JOINT COMMITTEE OF THE EUROPEAN SUPERVISORY AUTHORITIES

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Final Report

On

Draft Joint Regulatory Technical Standards on the measures credit institutions and financial institutions shall take to mitigate the risk of money laundering and terrorist financing where a third country's law does not permit the application of group-wide policies and procedures

JOINT COMMITTEE OF THE EUROPEAN SUPERVISORY AUTHORITIES

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JOINT COMMITTEE OF THE EUROPEAN SUPERVISORY AUTHORITIES

1. Executive Summary

1. On 26 June 2015, Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (Directive (EU) 2015/849) entered into force. This Directive aims, *inter alia*, to bring European Union legislation in line with the International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation that the Financial Action Task Force (FATF), an international anti-money laundering and counter-terrorist financing standard setter, adopted in 2012.

2. Directive (EU) 2015/849 requires obliged entities to put in place anti-money laundering and countering the financing of terrorism (AML/CFT) policies and procedures to mitigate and manage effectively the money laundering and terrorist financing (ML/TF) risks to which they are exposed. Where an obliged entity is part of a group, these policies and procedures should be implemented effectively and consistently at group level. In circumstances where a group operates branches or majority-owned subsidiaries in a third country whose law does not permit the implementation of group-wide AML/ CFT policies and procedures and in situations where the ability of competent authorities to supervise the group's compliance with the requirements of Directive (EU) 2015/849 is impeded because competent authorities do not have access to relevant information held at branches or majority-owned subsidiaries in third countries, additional policies and procedures are required to manage ML/TF risk effectively.

3. With these regulatory technical standards (RTS), the ESAs aim to foster a consistent and more harmonised approach to identifying and managing the ML/TF risk to which credit and financial institutions are exposed as a result of their operations in a third country, should the implementation of the third country's law not permit the application of group-wide policies and procedures. These RTS set out minimum actions that should be taken by credit and financial institutions in such circumstances and will contribute to creating a level playing field across the Union's financial sector.

4. The ESAs publicly consulted on these draft RTS between June and July 2017. Minor changes were brought to the draft as a result of comments received.

Next steps

5. The ESAs will submit these draft RTS to the European Commission for approval.

2. Background and rationale

2.1 Background

6. On 26 June 2015, Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (Directive (EU) 2015/849) entered into force. This Directive aims, *inter alia*, to bring European Union legislation in line with the International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation that the Financial Action Task Force (FATF), an international anti-money laundering and counter-terrorist financing standard setter, adopted in 2012.

7. In line with the FATF's standards, Directive (EU) 2015/849 puts the risk-based approach at the centre of European Union's anti-money laundering (AML) and counter-terrorist financing (CFT) regime. It recognises that the risk of money laundering and terrorist financing can vary and that Member States, competent authorities and obliged entities have to take steps to identify and assess that risk with a view to deciding how best to manage it.

2.2 Group-wide AML/CFT policies and procedures

8. Article 8 of Directive (EU) 2015/849 requires obliged entities to put in place AML/CFT policies and procedures to mitigate and manage effectively the ML/TF risks to which they are exposed. AML/CFT policies and procedures include those necessary for the identification and assessment of ML/TF risk, customer due diligence measures, reporting of suspicious transactions, record-keeping, internal control and compliance management. Where an obliged entity is part of a group, these policies and procedures should be implemented effectively and consistently at group level.

9. While most third countries' legal systems will not prevent groups from implementing group-wide AML/CFT policies and procedures that are stricter than national legislation requires, there can be cases where the implementation of a third country's law does not permit the application of some or all parts of a group's AML/CFT policies and procedures, for example because the sharing of customer -specific information within the group conflicts with local data protection or banking secrecy requirements.

10. In such cases, Directive (EU) 2015/849 requires obliged entities to ensure that group-wide AML/CFT policies and procedures are implemented effectively across all branches and majority-owned subsidiaries to the extent that local law permits this. Where it does not, obliged entities must take steps effectively to handle the resultant ML/TF risk. However, Directive (EU) 2015/849 does not set out in detail what obliged entities should do to manage the money laundering and terrorist financing (ML/TF) risk in those situations.

11. Article 45(6) of Directive (EU) 2015/849 requires the European Supervisory Authorities (ESAs) to develop draft regulatory technical standards that set out what these steps should be.

2.3 Objectives

12. In drafting these RTS, the ESAs aim to foster a consistent and more harmonised approach to identifying and managing the ML/TF risk to which credit or financial institutions are exposed as a result of their operations in a third country, should the implementation of the third country's law prevent the application of group-wide policies and procedures. This approach should be proportionate and risk-based, yet at the same time set clear expectations of the measures credit and financial institutions should take to manage this ML/TF risk effectively. In setting clear expectations, these draft RTS contribute to the creation of a level playing field across the Union's financial sector and may ultimately encourage greater adherence to international AML/CFT and transparency standards by third countries.

13. These draft regulatory technical standards will form part of the ESAs' wider work on supporting the development of a common understanding, by credit and financial institutions and competent authorities across the Union, of what the risk-based approach to AML/CFT entails and how it should be applied.

2.4 Next steps

14. The ESAs will be submitting these draft RTS to the Commission for endorsement before being published in the Official Journal of the European Union.

JOINT COMMITTEE OF THE EUROPEAN SUPERVISORY AUTHORITIES

3. Draft joint regulatory technical standards

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supplementing Directive (EU) 2015/849 of the European Parliament and of the Council with regard to regulatory technical standards for the minimum action and the type of additional measures credit and financial institutions must take to mitigate money laundering and terrorist financing risk where a third country's law does not permit the implementation of group-wide anti-money laundering and countering the financing of terrorism policies and procedures

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,
Having regard to Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015[1], and in particular Article 45(7) thereof,

Whereas:

(1) Directive (EU) 2015/849 requires credit institutions and financial institutions to identify, assess and manage the money laundering and terrorist financing (ML/TF) risk to which they are exposed, for example because they have established branches or majority-owned subsidiaries in third countries or because they are considering whether to establish branches or majority-owned subsidiaries in third countries.

