



FINANCIAL CONGLOMERATES COMMITTEE

**General guidance from the European Financial Conglomerates Committee to EU supervisors: the extent to which the supervisory regime in Switzerland is likely to meet the objectives of supplementary supervision in Directive 2002/87/EC**

**General guidance from the Banking Advisory Committee to EU supervisors: the extent to which the supervisory regime in Switzerland is likely to meet the objectives of consolidated supervision in Chapter 3 of Directive 2000/12/EC**

**Section 1: Introduction**

Article 21(5) of the Financial Conglomerates Directive (2002/87/EC) states that the European Financial Conglomerates Committee ("EFCC") "may give general guidance as to whether the supplementary supervision arrangements of competent authorities in third countries are likely to achieve the objectives of the supplementary supervision as defined in this Directive [...]. The Committee shall keep any such guidance under review and take into account any changes to the supplementary supervision carried out by such competent authorities." Article 18(1) requires that this guidance is taken into account by the competent authority (the 'coordinator') which would be responsible for exercising supplementary (i.e., group-level) prudential supervision when verifying whether a group, with its parent headquartered outside the Community, is subject to equivalent supervision in its home country.

Article 29(11) of the Financial Conglomerates Directive (2002/87/EC) inserts Article 56a into Directive 2000/12/EC, which states that the Banking Advisory Committee ("BAC") "may give general guidance as to whether the consolidated supervision arrangements of competent authorities in third countries are likely to achieve the objectives of consolidated supervision as defined in this Chapter [...]. The Committee shall keep any such guidance under review and take into account any changes to the consolidated supervision arrangements applied by such competent authorities." Article 56a requires that this guidance is taken into account by the competent authority which would be responsible for exercising consolidated supervision when verifying whether a credit institution, with its parent headquartered outside the Community, is subject to equivalent supervision in its home country.

Recital 13 of Directive 2002/87/EC describes equivalent supervision in terms of the objectives and results achieved from it. The recital states that regulated entities should be subject to "equivalent and appropriate supplementary supervisory arrangements which achieve objectives and results similar to those pursued by the provisions of this Directive". Recital 14 makes it clear that such equivalent supervision can, however, only exist where "third-country supervisory authorities have agreed to co-operate with the competent authorities concerned on the means and objectives of exercising supplementary supervision of the regulated entities of a financial conglomerate."

The EFCC and BAC have decided to give general guidance on the supervisory arrangements in Switzerland and in the USA, given the economic importance of Swiss and US financial groups to the European Union.

The following guidance relates to the supervision of financial conglomerates and banking groups in Switzerland. It is based on technical advice prepared by the Mixed Technical Group (“MTG”) Supervisory Sub-group and approved by the MTG at its meeting on 15 June 2004. In our view the objectives of supplementary supervision under Directive 2002/87/EC and the objectives of consolidated supervision under Directive 2000/12/EC are sufficiently close that this guidance addresses both topics.

The EFCC is giving guidance as to whether the arrangements of the Swiss supervisory authorities concerned are likely to achieve the objectives of supplementary supervision in Directive 2002/87/EC, identifying individual authorities where appropriate. This guidance is intended to facilitate the making of equivalence decisions, as required by Article 18 of Directive 2002/87/EC, by EU supervisors.

The BAC is giving guidance as to whether the arrangements of the Swiss supervisory authorities concerned are likely to achieve the objectives of consolidated supervision in Chapter 3 of Directive 2000/12/EC, identifying individual authorities where appropriate. This guidance is intended to facilitate the making of equivalence decisions, as required by Article 56a of Directive 2000/12/EC, by EU supervisors.

This guidance was approved at a joint session of the EFCC and the BAC on 28 June 2004. Now that the guidance is available, we expect EU supervisors to take equivalence decisions in relation to particular groups at the earliest possible opportunity, to provide the necessary degree of certainty to the industry.

## **Section 2: Overview of the Swiss regulatory system**

Supervision in Switzerland is conducted by three main agencies with regulatory powers: the Swiss Federal Banking Commission (SFBC) for banking, securities and investment funds, the Federal Office of Private Insurance (FOPI) for insurance and reinsurance and the Federal Social Insurance Office (FSIO) for pension funds. The objects of supervision are institutions, conduct of business, products and markets.

None of the supervisory agencies have explicit legal powers extending to financial conglomerates. Financial conglomerates are currently supervised on a consolidated basis according to special decrees issued by the lead-regulator. The SFBC has established, through case law, its right to conduct consolidated supervision of bank-led groups. If such bank-led groups also include insurance companies, the SFBC is responsible for the consolidated supervision of the group, while the FOPI is responsible for the supervision of the insurance subgroup. With respect to insurance-led groups the FOPI acts as consolidated supervisor, whereas the SFBC remains responsible for any banking and securities entities in the group. Decrees have been issued in relation to the supervision of all the Swiss-parented groups that are of interest to EU supervisors.

