

Methodology for the assessment of the Equivalence of Third Country Professional Secrecy Standards

As financial market integration increases and the number of internationally active insurance firms continue to grow, there is a greater need for cooperation and information exchange between supervisors (the Financial Stability Forum has, for example, recently called for Colleges of Supervisors to be established for all major international groups). Within this context, it is clearly recognised that the ability to share information in order to facilitate effective cooperation must be accompanied by adequate confidentiality safeguards. The ability to exchange information with a third country supervisor under conditions of professional secrecy will also be critical to any broader assessment of the equivalence of third country supervisory regimes by CEIOPS Members.¹

The Reinsurance, Consolidated Life and Third Non-Life Insurance Directives² contain similar professional secrecy provisions, founded on several principles/objectives in respect of which the equivalence of a third country professional secrecy regime can be assessed.

The methodology adopted by CEIOPS for the assessment of equivalence in this area (outlined below), is similar to the approach agreed by CEIOPS Members for the assessment of equivalence in respect of Directive 2005/68/EC (Reinsurance Directive); namely, it identifies the:

- key principles encapsulated in the [re]insurance legislation regarding professional secrecy;
- objectives each principle seeks to achieve; and
- core 'indicators' of equivalence - namely, those factors which provide guidance in determining whether the relevant principles and objectives are achieved.

¹ Article 26 of the Reinsurance Directive provides that Member States may conclude cooperation agreements providing for exchange of information with competent authorities of third countries or with authorities or bodies of third countries, only if the information disclosed is subject to guarantees of professional secrecy at least equivalent to those referred to in the Reinsurance Directive.

² Directives 2005/68/EC, 2002/83/EC and 92/49/EEC respectively.

i) Principle 1 - Confidential Information

Objective - Confidential information is information which is protected as confidential by operation of law.

Articles - 'Confidential information' is not specifically defined in the [re]insurance Directives.

Indicators – Existence of national provisions in respect of the following:

Indicators	Standard
Legal requirements	Provisions in national law (statutory or common law) which protect certain information as confidential.
Nature of information	Information is of a type that is regarded as confidential, namely, the information: <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 the individual undertaking can be identified.

ii) Principle 2 - Professional Secrecy Obligation

Objective - All persons who work(ed) or act(ed) on behalf of the competent authority must be bound by an ongoing obligation of professional secrecy in respect of information received in the course of their work for or on behalf of the competent authority.

Articles - Reinsurance Directive 24(1); Consolidated Life Directive 16(1); and Third Non Life Insurance Directive 16(1).

Indicators – Existence of specific and binding provisions in respect of the following:

Indicators	Standard
Legal requirements	Specific professional secrecy provisions in national law or in binding articles governing the competent authority.
Applicability - persons	Professional secrecy obligation applicable to all persons: <ul style="list-style-type: none"> ▪ working or who have worked for the competent authority; and ▪ acting or who have acted on behalf of the competent authority (e.g. 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"> ▪ in respect of information received in the course of work for, or on behalf of the competent authority.

iii) Principle 3 – Disclosure of Confidential Information

Objective - 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.

Articles – Reinsurance Directive Recital 18, Articles 24, 26-30; Consolidated Life Directive 16(1), 16(3)-(9); and Third Non-Life Directive 16(1), 16(4)-(6).

Indicators – If disclosure of confidential information is, prima facie, to be permissible, the four indicators in the following table must **all** exist, except where:

- an alternative is indicated in respect of the '**Purpose of Disclosure**' indicator, in which case at least **one** of the specified alternatives must be applicable; and/or
- the specific indicator is non-applicable (namely, the '**Consent of Competent Authority**' indicator).

Indicator	Standard
Professional Secrecy Obligation	The information is subject to conditions of professional secrecy (see above).
Purpose of Disclosure (at least <u>one</u> alternative must be applicable)	<p>The disclosure is intended:</p> <ul style="list-style-type: none"> ▪ for the performance of the supervisory task(s) of the competent authority <p>or</p> <ul style="list-style-type: none"> ▪ for the purpose of the carrying out of specific tasks (including those of oversight and/or legal supervision), by: <ul style="list-style-type: none"> • authorities responsible for the official supervision of credit institutions and other financial organisations / markets; and/or • bodies involved in liquidation, bankruptcy, winding up, or similar procedures of (re)insurance undertakings; and/or • persons responsible for carrying out statutory audits of the accounts of (re)insurance undertakings and other financial institutions; and/or • independent actuaries of (re)insurance undertakings <p>or</p> <ul style="list-style-type: none"> ▪ detecting and investigating breaches of company law by authorities / bodies legally responsible for this task <p>or</p> <ul style="list-style-type: none"> ▪ for the performance of the task of: <ul style="list-style-type: none"> • central banks and other monetary authorities, including public authorities responsible for overseeing payment systems <p>or</p> <ul style="list-style-type: none"> ▪ for reasons of prudential control to: <ul style="list-style-type: none"> • government administrations responsible for financial legislation

Extent of Disclosure	The information is disclosed no further than is necessary to achieve the purpose[s] for which the information was properly disclosed/obtained.
Consent of Competent Authority (if applicable)	<p>Where the confidential information originates from another competent authority:</p> <ul style="list-style-type: none"> ▪ there has been prior agreement to the disclosure of the information by the competent authority from which the information originated; and ▪ the disclosure is made in accordance with any specified conditions, including those relating to the purpose of the disclosure and use of the information.

Information may, prima facie, be disclosed in any of the following circumstances, even if the conditions for disclosure in the table immediately above do not apply:

- Disclosure is in summary or aggregate form, such that the individual undertaking cannot be identified.
- Disclosure is in respect of civil or criminal proceedings, where the undertaking has been declared bankrupt or is being compulsorily wound up, and the information does not concern third parties involved in rescue attempts.
- The individual regulated entity to whom the information relates explicitly agrees to the disclosure.

iv) Principle 4 – Use of Confidential Information

Objectives – Confidential information should only be used for the purposes for which it was properly disclosed.

Articles – Reinsurance Directive 27-30; Consolidated Life Directive 16(4)-(9); and Third Non-Life Directive 16(4)-(6).

Indicators – Confidential information should only be used for the following purposes:

Indicator	Standard
Performance of supervisory tasks	<ul style="list-style-type: none"> ▪ To ensure initial / ongoing compliance with conditions for authorisation; to impose penalties; in administrative appeals; applications to court in respect of [re]insurance decisions.
Oversight / legal supervision	<ul style="list-style-type: none"> ▪ Official supervision of financial institutions. ▪ Liquidation, bankruptcy, winding-up & similar proceedings. ▪ Carrying out statutory audits of accounts. ▪ Legal supervision by independent actuaries.
Detection / investigation	<ul style="list-style-type: none"> ▪ Detection / investigation of breaches of company law.
Payment systems oversight	<ul style="list-style-type: none"> ▪ Oversight of payment systems.
Government administrations responsible for financial regulation	<ul style="list-style-type: none"> ▪ Prudential control.

v) Principle 5 - Breach of the obligation of professional secrecy

Objective - The passing on of confidential information, in breach of the obligation of professional secrecy, is unlawful in the jurisdiction of the competent authority.

Articles – Reinsurance Directive 24; Consolidated Life Directive 16(1); and Third Non-Life Directive 16(1).

Indicators – The following should be considered as evidence of the unlawfulness of the breach of the obligation of professional secrecy:

Indicators	Standard
Legal breach	Provisions in national law in respect of the breach of the professional secrecy obligation: <ul style="list-style-type: none"> ▪ offences ▪ penalties
Enforcement	Provisions in national law relating to enforcement powers in respect of the breach/threatened breach of the professional secrecy obligation. Evidence of previous relevant enforcement action.