(2) The consistent implementation of group-wide anti-money laundering and countering the financing of terrorism (AML/CFT) policies and procedures is key to the robust and effective management of money laundering and terrorist financing risk within the group.

(3) Directive (EU) 2015/849 sets standards for the effective assessment and management of money laundering and terrorist financing risk at group level. There are, however, circumstances where a group operates branches or majority-owned subsidiaries in a third country whose law does not permit the implementation of group-wide AML/CFT policies and procedures. This can be the case, for example, where the third country's data protection or banking secrecy law limits the group's ability to access, process or exchange information related to customers of branches or majority-owned subsidiaries in the third country.

[1] Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC (Text with EEA relevance) (OJ L 141, 05.06.2015, p. 73).

(4) In those circumstances, and in situations where the ability of competent authorities effectively to supervise the group's compliance with the requirements of Directive (EU) 2015/849 is impeded because competent authorities do not have access to relevant information held at branches or majority-owned subsidiaries in third countries, additional policies and procedures are required to manage ML/TF risk effectively. These additional policies and procedures may include obtaining consent from customers, which can serve to overcome certain legal obstacles to the implementation of group-wide AML/CFT policies and procedures in third countries where other options are limited.

(5) Additional policies and procedures should be risk-based; however, the need to ensure a consistent, Union level response to legal obstacles to the implementation of group-wide policies and procedures justifies the imposition of specific, minimum actions credit and financial institutions should be required to take in those situations.

(6) Credit institutions and financial institutions should be able to demonstrate to their competent authority that the extent of additional measures they have taken is appropriate in view of the ML/TF risk. However, should the competent authority consider that the additional measures a credit institution or financial institution has taken are insufficient to manage that risk, the competent authority should be able to direct the credit institution or financial institution to take specific measures to ensure the credit institution's or financial institution's compliance with its AML/CFT obligations.

(7) Article 16 and Article 56(1) of Regulation (EU) No 1093/2010, Regulation (EU) No 1094/2010 and Regulation (EU) No 1095/2010 empower the European Banking Authority (EBA), the European Insurance and Occupational Pensions Authority (EIOPA) and European Securities and Markets Authority(ESMA) (the European Supervisory Authorities (ESAs) to issue joint guidelines to ensure the common, uniform and consistent application of Union law. To the extent that this is relevant, when complying with this Regulation credit institutions and financial institutions should take into account the joint guidelines issued in accordance with Article 17 and Article 18(4) of Directive (EU) 2015/849 on simplified and enhanced customer due diligence and the factors credit and financial institutions should consider when assessing the money laundering and terrorist financing risk associated with individual business relationships and occasional transactions (Risk Factors Guidelines) and make every effort to comply with these guidelines in line with Article 16(3) of Regulation (EU) No 1093/2010, Regulation (EU) No 1094/2010 and Regulation (EU) No 1095/2010.

(8) The provisions of this Regulation should be without prejudice to the duty of competent authorities of the home Member State to exercise additional supervisory actions as stipulated in Article 45(5) of Directive (EU) 2015/849 in cases where the application of additional measures defined by this Regulation will prove insufficient.

(9) The provisions of this Regulation should also be without prejudice to the enhanced due diligence measures credit institutions and financial institutions must take when dealing with natural persons or legal entities established in countries identified by the Commission as high risk pursuant to Article 9 of Directive (EU) 2015/849.

(10) Credit institutions and financial institutions should be given sufficient time to adjust their policies and procedures in line with this Regulation's requirements. To this end, it is appropriate that the application of this Regulation be delayed by three months from the date at which it enters into force.

(11) This Regulation is based on the draft regulatory technical standards submitted by the European Supervisory Authorities (the European Banking Authority, the European Securities and Markets Authority and the European Insurance and Occupational Pensions Authority) (ESAs) to the Commission.

(12) The European Supervisory Authorities have conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the opinion of the Banking Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1093/2010, Regulation (EU) No 1094/2010 and Regulation (EU) No 1095/2010, respectively. [2]

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[2] Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC (OJ L 331, 15.12.2020, p. 12), Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC (OJ L 331, 15.12.2010, p.48), Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

HAS ADOPTED THIS REGULATION:

Section 1: Subject matter, scope and definitions

Article 1- Subject matter and scope

This Regulation lays down additional measures, including minimum action credit institutions and financial institutions must take effectively to handle the ML/TF risk where a third country's law does not permit the implementation of group-wide policies and procedures referred to in Article 45(1) and Article 45(3) of Directive (EU) 2015/849 at the level of branches or majority-owned subsidiaries that are part of the group and established in the third country.

Article 2 –Definitions

For the purpose of this Regulation, the definitions contained in Directive (EU) 2015/849 shall apply.

For the purpose of this Regulation, the following definitions shall also apply:

(1) 'additional measures' means measures that credit institutions and financial institutions take in addition to, or instead of, minimum action pursuant to provisions in these RTS and their standard group-wide policies and procedures to manage the ML/TF risk where they have branches or majority- owned subsidiaries that are established in a third country;

(2) 'third country' means a country other than a Member State where the country's law prohibits or restricts the implementation of some or all of the group-wide policies and procedures credit institutions and financial institutions have put in place to comply with Directive (EU) 2015/849 as transposed by national law, including data protection policies and policies and procedures for sharing information within the group for AML/CFT purposes by branches or majority-owned subsidiaries that are established in the third country by a credit institution or a financial institution.

(3) 'credit institution' means a credit institution as defined in point (1) of Article 3 of Directive (EU) 2015/849 that has established a branch in a third country or is a majority owner of a subsidiary established in a third country;

(4) 'financial institution' means a financial institution as defined in point (2) of Article 3 of Directive (EU) 2015/849 that has established a branch in a third country or is a majority owner of a subsidiary established in a third country.

Section 2: General provisions

Article 3

For each third country, credit institutions and financial institutions shall at least:

a) assess the resultant ML/TF risk to their group, record that assessment, keep it up to date and retain it in order to be able to share it with their competent authority;

b) ensure that the risk referred to in point (a) is reflected appropriately in their group-wide AML/CFT policies and procedures;

c) obtain senior management approval at group-level for the risk assessment referred to in point (a) and for the group-wide AML/CFT policies and procedures referred to in point (b);

d) provide targeted training to relevant staff members in the third country to enable them to identify ML/TF risk indicators. Credit institutions and financial institutions shall ensure that this training is effective.

Section 3: Minimum action and additional measures

Article 4 - Individual ML/TF risk assessments

1) Where the third country's law prohibits or restricts the application of policies and procedures that are necessary adequately to identify and assess the ML/TF risk associated with a business relationship or occasional transaction due to restrictions on access to relevant customer and beneficial ownership information or restrictions on the use of such information for customer due diligence purposes, credit institutions or financial institutions shall at least:

   a) inform the competent authority of the home Member State without undue delay and in any case no later than 28 calendar days after identifying the third country of:

      i) the name of the third country concerned; and

      ii) how the implementation of the third country's law prohibits or restricts the application of policies and procedures that are necessary to identify and assess the ML/TF risk associated with a customer;

   b) ensure that their branches or majority-owned subsidiaries that are established in the third country determine whether consent from their customers and, where applicable, their customers' beneficial owners, can be used to legally overcome restrictions or prohibitions referred to in point (a)(ii); and

   c) ensure that their branches or majority-owned subsidiaries that are established in the third country require their customers and, where applicable, their customers' beneficial owners, to give consent to overcome restrictions or prohibitions referred to in point (a)(ii) to the extent that this is compatible with the third country's law.

2) In cases where consent referred to in point (c) of paragraph (1) is not feasible, credit institutions and financial institutions shall take additional measures as well as their standard AML/CFT measures, to manage the ML/TF risk. These additional measures shall include the additional measure set out in Article 9 (c) and one or more of the measures set out in points (a) and (b) and (d) to (f) of Article 9.

3) Where a credit institution or financial institution cannot effectively manage the ML/TF risk by applying the measures stipulated in paragraph 1 and 2 of this Article, it shall:

   a) ensure that the branch or majority-owned subsidiary terminates the business relationship;

   b) ensure that the branch or majority-owned subsidiary not carry out the occasional transaction; or

   c) close down some or all of the operations provided by their branch and majority-owned subsidiary established in the third country.

4) Credit institutions and financial institutions shall determine the extent of the additional measures referred to in paragraphs 2 and 3 on a risk-sensitive basis and be able to demonstrate to their competent authority that the extent of additional measures is appropriate in view of the ML/TF risk.

Article 5-Customer data sharing and processing

1) Where a third country's law prohibits or restricts the sharing or processing of customer data for AML/CFT purposes within the group, credit institutions and financial institutions shall at least:

   a) inform the competent authority of the home Member State without undue delay and in any case no later than 28 calendar days after identifying the third country of:

      i) the name of the third country concerned; and

      ii) how the implementation of the third country's law prohibits or restricts the sharing or processing of customer data for AML/CFT purposes.

   b) ensure that their branches or majority-owned subsidiaries that are established in the third country determine whether consent from their customers and, where applicable, their customers' beneficial owners, can be used to legally overcome restrictions or prohibitions referred to in point (a)(ii); and

   c) ensure that their branches or majority-owned subsidiaries that are established in the third country require their customers and, where applicable, their customers' beneficial owners, to provide consent to overcome restrictions or prohibitions referred to in point (a)(ii) to the extent that this is compatible with the third country's law.

2) In cases where consent referred to in point (c) of paragraph (1) is not feasible, credit institutions and financial institutions shall take additional measures as well as their standard AML/CFT measures to manage the ML/TF risk. These additional measures shall

include the additional measure set out in Article 9 (a) or the additional measure set out in Article 9 (c). Where the ML/TF risk is sufficient to require further additional measures, credit institutional and financial institutions shall apply one or more of the remaining additional measures set out in points (a) to (c) of Article 9.

3) Where a credit institution or financial institution cannot effectively manage the ML/TF risk by applying the measures stipulated in paragraph 1 and 2, it shall close down some or all of the operations provided by their branch and majority-owned subsidiary established in the third country.

4) Credit institutions and financial institutions shall determine the extent of the additional measures referred to in paragraphs 2 and 3 on a risk-sensitive basis and be able to demonstrate to their competent authority that the extent of additional measures is appropriate in view of the risk of money laundering and terrorist financing.

Article 6 - Disclosure of information related to suspicious transactions

1) Where the third country's law prohibits or restricts the sharing of information referred to in Article 33 (1) of Directive (EU) 2015/849 by branches and majority-owned subsidiaries established in the third country with other entities in their group, credit institutions and financial institutions shall at least:

   a) inform the competent authority of the home Member State without undue delay and in any case no later than 28 calendar days after identifying the third country of:

      i) the name of the third country concerned; and

      ii) how the implementation of the third country's law prohibits or restricts the sharing of the content of information referred to in Article 33 (1) of Directive (EU) 2015/849 identified by a branch and majority-owned subsidiary established in a third country with other entities in their group.

   b) require the branch or majority-owned subsidiary to provide relevant information to the credit institution's or financial institution's senior management so that it is able to assess the ML/TF risk associated with the operation of such a branch or majority-owned subsidiary and the impact this has on the group, such as:

      i) the number of suspicious transactions reported within a set period; and

      ii) aggregated statistical data providing an overview of the circumstances that gave rise to suspicion.

2) Credit institutions and financial institutions shall take additional measures as well as their standard AML/CFT measures and the measures in paragraph 1 to manage the ML/TF risk. These additional measures shall include one or more of the additional measures referred to in points (a) to (c) and (g) to (i) of Article 9.

3) Where credit institutions and financial institutions cannot effectively manage the ML/TF risk by applying the measures stipulated in paragraph 1 and 2, it shall close down some or

all of the operations provided by their branch and majority-owned subsidiary established in the third country.

4) Credit institutions and financial institutions shall determine the extent of the additional measures referred to in paragraphs 2 and 3 on a risk-sensitive basis and be able to demonstrate to their competent authority that the extent of additional measures is appropriate in view of the risk of money laundering and terrorist financing.

Article 7- Transfer of customer data to Member States for the purpose of AML/CFT supervision

1) Where the third country's law prohibits or restricts the transfer of data related to customers of a branch and majority-owned subsidiary established in a third country to a Member State for the purpose of AML/CFT supervision, credit institutions and financial institutions shall at least:

   a) inform the competent authority of the home Member State without undue delay and in any case no later than 28 calendar days after identifying the third country of:

      i) the name of the third country concerned; and

      ii) how the implementation of the third country's law prohibits or restricts the transfer of data related to customers for the purpose of AML/CFT supervision;

   b) carry out enhanced reviews, including, where this is commensurate with the ML/TF risk associated with the operation of the branch or majority-owned subsidiary established in the third country, onsite checks or independent audits, to be satisfied that the branch or majority-owned subsidiary effectively implements group-wide policies and procedures and that it adequately identifies, assesses and manages the ML/TF risks;

   c) provide the findings of the reviews referred to in point b) to the competent authority of the home Member State upon request;

   d) require the branch or majority-owned subsidiary established in the third country regularly to provide relevant information to the credit institution's or financial institution's senior management, including but not limited do:

      i) the number of high risk customers and aggregated statistical data providing an overview of the reasons why customers have been classified as high risk, such as PEP status;

      ii) the number of suspicious transactions identified and reported and aggregated statistical data providing an overview of the circumstances that gave rise to suspicion;

   e) make the information referred to in point (d) available to the competent authority of the home Member State upon request.

Article 8- Record-keeping

1) Where the third country's law prohibits or restricts the application of record-keeping measures equivalent to those specified in Chapter IV of Directive (EU) 2015/849, credit institution and financial institution shall at least:

  a) inform the competent authority of the home Member State without undue delay and in any case no later than 28 calendar days after identifying the third country of:

    (i) the name of the third country concerned; and

    (ii) how the implementation of the third country's law prohibits or restricts the application of record-keeping measures equivalent to those specified by Directive (EU) 2015/849;

  b) establish whether consent from the customer and, where applicable, their beneficial owner, can be used to legally overcome restrictions or prohibitions referred to in point (a)(ii); and

  c) ensuring that their branches or majority-owned subsidiaries that are established in the third country require customers and, where applicable, their customers' beneficial owners, to provide consent to overcome restrictions or prohibitions referred to in point (a)(ii) to the extent that this is compatible with the third country's law.

2) In cases where consent referred to in paragraph (1) point (c) is not feasible, credit institutions and financial institutions shall take additional measures as well as their standard AML/CFT measures and the measures referred to in paragraph 1 to manage the ML/TF risk. These additional measures shall include one or more of the additional measures set out in points (a) to (c) and (j) of Article 9.

3) Credit institutions and financial institutions shall determine the extent of the additional measures referred to in paragraph 2 on a risk-sensitive basis and be able to demonstrate to their competent authority that the extent of additional measures is appropriate in view of the risk of money laundering and terrorist financing.

Article 9 – Additional measures

Credit institutions and financial institutions shall take the following additional measures pursuant to paragraph 2 of Article 4, paragraph 2 of Article 5, paragraph 2 of Article 6 and paragraph 2 of Article 8 respectively:

  a) ensuring that their branches or majority-owned subsidiaries that are established in the third country restrict the nature and type of financial products and services provided by the branch of majority-owned subsidiary in the third country to those that present a low ML/TF risk and have a low impact on the group's ML/TF risk exposure;

  b) ensuring that other entities of the same group do not rely on customer due diligence measures carried out by a branch or majority-owned subsidiary established in the third country, but instead carry out customer due diligence on any customer of a branch or majority-owned subsidiary established in third country who wishes to be provided with products or services by those other entities of the same group even if

the conditions in Article 28 of the AMLD are met,;

c) carrying out enhanced reviews, including, where this is commensurate with the ML/TF risk associated with the operation of the branch or majority-owned subsidiary established in the third country, onsite checks or independent audits, to be satisfied that the branch or majority-owned subsidiary effectively identifies, assesses and manages the ML/TF risks.

d) ensuring that their branches or majority-owned subsidiaries that are established in the third country seek the approval of the credit institution’s or financial institution’s senior management for the establishment and maintenance of higher-risk business relationships, or for carrying out a higher risk occasional transaction;

e) ensuring that their branches or majority-owned subsidiaries that are established in the third country determine the source and, where applicable, the destination of funds to be used in the business relationship or occasional transaction;

f) ensuring that their branches or majority-owned subsidiaries that are established in the third country carry out enhanced ongoing monitoring of the business relationship, including enhanced transaction monitoring, until the branches or majority-owned subsidiaries are reasonably satisfied that they understand the ML/TF risk associated with the business relationship;

g) ensuring that their branches or majority-owned subsidiaries that are established in the third country share with the credit institution or financial institution underlying STR information that gave rise to the knowledge, suspicion or reasonable grounds to suspect that ML/TF was being attempted or had occurred, such as facts, transactions, circumstances and documents upon which suspicions are based, including personal information to the extent that this is possible under the third country’s law;

h) carrying out enhanced ongoing monitoring on any customer and, where applicable, beneficial owner of a customer of a branch or majority-owned subsidiary established in the third country who is known to have been the subject of suspicious transaction reports by other entities of the same group;

i) ensuring that their branches or majority-owned subsidiaries that are established in the third country has effective systems and controls in place to identify and report suspicious transactions.

j) ensuring that their branches or majority-owned subsidiaries that are established in the third country keep the risk profile and due diligence information related to a customer of a branch or majority-owned subsidiary established in the third country up to date and secure as long as legally possible, and in any case for at least the duration of the business relationship;

Article 10

This Regulation shall enter into force on the twentieth day [*if urgent entry into force necessary, then "*third day following publication" *should be the choice*. "The day following" *should only be used in extreme urgency*] following that of its publication in the *Official Journal of the European Union*. It shall apply from three months after the entry into force of this Regulation.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

For the Commission
The President

[For the Commission
On behalf of the President

[Position]

4. Accompanying documents

4.1 Draft impact assessment

Allegations that some credit and financial institutions may have been complicit in facilitating tax crimes and the imposition of regulatory sanctions for credit and financial institutions' failure to put in place effective anti-money laundering and counter-terrorist financing (AML/CFT) systems and controls, have highlighted the need for robust scrutiny of business relationships with customers in third countries where access to customer information can be difficult to obtain. [3]

Furthermore, the European Commission and the European Parliament have identified as a high priority the need to tackle the risks of doing business with customers in third countries where the minimum AML/CFT requirements are less strict than those of the Member States, and in particular those where the implementation of the law does not permit the application of equivalent policies and procedures.

B. Policy objectives[4]

Through these draft Regulatory Technical Standards, the European Supervisory Authorities (ESAs) aim to achieve a consistent and more harmonised approach to managing the risk associated with operations in third countries where the implementation of local law impedes the application of group-wide policies and procedures.

A consistent and more harmonised approach by credit and financial institutions will be conducive to a better understanding and management of the money laundering and terrorist financing (ML/TF) risk associated with operations in these third countries, and create a level playing field across the Union's financial sector. It also serves to encourage third countries to review their approach and ensure international AML/CFT and transparency standards are better implemented.

This approach should be proportionate and commensurate with the ML/TF risk to which that credit or financial institution is exposed as a result of its operations in a third country where the implementation of the third country's law does not permit the application of group-wide policies and procedures, and effective in the fight against ML/TF. In setting clear expectations, credit and financial institutions will be able to manage this risk effectively rather than de-risk.

[3] EBA: Risk assessment of the European Banking System (various editions); ESRB: Report on misconduct risk in the banking sector (2015)

[4] See also EBA: Annual Report 2016 (forthcoming);

C. Baseline scenario

In the baseline scenario, Directive (EU) 2015/849 would be transposed without accompanying draft RTS under Article 45(6). This means that Member States and credit and financial institutions may adopt divergent views about the way credit and financial institutions should address the risk associated with business in third countries where the implementation of local law does not permit the application of group-wide policies and procedures.

D. Options considered

Option 1: The draft RTS could require credit and financial institutions to close down all relationships and withdraw entirely from business in the third country.

Option 2: The draft RTS could set out minimum actions and additional measures credit and financial institutions have to apply in all cases, irrespective of the risk and the type of legal impediment.

Option 3: The draft RTS could distinguish between different situations where the implementation of a third country’s law does not permit the application of group-wide policies and procedures.

E. Preferred option

The advantage of Option 1 is that this would result in a harmonised approach.

The disadvantage of Option 1 is that this approach is unlikely to be proportionate or commensurate to the ML/TF risk associated with doing business in those third countries, as in many cases, alternative solutions can be found to manage those risks effectively.

The advantage of Option2 would be a harmonised approach and a level playing field across the Union’s financial sector.

The disadvantage of Option2 would be that requiring credit and financial institutions to apply the same measures in all cases is unlikely to be proportionate or effective, as measures are not targeted to address specific risks.

The advantage of Option 3 is that by identifying different legal impediments, it is possible to propose targeted measures to address the resultant risk. By providing targeted minimum actions and a set of targeted, additional measures that can be adjusted on a risk-sensitive basis, credit and financial institutions’ approaches to managing risk will be more effective and proportionate.

The disadvantage of Option 3 is that by taking a differentiated approach, the draft RTS may appear more complex, and may lead to a greater variety of private sector practices than other approaches, as the greater emphasis on the risk-based approach means that not everyone will come to the same view.

The ESAs’ preferred option is Option 3 because in spite of appearing more complex than Options 1 and 2, it is both risk-based and proportionate and most likely to lead to effective outcomes.

F. Cost-Benefit Analysis

In 2015, enquiries with the ESAs' Boards of Supervisors, AML/CFT competent authorities and the ESAs' stakeholder groups did not suggest that they had been made aware of cases where a third country's legislation prohibited the application of group-wide AML/CFT controls in line with those required by the home Member State. However, some competent authorities and stakeholders pointed out that in some instances, credit and financial institutions' perception of third countries' laws, in particular data protection and banking secrecy laws, stood in the way of providing access to, and the exchange of, customer data held in different jurisdictions.

These RTS will be conducive to greater transparency and better risk management in those cases. By adopting the preferred option, these draft RTS will not add undue cost or compliance burden on credit institutions or financial institutions as although they are more specific, they are closely aligned with existing, high-level requirements in Directive (EU) 2015/849. This means that credit institutions and financial institutions can absorb the cost of complying with these draft RTS as part of their overall risk-based approach to tackling ML/TF.

Furthermore, the draft RTSs' differentiated approach is cost-effective as it sets out clearly a number of measures that credit and financial institutions can chose from, that are best suited to mitigate ML/TF risk in each situation. It also encourages business in those countries to be maintained as long as the risks can be managed, and the RTS set out how this can be done.

4.2 Overview of questions for consultation

1. Do you agree with the scope of the draft RTS as described in Article 1?

2. Do you agree that while minimum action must always be taken, credit and financial institutions can adjust the nature and extent of the remaining additional measures on a risk-sensitive basis?

3. Do you agree that the minimum action in Article 3 is appropriate?

   If you do not agree, please explain and provide evidence where possible.

   Are there any other minimum actions you think Article 3 should include? If so, please explain and provide evidence where possible.

4. Do you agree that the minimum action and additional measures in Article 4 are appropriate?

   If you do not agree, please explain and provide evidence where possible.

   Are there any other minimum actions or additional measures you think Article 4 should include? If so, please explain and provide evidence where possible.

5. Do you agree that the minimum action and additional measures in Article 5 are appropriate?

   If you do not agree, please explain and provide evidence where possible.

   Are there any other minimum actions or additional measures you think Article 5 should include? If so, please explain and provide evidence where possible.

6. Do you agree that the minimum action and additional measures in Article 6 are appropriate?

   If you do not agree, please explain and provide evidence where possible.

   Are there any other minimum actions or additional measures you think Article 6 should include? If so, please explain and provide evidence where possible.

7. Do you agree that the minimum action in Article 7 is appropriate?

   If you do not agree, please explain and provide evidence where possible.

   Are there any other minimum actions or additional measures you think Article 7 should include? If so, please explain and provide evidence where possible.

8. Are there any other scenarios these RTS should address?

In particular, are there any policies and procedures in Article 8 of Directive (EU) 2015/849 where the implementation of a third country's law might prevent the application of group-wide policies and procedures?

Please explain and provide examples where possible.

9. Do you agree with the impact

assessment? In particular,

- do you agree that there are relatively few countries where the implementation of the law prevents the application of group-wide policies and procedures?

  Please provide the names of third countries, if any, and the nature of the impediment you have identified.

- do you agree that Option 3, whereby the draft RTS distinguish between different situations where a third country's law prevents the application of group-wide AML/CFT policies and procedures , is the most proportionate option?

  If you do not agree, please explain and provide evidence where possible. Please also explain which approach you would prefer, and why.

4.3 Summary of key issues and the ESAs' response

1. Many respondents welcomed the draft RTS. They thought the measures set out in these draft RTS were sensible and proportionate.

2. Where respondents raised concerns, these broadly fell into the following two categories:

   - the extent to which additional measures were binding; and
   - who should identify third countries whose law does not permit the implementation of group-wide AML/CFT policies and procedures.

3. The ESAs thank all respondents for taking the time to reply, and for the constructive and positive feedback received. The ESAs have carefully considered all responses and revised the draft RTS where appropriate.

Binding measures

4. A number of respondents were concerned that all additional measures were binding. They felt that some of these measures could be disproportionate.

5. These draft RTS identify how a third country's law might prevent the application of group-wide AML/CFT policies and procedures and sets out the measures credit and financial institutions should take in those situations to manage the resultant ML/TF risk. These measures apply in addition to the credit or financial institution's standard AML/CFT measures and include both, mandatory 'minimum action' credit and financial institutions must take in specific situations, and additional measures that credit and financial institutions may have to apply on a risk-sensitive basis where minimum action cannot be taken or is insufficient, of itself, to mitigate ML/TF risk.

6. There is no expectation that credit and financial institutions take all additional measures in all cases; instead, in most cases, it is down to each credit and financial institution to determine the type and extent of additional measures needed to manage ML/TF risk, and to demonstrate to its competent authority that these additional measures are commensurate with that risk.

Identifying third countries whose law does not permit the implementation of group-wide AML/CFT policies and procedures.

7. Several respondents asked that the ESAs make public which third countries prohibit the application of group-wide AML/CFT policies and procedures. They said it was unreasonable to ask credit and financial institution to do this.

8. Directive (EU) 2015/849 requires obliged entities to identify and assess the ML/TF to which they are exposed, among others as a result of their exposure to particular countries or geographical areas. It is therefore the responsibility of obliged entities that have branches or majority-owned subsidiaries in another country to assess how their presence in those countries affects their overall ML/TF risk profile.

9. However, since credit and financial institutions have to inform their competent authority if a third country's law does not permit the implementation of group-wide AML/CFT policies and procedures, and since Member States and the ESAs will share that information, Member States or the ESAs will consider whether it is possible to make that information public.

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Summary of responses to the consultation and the ESAs' analysis

Comments	Summary of responses received	ESAs' analysis	Amendments to the proposal
General comments			
Structure	It was suggested that all additional measures be listed in a separate article.	This suggestion has been accommodated.	A new Article 9 brings together the additional measures hitherto listed under Articles 4 to 8.
Notifying competent authorities	A number of respondents said that is was not necessary to notify competent authorities of third countries that do not permit the implementation of group-wide AML/CFT policies and procedures 'without delay'.	Credit and financial institutions have to identify and assess ML/TF risk on an ongoing basis. This includes the ML/TF risk to which they are exposed because they operate branches or majority-owned subsidiaries in a third country. Considering that very few third countries were identified by respondents as possibly making the implementation of group-wide AML/CFT policies and procedures difficult - though not normally impossible - notifying competent authorities whenever a third country is identified is therefore unlikely to be unduly burdensome.	Relevant provisions have been amended to make clear that competent authorities should be informed without undue delay, and in any case no later than 28 calendar days after the third country has been identified.
Recitals	One respondent questioned whether the situations set out in recitals 3 and 4 were cumulative or alternative.	These draft RTS describe different situations where a third country's law prevents the application of group-wide AML/CFT policies and procedures. Neither the situations set out in Recitals 3 or 4, nor the situations set out in Section 3 of these draft RTS, are mutually exclusive.	No change.

