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Methodology for the assessment of the equivalence of Third Country Professional Secrecy Standards with the Capital Requirements Directive for the purposes of EEA colleges

1. Article 131a of the revised Capital Requirements Directive (CRD)¹ allows the participation of third countries' supervisory authorities in colleges of supervisors provided that they are subject to confidentiality requirements that are equivalent, in the opinion of all competent authorities, to the requirements under Chapter 1, Section 2 of the CRD.
2. CEBS members have agreed to collate a set of criteria - to be used within supervisory colleges - against which any initial assessment would be conducted for the purposes of the participation of third countries' supervisory authorities in EEA colleges of supervisors.
3. To ensure consistency across the three Lamfalussy committees, the following proposed methodology is based on CEIOPS' recent work on assessing the equivalence of conditions of professional secrecy and disclosure of confidential information in the context of the Reinsurance, Consolidated Life and Third Non-Life Insurance Directives². In this case, assessing conditions will be in the context of the 'Capital Requirements Directive' (CRD) (Directive 2006/48/EC and Directive 2006/49/EC) as amended (Directive 2009/110/EC).
4. The starting point in the CRD is Article 46, which provides that Member States may enter into agreements providing for information exchanges with the competent authorities or bodies of third countries as defined in Articles 47 and 48 of the CRD, only if the information disclosed is subject to guarantees of professional secrecy at least equivalent to those in the CRD, and the exchange of information must be for the purpose of performing the supervisory task of the authorities or bodies receiving the information.
5. Accordingly, the methodology comprises:
 - key principles which encapsulate the standards of professional secrecy required by the CRD;

¹ Capital Requirements Directive (CRD) is a technical expression which comprises Directive 2006/48/EC and Directive 2006/49/EC. Please note that, in general, references to "Directive 2006/48/EC" and "Directive 2006/49/EC" or "CRD" refer to the amended versions of the Directives. The amending Directive can be found under: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:302:0097:0119:EN:PDF>

² <http://www.ceiops.eu/media/files/publications/standardsandmore/guidelines/CEIOPS-ConCo-04-09-Equivalence-Professional-Secrecy-Standards.pdf>

- the objective that each principle seeks to achieve in accordance with the CRD; and
 - core indicators of equivalence, which provide guidance in determining whether provisions within the legal system of the relevant jurisdiction together with other factors, achieve those principles and objectives that follow from the wording of the CRD.
6. The set of criteria outlined below should be used by college members when assessing third countries' confidentiality provisions.

Principle 1 – Definition of Confidential Information

Objective:

To establish the definition of confidential information through the provisions in national law which legally protect the type of information that could be defined as confidential information.

Articles:

The CRD does not specifically require Member States to define confidential information in their legislation. Confidential information in the context of the CRD should have regard to Article 44 (1)

Indicators:

Indicators	Standard Required
Legal requirements	Provisions in national law which protect certain information as confidential should include a clear assessment of what type of information is captured as 'confidential'.
Nature of information	Information which: <ul style="list-style-type: none"> • has been received in the course of a person's work for or on behalf of the competent authority; • is not in the public domain; and • is not in summary or aggregate form such that individual credit institutions cannot be identified.

Principle 2 – Existence of professional secrecy obligation

Objective:

To establish that an ongoing obligation of professional secrecy is imposed on all persons who work or have worked, as well as all auditors or experts acting or who have acted on behalf of the competent authority in respect of information received in the course of their work for or on behalf of the competent authority.

Articles:

CRD Article 44 (1).

Indicators:

Indicators	Standard Required
Legal requirements	Specific professional secrecy provisions in national law or in other laws binding the jurisdiction applying to the competent authority (ies) and other persons.
Applicability - persons	Professional secrecy obligations must apply to all persons: <ul style="list-style-type: none"> • working or who have worked for the competent authority (ies) ; and • acting or who have acted on behalf of the competent authority(ies) (including all auditors and experts).
Duration of obligation	Professional secrecy obligation applicable: <ul style="list-style-type: none"> • at all times whilst working for, or acting on behalf of, the competent authority; and • on an ongoing basis thereafter.
Nature of information	Professional secrecy obligation applicable: <ul style="list-style-type: none"> • to confidential information received in the course of their work for, or on behalf of the competent authority.