At present, the Swiss insurance supervisory regime does not provide an explicit legal basis for consolidated supervision, neither with respect to an insurance group nor with respect to financial conglomerates. In May 2003, the Federal Council adopted the message on the revision of the Insurance Supervision Act. The main aims of the revision are to upgrade the instruments of insurance supervision, strengthening solvency requirements of insurance companies, improve consumer protection and to create a legislative basis for group and conglomerate supervision. This bill is expected to come into force in 2005. Meanwhile, FOPI

is considering whether it is able to act as co-lead supervisor in charge of supplementary supervision on the undertakings based in Switzerland and belonging to cross-border insurance groups (an Addendum to the Helsinki Protocol may follow.).

In July 2003, an expert committee commissioned by the Federal Department of Finance submitted the first part of its report on “Integrated Financial Market Supervision” which includes a first draft of the “Federal Act on Financial Market Supervision” (the FINMA Act). The draft FINMA Act contains recommendations on the organisation of the FINMA, as well as supervisory instruments extending across areas of specialisation. In a first step the SFBC and the FOPI shall be integrated into the FINMA. The FINMA would have direct responsibility for supervising banks, securities dealers, investment funds, private insurance companies and the stock market. The FINMA would be established as an institution under public law with its own legal personality. The consultation process on the first draft of the FINMA Act started in October 2003 and showed not full support for an integrated supervisory agency in Switzerland. It is expected that the FINMA Act will not come into force before 2006.

As of June 2004 Swiss legislation on financial groups (banking, insurance) and financial conglomerates include: the Federal Banking Act with respect to banking groups, specific Decrees on existing financial conglomerates and two draft laws on supervision of insurance groups and financial conglomerates.

### **Section 3: Guidance on achievement of objectives**

The present Swiss legislative framework does not provide Swiss supervisors with the direct powers needed to exercise supplementary supervision of the type envisaged in EU legislation. However, by the use of decrees, the Swiss supervisors have put in place a framework which is far closer to the supervisory framework in the EU and which should, therefore, permit most of the same objectives to be achieved. Nonetheless, we are of the view that, on balance, there is broad equivalence in the Swiss supervisory approaches, notwithstanding the caveats noted below.

In general, there are differences in approach between the Swiss banking and insurance supervisors – as is often the case in many jurisdictions. The Swiss banking supervisory regime makes use of many of the same tools as the banking supervisory regime in the EU, and aims to achieve essentially the same objectives as set out in EU legislation. The Swiss insurance supervisory regime less directly achieves the objectives of EU legislation on consolidated or supplementary supervision, particularly in areas such as the review of shareholders, and EU supervisors must take account of this when considering the equivalence of Swiss-parented groups. Neither Swiss authority has the power to prohibit a specific group structure, so EU supervisors will need to consider whether this is an issue for any particular group. In addition, EU supervisors must consider the issues set out below.

#### ***Group-specific decrees***

The reliance on decrees specific to certain groups means that it is difficult to reach any general conclusions as to whether the supervisory approach is likely to achieve the objectives of EU legislation. The consequence of this is that any EU supervisor considering the equivalence of supervision for a particular Swiss-parented group should clearly understand the features of the decree governing supervision of that group, and satisfy themselves that the decree, and its practical application, can achieve objectives consistent with the objectives of supplementary or consolidated supervision, as appropriate.

#### ***Supervisory co-operation and exchange of information***

EU supervisors considering the equivalence of supervision for a particular Swiss-parented group must – in all cases - also satisfy themselves that there will be an appropriate level of cooperation from Swiss supervisors (we have no reason to assume that the appropriate level of cooperation will not be forthcoming). As made clear in Section 1 of this guidance, this is a prerequisite for any finding of equivalence.

EU supervisors must also satisfy themselves that they would be able to obtain appropriate information from the Swiss supervisory authorities. There are a number of features of the Swiss legislative regime that place constraints on the exchange of information with non-Swiss supervisors. It will be a matter for the judgement of EU supervisors whether any of these legal or practical constraints prevent the necessary degree of information exchange, or supervisory cooperation, which is required for equivalence.

***Legislative change***

Any assessment of the Swiss supervisory regime must acknowledge the extent of legislative change that is expected to take place over the next two years. This desire on the part of the Swiss authorities to enhance their legislative and supervisory framework should be encouraged. If all the proposed legislation comes into force, then the powers of Swiss supervisors over conglomerates – whether banking or insurance dominated – will be far clearer.

***Review***

For the reasons given above, and because it will be necessary to review how supervisory cooperation is working in practice, the EFCC and BAC would intend to review this guidance by 2006 at the latest.