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Comments	Summary of responses received	ESAs' analysis	Amendments to the proposal
	It was suggested that credit and financial institutions should take into account the ESAs' Guidelines under Articles 17 and 18(4) of Directive (EU) 2015/847 (the 'Risk Factors Guidelines') when complying with these draft RTS.	This suggestion has been accommodated.	A new Recital 7 refers to the ESAs' Risk Factors Guidelines.
Information sharing	One respondent thought that the draft RTS confused barriers to information sharing with barriers to the implementation of group-wide AML/CFT policies and procedures.	Information sharing within the group is an important part of effective group-wide AML/CFT compliance and key to the identification and assessment of ML/TF risk at the group level.	No change.
Applying group-wide policies and procedures	One respondent asked that the draft RTS describe situations where a third country's law prohibits the application of group-wide AML/CFT policies and procedures.	Section 3 of these draft RTS describes those situations.	No change.
Scope	One respondent was concerned that the scope, as drafted, excluded financial institutions that were headquartered outside of the EEA.	The scope of these draft RTS is set out in Article 45(6) of Directive (EU) 2015/849 and does not include financial institutions that are headquartered outside of the EEA.	No change.
Benchmarks	One respondent asked whether credit and financial institutions should use Directive (EU) 2015/849 or their group-wide AML/CFT policies and procedures as a benchmark for assessing whether a third country's law prohibits or restricts the application of group-wide AML/CFT policies and procedures.	In line with Article 45 of Directive (EU) 2015/849, the benchmark must be the group-wide AML/CFT policies and procedures, that are designed to ensure the group's compliance with the requirements of Directive (EU) 2015/849 as transposed by national law.	No change.
Additional measures	A number of respondents commented on individual 'additional measures', considering them either disproportionate or insufficient adequately	These draft RTS require credit and financial institutions to assess which, and, where appropriate, which combination of additional measures they should take to mitigate the risks	No change.

Comments	Summary of responses received	ESAs' analysis	Amendments to the proposal
	to manage ML/TF risk.	they have identified. This is in line with the risk-based approach.	
Reliance	Some respondent were of the view that credit and financial institutions should be able to rely on CDD measures carried out by their branches or majority-owned subsidiaries in a third country, even if that country's laws prohibited or restricted the application of group-wide AML/CFT policies and procedures.	Article 28 of Directive (EU) 2015/849 makes intra-group reliance dependent on the application of group-wide AML/CFT policies and procedures, which, according to that Directive, include the sharing of STRs within the group, record keeping and data protection, among others.	No change.
Section 1: Subject matter, scope and definitions			
Third countries	Some respondents asked the ESAs to provide a list of 'third countries'. They said it was unreasonable to expect financial institutions to assess the extent to which third countries' laws permitted the application of group-wide AML/CFT policies and procedures. Several respondents questioned why credit and financial institutions should be reporting 'third countries' to their authorities.	Directive (EU) 2015/849 requires obliged entities to identify and assess the ML/TF to which they are exposed, among others as a result of their exposure to particular countries or geographical areas. It is therefore the responsibility of obliged entities that have branches or majority-owned subsidiaries in another country to assess how their presence in those countries affects their overall ML/TF risk profile. However, since credit and financial institutions have to inform their competent authority if a third country's law does not permit the implementation of group-wide AML/CFT policies and procedures, and since Member States and the ESAs will share that information, Member States or the ESAs will consider whether it is possible to make that information public.	No change.

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Comments	Summary of responses received	ESAs' analysis	Amendments to the proposal
	One respondent thought that the term 'third country' as defined in these draft RTS was not in line with third countries described in Article 9 of Directive (EU) 2015/849.	Article 9 of Directive (EU) 2015/849 requires the European Commission to identify third country jurisdictions with strategic deficiencies in their national AML/CFT regimes. Third countries that fall into this category are described as 'high risk third countries'. This is different from, and consistent with, the use of the term 'third country' used in these draft RTS.	No change.
Section 2: General provisions			
Senior management	A number of respondents said that the term 'senior management' in Article 3 of these draft RTS was unclear. Some thought that senior management should not be expected to approve group-wide AML/CFT policies and procedures.	The term 'senior management' is defined in Article 3(12) of Directive (EU) 2015/849. Article 2 of these draft RTS makes clear that definitions contained in this Directive also apply to these draft RTS. Directive (EU) 2015/849 is also clear, in Article 8(5), that senior management must approve the credit or financial institution's AML/CFT policies and procedures.	Article 3 (c) of these draft RTS has been amended to make clear that senior management at group level, rather than at the level of branches or subsidiaries, is required to approve the credit or financial institution's AML/CFT policies and procedures.

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Comments	Summary of responses received	ESAs' analysis	Amendments to the proposal
Training	One respondent argued that credit or financial institutions could not force their staff to act in a certain way, and asked that Article 3(d) of these draft RTS be amended to acknowledge that.	Article 46 of Directive (EU) 2015/849 requires that staff be trained to recognise ML/TF risk indicators. This is consistent with the provision in Article 3(d) of these draft RTS.	Article 3(d) of these draft RTS has been amended to clarify that credit and financial institutions must satisfy themselves that staff training is effective.
Section 3: Additional measures			
Proportionality of additional measures	Some respondents thought that all additional measures were compulsory in all cases. They told the ESAs that this was disproportionate and might exacerbate de-risking.	For each of the scenarios described in Section 3 of these draft RTS, credit and financial institutions have to take minimum action to mitigate specific ML/TF risks. Where that minimum action cannot be taken, credit and financial institutions have to take one or more 'additional measures' to manage that risk. There is no expectation that credit and financial institutions take all additional measures in all cases; instead, the draft RTS are clear that credit and financial institutions must determine the extent of additional measures on a risk-sensitive basis and in a way that is appropriate in light of the ML/TF risk. Notwithstanding, should a competent authority consider that the additional measures a credit or financial institution has taken are insufficient to	Introduction of a new recital 6 to clarify that competent authorities can require firms to take specific 'additional measures' where this is necessary to ensure compliance

Comments	Summary of responses received	ESAs' analysis	Amendments to the proposal
		manage that risk, it can direct the credit or financial institution to take specific measures to ensure the credit or financial institution's compliance with its AML/CFT obligations.	
Closing down operations in third countries	Some respondents thought that the draft RTS should not require credit or financial institutions to close down all or part of their in a third country. This should be the prerogative of competent authorities, as per Article 45(5) of Directive (EU) 2015/849.	These draft RTS require institutions to close down some or all of their operations in the third country as a last resort, where they cannot effectively manage the ML/TF risk by applying the minimum action and additional measures stipulated in the respective Articles. Recital 7 of the draft RTs makes it clear that the provisions in these draft RTS should be without prejudice to the duty of NCAs to exercise additional supervisory actions as stipulated in Article 45(5) of Directive (EU) 2015/849 in cases where the application of additional measures defined by the draft RTS will prove insufficient.	No change.
Consent	One respondent said consent could not be used to overcome legal restrictions. Others explicitly welcomed the provisions in Articles 4, 5 and 8 of these draft RTS and said these were reasonable and in line with existing business practices.	The draft RTS are clear that where consent cannot be obtained, credit and financial institutions must apply other, additional, measures instead.	No change.
Refusal to provide CDD information	One respondents wanted to add numbers of customers refusing to provide CDD information to the list of information in Article 6(1)(a) of these draft RTS.	Refusal to provide CDD information does not, of itself, constitute evidence or grounds of suspicion.	No change.
Sharing STRs	One respondent thought that Article 6(2) of the draft RTS was irrelevant because Article 6 covered	A prohibition to share actual STRs is unlikely to extend to aggregate or background information	No change.

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Comments	Summary of responses received	ESAs' analysis	Amendments to the proposal
	situations where STRs could not be shared within the group. They said it therefore made no sense to take additional measures to manage the resultant ML/TF risk.	related to STRs. Sharing of that information is an important prerequisite for understanding and assessing the ML/TF risk to which the group is exposed.	
Enhanced reviews of branches and majority-owned subsidiaries	Several respondents commented on the proposed use of enhanced reviews to mitigate in situations outlined in Section 3 of these draft RTS. Some told us that enhanced reviews of branches or majority-owned subsidiaries were important in all cases and should be mandatory. Contrariwise, one respondent asked that enhanced reviews of the group's operations in the third country be optional, and not mandatory .	Credit and financial institutions have to demonstrate to their home AML/CFT supervisor that they comply with their requirements under Directive (EU) 2015/849. These requirements include a requirement to ensure the application of group-wide AML/CFT policies and procedures, and to monitor that application. The reviews envisaged in these draft RTS can help credit and financial institutions and home AML/CFT supervisors understand whether group-wide AML/CFT controls are sufficient to mitigate ML/TF risk effectively. Based on feedback received, the draft RTS have been amended to require credit and financial institutions to carry out enhanced reviews of branches and majority-owned subsidiaries not just in situations described in Article 7, but also in situations described in Article 4 and potentially, in situations described in Article 5 where consent from the customer cannot be obtained.	Articles 4 and 5 have been amended to prescribe further mandatory measures where consent from the customer cannot be obtained.
Situations that give rise to suspicion	One respondent asked that aggregate data providing an overview of the circumstances that gave rise to suspicion should be included as part of the information the group's senior management	This suggestion has been accommodated.	Article 7(1)(d) has been amended with a reference to data on circumstances that gave rise to suspicion.

Comments	Summary of responses received	ESAs' analysis	Amendments to the proposal
	should receive in line with Article 7 (1)(d) of these draft RTS.		
Record-keeping	One respondent, who said that it was unreasonable and disproportionate to suggest credit and financial institutions terminate business relationships in cases outlined by these draft RTS, went on to suggest that credit and financial institutions do just that where record keeping to group standards was impossible.	Terminating operations in a third country simply because of record-keeping constraints does not appear to be proportionate, but credit and financial institutions are not prevented from applying additional measures on top of those set out in these draft RTS.	No change.
Additional scenarios	One respondent asked that these draft RTS also address barriers to group-wide information sharing for AML/CFT purposes.	Article 5 of these draft RTS already addresses this point.	No change.
	One respondent suggested that the draft RTS should address barriers to the application of group-wide policies and procedures in relation to frozen assets.	This is outside the scope of these draft RTS as defined in Article 45(6) of Directive (EU) 2015/849.	None.
	One respondent asked that these draft RTS include an explicit provision enabling the exchange of information for AML/CFT purposes.	Articles 45(1) and 45(8) of Directive (EU) 2015/849 already provide a clear legal basis for sharing information within the group for AML/CFT purposes.	No change.
Third countries	Some respondents stated that to their knowledge, no third countries prohibited the application of group-wide AML/CFT policies and procedures. Others provided examples of jurisdictions where local law was not conducive to the exchange of customer data within the group, but several suggested that in those cases, perceived legal	These comments support the ESAs' analysis and approach.	No change.

Comments	Summary of responses received	ESAs' analysis	Amendments to the proposal
	obstacles could be overcome by obtaining consent from customers in line with provisions in these draft RTS.		
Timing	It was suggested that credit and financial institutions should be given sufficient time to adjust their policies and procedures in line with the new requirements.	This suggestion has been accommodated.	A new Recital 10 and amendment to Article 10 delay the application of the Regulation by three months.