Principle 3 – Use of confidential information

Objective:

To establish that confidential information should only be used for the purposes for which it was properly disclosed, as detailed in the CRD.

Articles:

CRD 45, 47, 48 and 49.

Indicators:

Indicators	Standard Required
Performance of supervisory tasks (ref. Article 45)	Confidential information received by the competent authority should be used in the course of its duties and only: <ul style="list-style-type: none"> • to ensure compliance with conditions pertaining to the establishment and ongoing business of a credit institution; • to impose penalties; • in administrative appeals; and • in court proceedings initiated pursuant to Article 55 or to specific provisions of Directives adopted in the field of credit

	institutions.
Oversight/ legal supervision (ref. Article 47)	<ul style="list-style-type: none"> • public duty of supervision of other financial organisations, insurance companies or financial markets; • involvement in the liquidation, bankruptcy or similar procedures with respect to credit institutions; • carrying out statutory audits of the accounts of credit institutions and other financial institutions.
Administration of deposit-guarantee scheme (ref. Article 47)	<ul style="list-style-type: none"> • Ensure proper administration of the national deposit-guarantee scheme if one exists.
Detection/investigation of breaches of company law (ref. Article 48 (2)).	<ul style="list-style-type: none"> • Detection/Investigation into suspected breaches of company law where disclosing country has as its aim the strengthening of stability and integrity of the financial system.
Central banks and other bodies with similar function in capacity as monetary authorities (ref. Article 49)	<ul style="list-style-type: none"> • Exercise of their statutory tasks, including the conduct of monetary policy and related liquidity provision, oversight of payments, clearing and settlement systems and the safeguarding of the financial system, including in emergency situations.
Payment systems oversight (ref. Article 49)	<ul style="list-style-type: none"> • Ensure proper oversight of payment system.
Government departments responsible for financial legislation (ref. Article 50)	<ul style="list-style-type: none"> • Prudential control and emergency situations.

Principle 4 – Restrictions on disclosure of confidential information

Objective:

To establish that confidential information received by a competent authority in the performance of the competent authority's duties can only be disclosed in restricted and clearly defined circumstances, except for cases covered by criminal law.

Articles:

CRD 44(1), 44(2), 46, 47, 48(1), 48(2), 49, 50, 51 and 52.

Indicators:

Indicators	Standard Required
Legal requirements	Legal provisions establishing that the disclosure of confidential information cannot be divulged except in certain clearly delineated circumstances, with clear conditions of disclosure that need to be secured.
Authorities or bodies to which information can be disclosed (ref. CRD Articles 44 and 47 – 52)	<p>In fulfilling their supervisory functions competent authorities may disclose confidential information in the following circumstances:</p> <ul style="list-style-type: none"> • to other competent authorities of the same state; or • to authorities entrusted with the public duty of supervising other financial institutions, insurance companies and the financial markets; or • to bodies involved in liquidation and bankruptcy of credit institutions or other similar procedures; or • to persons responsible for carrying out statutory audits of accounts of credit institutions and other financial institutions; or • to bodies responsible for the administration of deposit-guarantee schemes so far as the information is required for the exercise of their functions; or • to central banks and other bodies with a similar function in their capacity as monetary authorities; or • to public authorities responsible for overseeing payment systems. • to authorities responsible for overseeing persons charged with carrying out statutory audits of the accounts of insurance undertakings, credit institutions, investment firms and other financial institutions. <p>or for reasons of prudential control:</p> <ul style="list-style-type: none"> • to government administrations responsible for financial legislation (precluding that information obtained through the means of on-site verification). <p>or to ensure the proper functioning of those bodies charged with the provision of clearing or settlement services:</p> <ul style="list-style-type: none"> • to a clearing house or similar body recognised under national law (which may not be within the same country) for the provision of clearing and settlement services for one of their national markets.

