized by an inversion of the production cycle, which obliges insurance undertakings to constitute often substantial reserves in order to be able to meet future and uncertain commitments. Secondly, the directive is without prejudice either to the development of the national legislations or to the possible harmonization of the rules governing bankruptcy, and, in this latter case, the directive makes it possible to ensure from the outset an improved level of homogeneity between a harmonized general regime and the regime applicable to direct insurance undertakings.

The proposal is concerned with the compulsory winding-up, i.e. imposed by an administrative authority or a court, of the undertaking to which the two first coordination directives referred to earlier apply. The proposal distinguishes between two procedures, depending on whether the winding-up is imposed because of the insolvency of the undertakings (special compulsory winding-up) or not (normal compulsory winding-up).

(1) First Council Directive 73/239/EEC of 24 July 1973 concerning direct insurance other than life insurance (OJ No L 228, 16.8.1973, p. 3).
First Council Directive 79/267/EEC of 5 March 1979 concerning direct life assurance (OJ No L 63, 13.3.1979, p. 1).

The proposal contains rules relating to the role to be played by the various supervisory authorities which monitor the activity of the undertaking, provisions governing the treatment of insurance contracts in the two hypotheses outlined above, and lastly, in the case of special compulsory winding-up, specific rules for the distribution of the assets, based on the constitution of separate asset funds reserved as a matter of priority for life and non-life insurance creditors and made up of the assets representing the mathematical or technical reserves relating to the contracts in question. Such a system presupposes the keeping of an up-to-date register of those assets, under the supervision of the supervisory authorities.

This system is not completely new for certain of the Member States : a register is kept in the Federal Republic of Germany, but only for life assurance, and a similar inventory is required in Belgium since 1978. The actual concept of a separate fund reserved for insurance creditors is also known in Italy, Luxembourg and the Netherlands.

An effort has been made in the proposal to reconcile the need to guarantee the rights of policyholders, whose premiums supply the funds of insurance undertakings, with the legitimate interests of other creditors, in particular the employees. The scheme for the distribution of the separate asset fund represents a compromise which clearly reflects this concern.

The work carried out within the Commission was preceded by a number of studies, in the OECD, the European Insurance Committee, the Conference of Supervisory Authorities, all of which demonstrated the enormous difficulties that would be involved in a general harmonization of preferential claims. An independent expert submitted a report to the Commission in 1972 advocating the system of the separate asset fund. The Commission then convened a working party consisting of Government experts which examined the relevant draft in the course of some twenty meetings. During the elaboration of the draft text opinions were sought from the professional organizations concerned (insurance undertakings and the unions). The results of the work were finally discussed with the expert who had produced the 1972 report.

II. Comments on the articles

Article 1 - Scope

The Directive applies to those insurance undertakings covered by either of the First Coordination Directives concerning the activity of direct insurance (73/239/EEC of 24 July 1973 or 79/267/EEC of 5 March 1979). This means that those undertakings which engage only in reinsurance, and those undertakings excluded by virtue of Articles 3 and 4 of the First Non-Life Directive and Article 2(2),(3) and (4) and Articles 3 and 4 of the First Life Directive do not fall within the scope of this Directive. This article also contains the definition of certain shortened expressions which are used throughout the Directive.

Articles 2 and 3 - Register of assets representing the reserves

Every undertaking is required to keep, for each establishment, in respect of life business or non-life business, or separately for each in the case of a composite undertaking, a register of the assets representing the reserves corresponding to its direct insurance and, where appropriate, reinsurance obligations, including the obligations entered into by way of the provision of services. This requirement is fundamental in the context of this Directive. Indeed, as will be made clear in Article 17(1), the composition of the assets entered in all the registers at the moment of the opening of a special compulsory winding-up (SCW) can no longer be called into question and the proceeds from the realization of those assets constitute a separate fund for the benefit of the creditors listed in Article 18. Article 2(3), (4) and (5) specify the arrangements for the keeping of the registers. Article 2(3) provides a reminder, moreover, that in conformity with the First Directives (Article 15 of the Non-Life Directive and Article 17 of the Life Directive) the rules governing the calculation of the reserves, like those governing the valuation of assets, are matters within the competence of the supervisory authorities of each Member State in which the undertaking has an establishment. It is specified, however, that it is the gross amount of the reserves that is taken into consideration - without prejudice to the possibility of partially representing the technical reserves by claims on reinsurers. It should also be remembered that the

proposal for a Second Non-Life Coordination Directive (presented to the Council on 30.12.1975 and amended on 15.2.1978) contains additional provisions concerning the calculation of the reserves.

Article 3 specifies the circumstances in which the register has to be lodged with the supervisory authorities : this lodging is linked to decisions restricting or prohibiting the free disposal of assets which the supervisory authorities may take in the context of reorganization measures or the withdrawal of authorization. This article also states that a decision restricting the free disposal of assets may be invoked as against third parties.

Article 4 -Forms of winding-up

The normal compulsory winding-up (NCW) is the automatic consequence of the withdrawal of authorization. The special compulsory winding-up (SCW) is opened when the undertaking is in a state of proven or probable insolvency. It is also possible to pass from an NCW to an SCW, as is provided for in Article 8(2), or even from a voluntary winding-up to a compulsory winding-up, where during the procedure the conditions for an SCW or for the withdrawal of authorization are fulfilled. Furthermore, an undertaking which has had its authorization withdrawn can no longer undertake a voluntary winding-up. The opening and supervision of the NCW are the responsibility of the supervisory authority (Article 5) ; the opening and supervision of the SCW are the responsibility either of the supervisory authority or of the courts, assisted by the supervisory authority, according to the arrangements provided for in Title III.

Articles 5, 6, 7, 8 and 9 - Normal compulsory winding-up

The NCW is the form taken by the compulsory winding-up as long as the undertaking is deemed to be solvent.

It is an administrative procedure : the supervisory authorities which monitor the undertaking's business wherever it is established retain their competence (Article 5(1)). The NCW has effect in all the Member States (Article 8(1)). Failing a specific provision, the NCW operates in accord-

ance with the law of the Member State of the head office (Article 9(2)). The bodies of the undertaking are not deprived of their powers and replaced by an administrator unless this is necessary for the proper implementation of the NCW (Article 5(2)). Although responsibility for supervising the NCW is given to the supervisory authorities, the law of the Member State of the head office may confer jurisdiction on the courts to appoint an administrator in place of the bodies of the undertaking. The initiative rests, however, with the supervisory authority of that State. The right of appeal against this decision is the subject of Article 6. The six-monthly report by the administrator to the appointing authority is in any event sent to the supervisory authority (Article 5(5)).

Article 5(4) contains provisions governing the publicizing of the withdrawal of the authorization and/or the appointment of the administrator, this matter not being covered in the First Coordination Directives.

During the NCW the supervision by the supervisory authorities will concentrate on two points : the rapidity of the procedure and protection of the interests of the insured. Consequently, possibilities of (total or partial) transfer of portfolio will be sought (Article 7(3)(a)), while respecting the rules laid down by the First Coordination Directives (Article 21 of the Non-Life Directive and Article 25 of the Life Directive). For the same reasons, the insurance contracts are not automatically terminated but a possibility of termination is given to the policyholder (Article 7(1)), and the insurer is encouraged to make use of any rights of termination he may have (Article 7(3)(b)). The object of the NCW is indeed to put an end to the insurance relationships and Article 9(1) provides some examples of ways of achieving this object.

Article 10 - Opening of the special compulsory winding-up

The SCW is opened either by the supervisory authority, or by the courts after consulting the supervisory authority or at its request : the national rules relating to competence in this matter are not therefore affected.

The SCW is opened where the head office is situated (Article 10(1)). In the case of a non-Community undertaking it is necessary to refer to the rules of Title IV (Article 21(3) and (4)). The SCW has effect in all the Member States (Article 10(2)).

Articles 11 and 12 - Liquidator and assistant liquidator

The directive does not specify the authority (supervisory authority or court) responsible for appointing a liquidator or assistant liquidator. If, in accordance with the national legislation, the procedure is placed under the supervision of the courts, the supervisory authority is nevertheless associated (Article 11(2) and (3)), as is confirmed by Articles 13 and 15.

It must always be possible to appoint more than one liquidator. It must also be possible to appoint an assistant liquidator, whose powers are strictly defined and subordinated to those of the liquidator (Article 12(4)), in any Member State in which the insurance undertaking covers risks, even if it is not established there. Where there is an establishment the supervisory authority responsible for its supervision may itself propose the appointment of an assistant liquidator (Article 12(3)).

Article 13 - Transfer of portfolio during SCW

In the context of the SCW, and in the light of the rules governing the supervision of that procedure in the Member State of the head office, it is possible that the transfer may have to be authorized by the courts. The supervisory authorities must nevertheless be consulted (Article 13(1) of the proposal and Articles 21 and 25 of the First Non-Life and Life Directives respectively).

The working party of government experts had long discussions on whether or not it should be possible to make partial transfers. The Commission finally opted for a formula which leaves it to the authorities to assess whether or not the transfer arrangements are prejudicial to the body of creditors admitted to the distribution of the separate fund (Article 13(3)).

A particular transfer situation is, however, provided for in Article 14(3). That provision covers the hypothesis in which a Member State has established a systematic procedure for the transfer of the portfolio of undertakings being wound up or of the establishments on its territory of such undertakings.

Articles 14, 15 and 16 - Effects of the special compulsory winding-up on insurance contracts

Non-life insurance contracts remain in force for a period of 30 days following the opening of the SCW, at the end of which, if there has not been a transfer, they are automatically terminated (Article 14(1)). This period may be extended with the agreement of the competent authorities if a transfer is in progress, and the termination possibilities may be suspended during this period so as to preserve the integrity of the transferred portfolio (Article 14(2) and (3)).

Life assurance contracts remain, in principle, in force despite the opening of the SCW (Article 15(1)). Naturally, the policyholder retains the right to terminate.

Provided he is so authorized, the liquidator for his part may reduce the obligations under the contracts (for example to facilitate a transfer) or terminate them, if this is in the interests of the body of life assurance creditors (for example, because the management of these contracts would result in a substantial increase in the winding-up expenses). The competent authorities may themselves impose this termination if the liquidator does not himself take the initiative (Article 15(3)). Where the life assurance contract is terminated against the wishes of the policyholder, it would be unjust to penalize him by deducting from his claim any termination costs, hence the second paragraph of Article 15(3).

The undertaking being wound up is no longer in a position to provide re-insurance cover to ceding undertakings and the maintenance of such cover could add considerably to the liabilities, to the detriment of the other creditors eligible to participate in the distribution of the separate fund ; that is why these contracts cannot be renewed (Article 16(1)). On the other hand, Article 16(2) is intended to encourage the maintenance of

passive reinsurance. In practice it will be extremely difficult for the insurer undergoing SCW to meet the cost of claims incurred after the opening of the SCW if he is deprived overnight of his own reinsurance cover.

Article 17 - Determination of the assets and of the separate asset funds

This article is one of the fundamental provisions of the directive. The reserved funds are composed of the assets registered in accordance with Article 2 and the proceeds of their realization form the asset funds to be allocated among the claims referred to in Article 18 in accordance with the rules fixed in Article 19. This formula is based on the consideration that insurance undertakings receive in advance the price of their services. This obliges them to constitute, with the aid of the premiums paid, reserves the sufficiency of which is strictly monitored. It is thus normal that insurance creditors should enjoy preferential rights in respect of these reserves which constitute in a way the guarantee that their claims will be paid. However, as will be seen in Article 19, the direct insurance creditors are not alone in having access to the distribution of these asset funds.

Article 17(1) and (2) lay down the principle that the composition of the reserved assets is determined, without any possibility of modification, by the assets entered in the registers on the day the SCW is opened. There are two exceptions to this principle : firstly, any simple error of fact must be rectified ; secondly, the part of the premiums received after the opening which is allocated to the reserve (roughly speaking the pure premium) is added to the funds (Article 17(3)). Moreover, reported claims which occurred (in accordance with the terms of the relevant contracts governing their application in time) during this same period, will be eligible under Article 19.

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Article 18 - Claims eligible to participate in the distribution of the asset funds

The first category of claims eligible to participate in the distribution of the reserved asset funds is that of claims, other than insurance claims, arising after the opening of the SCW subparagraph (a) ; these are claims in respect of debts incurred on behalf of the creditors as a whole ('créances de la masse') as opposed to claims forming part of the general body of claims ('créances dans la masse').

These are liabilities which the undertaking was obliged to incur for the purposes of the SCW, the primary example of which is the liquidator's emoluments. Reference was not made, however, to claims incurred on behalf of the creditors as a whole, so as to exclude from the outset certain claims arising prior to the opening of the SCW, which in certain Member States are regarded as claims incurred on behalf of the creditors as a whole ('créances de masse') for social reasons (sometimes referred to as 'quasi créances de masse'). Article 18(1)(a) also excludes certain claims which, while arising in respect of a redundancy occurring after the opening of the SCW, are nevertheless calculated by reference to a period of employment prior to that date and thereby constitute a kind of deferred remuneration, a proportion of the salary payable prior to the opening of the SCW.

These claims incurred on behalf of the creditors as a whole are met out of the life or non-life asset fund to the extent that they relate to either branch of insurance business, or if their allocation to either of these branches is impossible, in proportion to the size of the asset funds (Article 18(2)). If these claims cannot be allocated specifically to the business of insurance but have been incurred in the interests of all the creditors, only an equitable share is charged to the separate asset funds (Article 18(a) first paragraph).

The separate asset funds also serve to satisfy insurance claims (Article 18(1)(b), which comprise indemnity and lump-sum insurance claims i.e. claims arising upon the occurrence of the insured event and claims in respect of portions of premiums paid but unused on account of the premature termination of coverage of the risk.

The claims of undertakings reinsured with the accepting undertaking being wound up are also met out of the separate asset funds (Article 18(1)(c)). Such reinsurance acceptances give rise to the constitution of technical reserves, in respect of which Article 2 requires the undertaking to maintain assets recorded in the register. For this reason, and also to avoid the SCW of the reinsurer leading in turn to the SCW of the ceding undertakings, the Commission, having discussed this question in the working party, decided to allow these claims to participate in the distribution of the separate asset funds.

The final category to have a call on the separate asset funds are wage and salary claims (Article 18(1)(d)) in so far as they have not already been taken into account and paid as claims arising after the opening of the SCW, within the meaning of (a), and in so far as the assets not entered in the registers are insufficient to satisfy them. These will be, for example, wage and salary claims arising before the opening or linked to that opening, or again that part of the redundancy payment payable by reason of redundancy occurring after the opening which is excluded from the category of claims arising after the opening by virtue of (a). As in the case of the claims incurred on behalf of the general body of SCW creditors, these wage and salary claims are met from the life or non-life asset funds according to which of these two branches of insurance business they relate, or if such allocation is impossible, in proportion to the size of the asset funds. It is for social reasons that the Commission introduced this derogation from the principle of the separate asset funds reserved exclusively for insurance creditors.

Article 19 - Distribution of the separate asset funds

This article establishes the order of precedence of the various categories of claims which are met from the non-life and life asset funds respectively.

The non-life asset fund is used first to meet that part of the claims arising after the opening of the SCW which are to be counted against that fund pursuant to article 18. Next come insurance claims in favour of the insured or third party victims (when in the field of liability insurance such victims have a right of direct action against the insurer) or possibly

guarantee funds to the extent that these have an action in ~~subrogation~~ against the insurer after having compensated the victims (Article 19(1)(b)). There is no difference of treatment between physical injury and property damage claims : such a distinction would have been arbitrary and would have complicated unnecessarily the distribution. The creditors under (b) are particularly worthy of interest since they are precisely the persons who are affected, financially or physically, by circumstances against which they intended to protect themselves and whose measures of foresight are compromised for reasons beyond their control. It is this which justifies their preferential position in the order of Article 19(1). The reinsurance claims mentioned in Article 18(1)(c) come in third position. They are followed by wage and salary claims within the limits fixed in Article 18, and then by claims for unused portions of premiums paid. The latter represent an appreciable sum and they presuppose the existence of corresponding assets ; these are thus released for the benefit of the employees, while the claims placed in the final position generally represent a relatively small amount per individual creditor.

The distribution of the separate life asset fund broadly follows the same order. It should be noted, however, that subparagraph (b) does not distinguish here according to whether or not the event has occurred : accordingly, the claims based on the insured capital and that based on the surrender value or on the mathematical reserve (for example in the circumstances referred to in the second paragraph of Article 15(3)) are placed on an equal footing. The reason for this is that, in addition to its function as a guarantee against a risk, life assurance in many cases also has an important savings function. Subparagraph (e), on the other hand, covers those cases (e.g. very short duration term assurance) where there is no constitution of mathematical reserves, i.e. the totality of annual premiums covers the annual risk. As in Article 19(1) the Commission felt that this category of assurance claims could be downgraded in favour of the balance of wage and salary claims, other than those covered in subparagraph (a), left unpaid out of the assets not entered in the register.

Article 19(3) is intended to avoid losses reported late weighing too heavily on the SCW and delaying excessively the distribution. This provision maintains a certain flexibility in that it enables the liquidators and the

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competent authorities to assess the amount to be set aside for these losses and the period to be taken into consideration, in the light in particular of the insurance branches which the undertaking is engaged in.

Under Article 19(5), if, which is unlikely, one of the separate asset funds shows a positive balance after the payment of the creditors listed in Article 19(2)(a) to (e), this balance is available to the creditors who have not yet been satisfied (from the assets not entered in the registers), in particular the unsecured creditors.

Article 20 - Law applicable to the SCW

This provision provides a reminder that the Directive does not set out to regulate the whole of the procedure applicable to the winding-up of direct insurance undertakings, but solely those aspects which, from the financial, contractual and supervision viewpoints, distinguish these undertakings from other industries. Article 20(2) refers back, as regards everything not otherwise regulated, to the law of the Member State of the head office, including its provisions of international private law.

Article 21 - Non-Community undertakings

The Community establishments of undertakings the head office of which is not located in a Member State are subject to this Directive (Article 21(1)), just as they are subject to the First Coordination Directives. The NCW may be opened in respect of any establishment (Article 21(2)) and has only territorial effect (Article 21(7)), except if the undertaking is itself wound up at the level of the head office in a third country (Article 21(6)).

The SCW can be opened in any Member State in which the undertaking is established, unless the undertaking has been accorded to the benefit of Article 26 of the First Non-Life Directive or Article 30 of the First Life Directive ; in such case it is then the supervisory authority designated under those provisions which assumes the role of the supervisory authority of the head office and it is only in the Member State of that authority that the SCW can be opened (Article 21(3) and (4)).

The opening of a winding-up, normal or special, is preceded, as far as possible, by a consultative phase during which the supervisory authorities of all the Member States in which the undertaking is established examine the overall situation of the undertaking and cooperate in the reorganization measures which any of those States might be taking, this being the case even if the undertaking in question has not been accorded the benefit of Article 26 of the Non-Life Directive or Article 30 of the Life Directive (Article 21(5)). The aim of this procedure is to enable the authorities to judge whether the financial difficulties being experienced by a given establishment can be overcome by the undertaking as a whole or whether, on the contrary, they point to a general failure on its part. If the measures taken do not result in a restoration of the stability of the undertaking the SCW, once opened, will have effect throughout the Community pursuant to Article 10(2), which represents in itself a threat that is likely to discourage the undertaking from simply abandoning an unprofitable establishment.

Articles 22 and 23 - Final provisions

These articles need no comment.

II

(Preparatory Acts)

COMMISSION

Proposal for a Council Directive on the coordination of laws, regulations and administrative provisions relating to the compulsory winding-up of direct insurance undertakings*COM(86) 768 final**(Submitted by the Commission to the Council on 23 January 1987)**(87/C 71/05)*

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Articles 57 (2) and 66 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament,

Having regard to the opinion of the Economic and Social Committee,

Whereas coordination of the conditions governing the taking up and pursuit of the business of direct insurance has been largely implemented, as regards insurance other than life assurance, by the 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⁾, and, as regards life assurance, by the 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⁽²⁾;

Whereas those Directives do not harmonize the rules on the role of the supervisory authorities or those governing the treatment of insurance contracts in the event of the winding up of the undertaking or the distribution of the assets representing technical reserves in that eventuality;

Whereas, however, it is in the interests not only of creditors, in particular insurance creditors, but also of the supervisory authorities, that common solutions be found to the problems raised;

Whereas harmonized provisions should therefore be adopted in so far as is necessary to take account of the specific features of insurance undertakings; whereas, for the rest, compulsory winding up remains subject to the law of the Member State in which the head office is situated;

Whereas it is not advisable to extend the scope of this Directive to insurance undertakings that are not subject to the First Coordination Directives;

Whereas direct insurance undertakings, by reason of their activities, are required to establish reserves in order to meet their future liabilities; whereas the existence of assets representing such reserves, as required by the First Coordination Directives and verified by the supervisory authorities, is an evident safeguard of the rights of insurance creditors;

Whereas the keeping of registers of such assets at the head office and in each Community agency or branch in respect of all the life and non-life direct insurance and reinsurance business managed by such head office, agency or branch on the basis both of establishment and the provision of services makes it possible to identify such assets, to verify that they are sufficient, to monitor compliance with any measures prohibiting the free disposal of assets and to create, in the event of special compulsory winding up, a separate single life and/or non-life asset fund reserved as a matter of priority for insurance creditors whose claims relate to the direct life and/or non-life insurance or reinsurance business, as appropriate, managed by the head office, agency or branch concerned;

Whereas it is necessary to distinguish between cases in which an undertaking is in a situation of proven or probable insolvency (special compulsory winding up) and those in which compulsory winding up proceedings are initiated because the undertaking, for any other reason, is no longer authorized in accordance with the First Directives (normal compulsory winding up); whereas in the latter case, by its very nature, the question of the distribution of assets does not arise and only rules on jurisdiction or the effects of such winding up on insurance contracts are necessary;

⁽¹⁾ OJ No L 228, 16. 8. 1973, p. 3.

⁽²⁾ OJ No L 63, 13. 3. 1979, p. 1.

Whereas it is essential that the supervisory authorities be closely associated with the implementation and supervision of the special compulsory winding up procedure, even where the opening of the procedure and the appointment of the liquidator fall within the jurisdiction of a court;

Whereas special compulsory winding up must not have the effect of depriving life or non-life policyholders of cover immediately and unilaterally; whereas however it is necessary to guarantee that winding up operations are not unduly prolonged to the detriment of the general body of creditors; whereas provision must be made for possible transfers of portfolios in this connection; whereas partial transfers may be authorized under certain conditions;

Whereas the value of indemnity insurance claims or claims resulting from reinsurance acceptances may not be known either because the loss has not yet been determined or because losses have been incurred but have not yet been reported; whereas to prevent such a situation from impeding the progress and completion of a special compulsory winding up within a reasonable period, the supervisory authorities should be allowed discretion to authorize the lodging of a sum, set aside to satisfy such claims, with a trustee responsible for satisfying the said claims, under their supervision and within a prescribed period; whereas the lodging with a trustee of reserves in respect of losses which have been incurred but have not yet been reported should be possible under the normal compulsory winding up procedure also;

Whereas claims, other than insurance claims, arising after the opening of the winding up represent a special category that must be satisfied prior to any distribution; whereas, on social grounds, claims in respect of wages and salaries, in so far as they cannot be satisfied from the funds resulting from the assets not entered in the register, should be accorded an entitlement to the separate funds that takes precedence over claims in respect of portions of premiums;

Whereas the agencies and branches in the Community of undertakings whose head offices are situated outside the Community are subject to the First Coordination Directives; whereas their overall solvency is subject to verification only in certain conditions laid down in the First Coordination Directives; whereas in these circumstances it is advisable to intensify cooperation between the supervisory authorities concerned when reorganization measures are taken before ordering the opening of a special compulsory winding up, which takes effect throughout the Community; whereas, on the other hand, the normal compulsory winding up of an agency or branch in the Community of such an undertaking need not entail the normal compulsory winding up of the other Community agencies or branches of that undertaking,

HAS ADOPTED THIS DIRECTIVE:

TITLE I

General provisions

Article 1

1. This Directive shall apply to insurance undertakings which come within the scope of Directive 73/239/EEC, hereinafter referred to as the First Non-Life Coordination Directive, or Directive 79/267/EEC, hereinafter referred to as the First Life Coordination Directive.

2. Non-Life business (direct insurance or reinsurance) shall mean transactions included within the classes listed in Annex A to the First Non-Life Coordination Directive, and the corresponding reinsurance transactions.

Life business (direct assurance or reinsurance) shall mean assurance transactions included within the classes listed in the Annex to the First Life Coordination Directive and the corresponding reinsurance transactions.

Article 2

1. Every undertaking shall, in each Member State in which it has its head office or an agency or branch, keep registers of the assets representing, in accordance with national rules, the technical reserves corresponding to the direct insurance transactions and reinsurance acceptances managed by such head office, agency or branch, irrespective of the country in which the policyholder is normally resident or in which the risk is situated.

2. Where an undertaking transacts both non-life business (direct insurance or reinsurance) and life business (direct assurance or reinsurance), it shall keep separate registers in respect of each type of business at the head office, agency or branch at which both types of business are transacted.

3. The total value of the assets entered, valued in accordance with national rules, shall at all times be not less than the value of the technical reserves. The latter shall be calculated without deduction of amounts reinsured, but the assets entered shall include claims against reinsurers where the Member State concerned allows technical reserves to be covered by such claims.

4. Where an asset entered in the register is subject to a charge in favour of a creditor or another person, so

that part of the value of the asset is not available for the purpose of covering commitments, that fact shall be recorded in the register and the amount not available shall not be included in the total value referred to in paragraph 3.

5. Where an asset entered in the register is realized or where it becomes subject to a charge as provided for in paragraph 4, the undertaking shall, where necessary in order to remain in compliance with the provisions of paragraph 3, make good the resulting reduction of the total value of assets entered by entering new assets in the register.

Article 3

1. The registers shall be documents internal to the undertaking, subject to supervision by the supervisory authorities of the Member States in which the undertaking has its head office or an agency or branch.

2. Where the supervisory authority restricts or prohibits the free disposal of assets pursuant to Articles 20, 22 or 27 of the First Non-Life Coordination Directive or Articles 24, 26 or 31 of the First Life Coordination Directive, that decision may be invoked as against third parties. The authority shall at the same time require the lodging of the non-life or life register, as appropriate, of the head office, agency or branch concerned.

3. Where, pursuant to the preceding paragraph a register is lodged with the supervisory authority of the Member State in which the head office is situated or of the Member State responsible for verifying overall solvency within the meaning of Article 26 of the First Non-Life Coordination Directive or Article 30 of the First Life Coordination Directive, the registers kept in the Member States in which the undertaking has an establishment shall likewise be lodged with the appropriate authorities of those States.

4. During such time as the register is lodged, any modification shall be conditional on the consent of the supervisory authorities and shall be entered in the register on their responsibility.

Where the prohibition on the free disposal of assets is lifted, the register shall be returned to the undertaking.

Article 4

1. Where the authorization provided for in Articles 6 (2) (a) and 23 of the First Non-Life Coordination Directive and in Articles 6 (2) (a) and 27 of the First Life Coordination Directive is withdrawn or where the conditions for withdrawal of authorization are fulfilled, the insurance undertaking shall be automatically wound up. Such compulsory winding up shall take one of the following two forms:

- (a) normal compulsory winding up as long as special compulsory winding up has not been ordered;
 - (b) special compulsory winding up, which shall be ordered where it appears probable that the assets of the undertaking are no longer sufficient to cover its existing liabilities, or where the undertaking is found to be insolvent or to have ceased to pay its debts.
2. Once authorization has been withdrawn, the undertaking may no longer be wound up voluntarily.

TITLE II

Normal compulsory winding up

Article 5

1. Normal compulsory winding up shall be carried out under the supervision of the supervisory authority of the Member State in which the head office is situated, in cooperation with the supervisory authorities of the other Member States concerned.

2. Normal compulsory winding up shall be carried out by the bodies of the undertaking. However, where the said bodies do not carry out the winding up satisfactorily, or where there is good reason to believe that they may not do so, the supervisory authority of the Member State in which the head office is situated may, on its own initiative or at the request of the supervisory authorities of the countries in which agencies or branches are situated, in accordance with the law of the Member State of the head office, deprive the bodies of the undertaking of their powers, wholly or in part, or propose such deprivation to the court. The said supervisory authority shall at the same time, in accordance with the law of the Member State, appoint an administrator or propose such appointment to the court.

3. The instrument of appointment shall specify the powers of the administrator.

4. Publication of the withdrawal of authorization and, where appropriate, of the appointment of the administrator, shall be effected by the bodies carrying out normal compulsory winding up by placing an announcement summarizing the decision concerned in the *Official Journal of the European Communities*.

5. The administrator shall submit a progress report on the winding up to the authority that appointed him at least every six months and whenever the authority considers it desirable. The report shall be communicated to the supervisory authority of the Member State in which the head office is situated.

Article 6

1. The Member States shall adopt the measures necessary to enable the undertaking to appeal to the court against any decision taken pursuant to Article 5 (2)

depriving its bodies of their powers wholly or in part and appointing an administrator.

2. The lodging of an appeal by the undertaking shall not have suspensory effect. The court hearing the appeal may, however, decide otherwise by way of exception.

3. Where the appeal is held to be well founded, acts carried out by the administrator prior to that decision shall remain valid, unless the court hearing the appeal considers that they may be declared void without prejudicing the interests of third parties who have acted in good faith.

Article 7

1. Normal compulsory winding up shall not entail the automatic termination of insurance contracts, but shall preclude their automatic renewal. The policyholder may, however, terminate the contract when the annual premium falls due, subject to giving notice thereof.

2. The supervisory authority of the Member State in which the head office is situated shall ensure that the winding up procedure is conducted satisfactorily and shall, in particular, exercise, where necessary, the power provided for in Article 5 (2) to appoint or request the appointment of an administrator.

3. The supervisory authorities shall ensure that the insurance undertaking:

- (a) seeks possible transfers of portfolios;
- (b) exercises existing rights to terminate contracts.

The supervisory authorities may impose a time limit by which the bodies acting in the winding up must exploit the said possibilities.

4. The Member States may adopt special measures to facilitate winding up in respect of long-term contracts.

Article 8

1. The normal compulsory winding up of an undertaking shall take effect in all the Member States.

2. Where one of the conditions laid down in subparagraph (b) of Article 4 (1) is satisfied in the course of a normal compulsory winding up procedure, the supervisory authority of the Member State in which the head office is situated shall transform or shall request the courts of that State to transform the procedure into a special compulsory winding up under the conditions laid down in Title III.

Article 9

1. Subject to Article 8 (2), the provisions of this Title shall apply pending the final settlement of all insurance obligations, which shall, *inter alia*, be procured by:

- the termination or surrender of contracts, or their natural maturity,
- satisfaction of incurred and reported claims,
- the lodging with a trustee of reserves in respect of claims which have been incurred but have not yet been reported,
- the transfer of the portfolio.

2. Save as otherwise provided in special provisions contained in this Title, normal compulsory winding up shall be carried out in accordance with the law of the Member State in which the head office is situated.

TITLE III

Special compulsory winding up

Article 10

1. Special compulsory winding up of an undertaking whose head office is situated within the Community shall be ordered either by the supervisory authority of the Member State in which the head office is situated, or by the courts of that State after consulting the supervisory authority or at its request.

2. Special compulsory winding up shall take effect in all Member States.

Article 11

1. At the outset of special compulsory winding up, the authorities competent under the law of the Member State in which the head office is situated shall appoint one or more liquidators forthwith.

2. Special compulsory winding up shall be carried out by the liquidators under the supervision of the authorities referred to in paragraph 1, in cooperation with the supervisory authorities of the other Member States concerned.

3. The liquidators shall report to the authorities referred to in paragraph 1 on the position at the time of opening the winding up and on the progress of the winding up at least every six months and whenever those authorities consider it desirable. The report shall be communicated to the supervisory authority of the Member State in which the head office is situated.

Article 12

1. One or more assistant liquidators may be appointed in each Member State in which the undertaking has an establishment, or, where appropriate, in any other Member State.

2. The assistant liquidators shall be appointed by the liquidator, or by the authorities referred to in Article 11 (1) in accordance with the law of the Member State in which the head office is situated.

3. The supervisory authority of any Member State in which the undertaking has an establishment may propose the appointment of an assistant liquidator and submit observations on his powers.

4. The assistant liquidators shall be invested with specific powers and shall act on behalf of the liquidator only in respect of the Member State for which they have been appointed.

Article 13

1. In the case of special compulsory winding up, the liquidators shall not transfer a portfolio to one or more insurance undertakings without the prior authorization of the supervisory authority of the Member State in which the head office is situated or of the courts of that State after consulting the supervisory authority and in accordance with the conditions laid down in Article 21 of the First Non-Life Coordination Directive, or Article 25 of the First Life Coordination Directive, as appropriate.

2. The transfer of the entire portfolio relating either to direct life assurance and life reinsurance business, or to direct non-life insurance and non-life reinsurance business, may be permitted even where the other portfolio is not transferred.

3. The transfer of only part of the portfolio relating to life assurance and life reinsurance business or to non-life insurance and non-life reinsurance business may be permitted on condition that such transfer does not impede the satisfactory conduct of the winding up procedure or prejudice the interests of the insurance and reinsurance creditors referred to in Article 18 (1) (b) and (c), and in the cases provided for in Article 14 (3).

Article 14

1. Special compulsory winding up shall automatically terminate existing non-life insurance contracts 30 days after publication of the order for such winding up, where such contracts have not been transferred during that period.

2. The liquidators may, with the consent of the supervisory authority of the Member State in which the head office is situated or of the courts of that State after consulting the supervisory authority, extend the period provided for in paragraph 1 and suspend policyholders' rights of termination if genuine negotiations concerning the transfer of an entire portfolio are in progress.

3. Member States may introduce or retain an official system for transferring the portfolio of an undertaking whose head office is situated in their territory or of an agency or branch situated therein, entailing automatic extension of the time limit provided for in paragraph 1 and the suspension of policyholders' rights of termination.

Article 15

1. Special compulsory winding up shall not entail the automatic termination of existing life assurance contracts.

2. The liquidators may, with the permission of the supervisory authority of the Member State in which the head office is situated or of the courts of that State after consulting the supervisory authority, reduce the obligations of the insurer arising from life assurance contracts, particularly with a view to effecting a transfer of portfolio.

3. Failing a transfer under the conditions laid down in Article 13, the liquidators may, after obtaining permission under the conditions laid down in paragraph 2, terminate the contracts in the interests of the general body of life assurance creditors. Such termination may be imposed by the supervisory authority of the Member State in which the head office is situated or by the courts of that State after consulting the supervisory authority.

In such cases, the amount of their claims shall correspond to the total value of the mathematical reserves and other benefits attaching to their contract, without deduction of administrative or termination expenses.

Article 16

1. Contracts by virtue of which the undertaking being wound up accepts reinsurance risks shall not be renewed after special compulsory winding up has been ordered.

2. The liquidators shall seek appropriate reinsurance cover throughout the special compulsory winding up procedure.

3. Special compulsory winding-up shall not preclude the offsetting of reinsurance claims and liabilities.

Article 17

1. The composition of the assets entered in accordance with Article 2 at the time when special compulsory winding up is opened in all the registers kept in respect of direct life assurance and life reinsurance business and in all the registers kept in respect of direct non-life insurance and non-life reinsurance business shall not thereafter be changed.

2. No alteration other than the correction of purely technical errors shall be made in the registers.

3. Notwithstanding paragraph 2, the liquidators shall add to the said assets the yield therefrom and the value of premiums received in respect of the class of business concerned up to the time any transfer of portfolio is effected in the case of direct life assurance and life

reinsurance transactions and during the period provided for in Article 14 or up to the time any transfer of portfolio is effected in the case of direct non-life insurance and non-life reinsurance.

4. Failing transfer of the portfolio, the assets entered in all the registers kept in respect of non-life and life business shall be realized, and the proceeds therefrom shall constitute the non-life and life asset funds which shall be distributed to creditors for the claims specified in Article 18 in accordance with Article 19 (1) and Article 19 (2) respectively.

5. Where the proceeds of realizing the assets are less than the amount at which they are valued in the registers, the liquidators shall justify that circumstance to the supervisory authority of the Member State in which the head office is situated or to the courts of that State, which shall inform the supervisory authority accordingly.

Article 18

1. The claims eligible to participate in the distribution of the asset funds defined in Article 17 (4) shall be the following:

(a) Claims, other than insurance claims, arising after the opening of the special compulsory winding up and relating to the winding-up operations in so far as they relate to costs actually incurred for the benefit of the claims referred to in subparagraphs (b) or (c); where a strict allocation is impossible, an equitable portion thereof shall be payable.

Where redundancies occur after such winding up is opened, such claims shall not include that portion of any redundancy payments due, calculated by reference to the period of employment prior to the opening.

(b) Indemnity and lump-sum insurance claims, and claims in respect of the repayment of unused portions of premiums paid arising from direct life assurance or non-life insurance business managed by the head office, or an agency or branch situated within the Community.

(c) Claims in respect of reinsurance acceptances arising from life or non-life reinsurance business managed by the head office, or an agency or branch situated within the Community in so far as they are not extinguished by offsetting pursuant to Article 16 (3).

(d) Claims in respect of wages and salaries arising before or after the opening, to the extent that, in the latter case, they are not included in the claims referred to in subparagraph (a), if the funds resulting from assets not entered in the registers are insufficient to satisfy them.

2. The claims referred to in subparagraphs (a) and (d) of paragraph 1 shall be satisfied out of the life and non-life asset funds according to the class of business to which they relate or, where strict allocation is impossible,

in proportion to the size of the asset funds available for distribution.

Article 19

1. The non-life asset fund constituted in accordance with the conditions laid down in Article 17 (4) shall be distributed among the creditors by the liquidators in satisfaction of claims relating to non-life business in the following order:

(a) claims arising after the opening of the special compulsory winding up and referred to in Article 18 (1) (a) and (2);

(b) indemnity insurance claims in favour of policyholders and entitled third parties or, as the case may be, guarantee funds;

(c) claims resulting from reinsurance acceptances, subject to the limits laid down in Article 18 (1) (c);

(d) claims in respect of wages and salaries, subject to the limits laid down in Article 18 (1) (d);

(e) claims in respect of unused portions of premiums paid.

2. The life asset fund constituted in accordance with the conditions laid down in Article 17 (4) shall be distributed by the liquidators in satisfaction of claims relating to life business in the following order:

(a) claims arising after the opening of the special compulsory winding up and referred to in Article 18 (1) (a) and (2);

(b) claims in respect of lump-sum benefits, annuities, surrender values, mathematical reserves or other benefits in favour of policyholders and beneficiaries;

(c) claims resulting from reinsurance acceptances, subject to the limits laid down in Article 18 (1) (c);

(d) claims in respect of wages and salaries, subject to the limits laid down in Article 18 (1) (d);

(e) claims in respect of unused portions of premiums paid.

3. Where the value of insurance claims or claims resulting from reinsurance acceptances is not known, or where losses have been incurred but not yet reported, the liquidators shall set aside a sum to satisfy such claims. Where after payment of the other claims listed in Article 18 (1), the value of such claims is still not known or losses have still not been reported, the liquidators may, with the consent of the supervisory authority of the Member State in which the head office is situated or of the courts of that State after consulting the supervisory authority, lodge that sum with a trustee appointed for

the purpose who shall be responsible for satisfying the said claims under the supervision of the said authorities, on condition that such claims are made within a period which they shall prescribe.

4. The creditors referred to in paragraphs 1 and 2 may participate in the distribution of the assets not entered in the registers defined in Article 2 as unsecured creditors in respect of any unsatisfied portion of their claim.

5. Any residue of either of the asset funds, and any amount lodged with the trustee pursuant to paragraph 3 and not claimed within the prescribed period, shall be added to the assets not entered in the registers.

Article 20

1. This Title shall apply neither to the satisfaction of claims other than those referred to in Article 18 (1), nor to the realization and distribution of assets not entered in the registers referred to in Article 2.

2. Save as otherwise provided in special provisions contained in this Title, the special compulsory winding up of undertakings to which this Directive applies shall be carried out in accordance with the provisions of the law of the Member State in which the head office is situated.

TITLE IV

Non-Community undertakings

Article 21

1. Subject to the provisions that follow, this Directive shall apply to agencies or branches, established in the territory of a Member State, of undertakings whose head office is situated outside the Community.

2. For the purposes of applying the provisions of Title II of this Directive to the establishments referred to in paragraph 1, 'supervisory authority of the Member State in which the head office is situated' shall mean the authority that granted the authorization referred to in Article 23 of the First Non-Life Coordination Directive or Article 27 of the First Life Coordination Directive, and 'Member State in which the head office is situated' shall mean the corresponding Member State.

3. The special compulsory winding up of an agency or branch of an undertaking whose head office is situated outside the Community shall be opened either by the supervisory authority of the Member State which withdrew the authorization or by the courts of that State after the supervisory authority has given its opinion or at that authority's request. Where Article 26 of the First

Non-Life Coordination Directive or Article 30 of the First Life Coordination Directive has been applied, the special compulsory winding up shall be opened either by the supervisory authority of the Member State which is responsible for supervising the solvency margin or by the courts of that State after the supervisory authority has given its opinion or at that authority's request. 22

4. For the purposes of applying the provisions of Title III, 'supervisory authority of the Member State in which the head office is situated' shall mean the supervisory authority referred to in paragraph 3 and 'Member State in which the head office is situated' shall mean the corresponding Member State.

5. Without prejudice to the second paragraph of Article 27 of the First Non-Life Coordination Directive and the second subparagraph of Article 31 (2) of the First Life Coordination Directive, the supervisory authority of a Member State in whose territory a non-Community undertaking has an agency or branch shall inform the supervisory authorities of the other Member States, in whose territory the undertaking has an establishment, of the reorganization measures it proposes to take under Articles 20 and 27 of the First Non-Life Coordination Directive and Articles 24 and 31 of the First Life Coordination Directive with a view to cooperating in the implementation of those measures.

It shall consult the same authorities before withdrawing authorization.

6. The opening of compulsory winding up or the withdrawal of authorization in respect of the head office shall necessarily entail withdrawal of the authorization granted by Member States to the agencies or branches of the undertaking in question.

7. Without prejudice to the application of paragraph 6, the normal compulsory winding up of an agency or branch established in the territory of a Member State shall not entail the normal compulsory winding up of agencies and branches established in the territory of the other Member States.

TITLE V

Final provisions

Article 22

Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive not later than

They shall forthwith inform the Commission thereof.

Article 23

This Directive is addressed to the Member States.