<p>Conditions on disclosure</p>	<ul style="list-style-type: none"> • The purpose of disclosure of the confidential information is essential to the performance of the receiving competent authority's duties ; and • The confidential information itself is subject to conditions of professional secrecy. • Where the confidential information has originated in another jurisdiction, and it is proposed to onwardly disclose it to a body falling under (a), (b) or (c) below, the competent authorities that originally disclosed the information must give express agreement to its disclosure and where appropriate the information may only be used for the purposes for which the authorities give their consent. <p>(a) authorities responsible for overseeing those bodies involved in the liquidation and bankruptcy of credit institutions and other similar procedures;</p> <p>(b) authorities responsible for overseeing persons charged with carrying out statutory audits of the accounts of insurance undertakings, credit institutions, investment firms and other financial institutions; and</p> <p>(c) authorities or bodies responsible for detecting and investigating breaches of company law.</p>
<p>Specific consent of originating EEA competent authority required in case of disclosure by another EEA authority to a non-EEA supervisory authority (ref. CRD Article 46).</p>	<p>Where the confidential information originates in another jurisdiction, disclosure is only permitted where:</p> <ul style="list-style-type: none"> • the express consent to the disclosure of the information by the competent authority from which the information originated is obtained by the competent/national authority. • it is for the purposes for which the originating authority has given its consent.

Additional important information to be taken into account: Breach of professional secrecy and disclosure requirements relating to confidential information

Objective:

To establish that disclosure of confidential information in breach of the obligation of professional secrecy by any person bound by the obligation is unlawful and sanctionable.

Article:

The consequences of a breach of professional secrecy are not described in the CRD, although Article 44 implies their existence.

Indicators:

Indicators	Standard Required
Legal requirements	Provisions in national law in respect of the breach of professional secrecy obligation, comprising of: <ul style="list-style-type: none">• offences• penalties
Enforcement process	Provision in national law relating to enforcement powers in respect of the breach/threatened breach of the professional secrecy obligation. Evidence of previous relevant and successful enforcement action.

Annex 1: Template for the assessment of the equivalence to the CRD of third countries' professional secrecy and confidentiality provisions

NAME OF THIRD COUNTRY:

PRINCIPLE 1: DEFINITION OF CONFIDENTIAL INFORMATION

Third country's legal provisions relating to the definition of confidential information:

Broad assessment of equivalence with the CRD regarding the definition of confidential information:

PRINCIPLE 2: EXISTENCE OF PROFESSIONAL SECRECY OBLIGATION

Third country's legal provisions relating to the existence of professional secrecy obligation:

Broad assessment of equivalence with the CRD regarding the existence of professional secrecy obligation:

PRINCIPLE 3: USE OF CONFIDENTIAL INFORMATION

Third country's legal provisions relating to the use of confidential information:

Broad assessment of equivalence with the CRD regarding the use of confidential information:

PRINCIPLE 4: RESTRICTIONS ON THE DISCLOSURE OF CONFIDENTIAL INFORMATION

Third country's legal provisions relating to restrictions on the disclosure of confidential information:

Broad assessment of equivalence with the CRD regarding restrictions on the disclosure of confidential information:

ADDITIONAL IMPORTANT INFORMATION TO BE TAKEN INTO ACCOUNT: BREACH OF PROFESSIONAL SECRECY AND DISCLOSURE REQUIREMENTS RELATING TO CONFIDENTIAL INFORMATION

Third country's legal provisions relating to the breach of professional secrecy and disclosure requirements relating to confidential information:

Broad assessment of equivalence with the CRD regarding the breach of professional secrecy and disclosure requirements relating to confidential information:

OTHER RELEVANT POINTS NOT COVERED BY THE PRINCIPLES ABOVE:

OVERALL BROAD ASSESSMENT OF EQUIVALENCE TO THE CONFIDENTIALITY PROVISIONS OF THE CRD: