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# Consultation Paper

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## 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  
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# 1. Responding to this consultation

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The European Supervisory Authorities (the ESAs) invite comments on all proposals put forward in this paper and in particular on the specific questions summarised in section 5.2.

Comments are most helpful if they:

- respond to the question stated;
- indicate the specific point to which a comment relates;
- contain a clear rationale;
- provide evidence to support the views expressed/ rationale proposed; and
- describe any alternative regulatory choices the ESAs should consider.

## Submission of responses

To submit your comments, click on the 'send your comments' button on the consultation page by 11 July 2017. Please note that comments submitted after this deadline, or submitted via other means may not be processed.

## Publication of responses

Please clearly indicate in the consultation form if you wish your comments to be disclosed or to be treated as confidential. A confidential response may be requested from us in accordance with the ESAs' rules on public access to documents. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by the ESAs' Board of Appeal and the European Ombudsman.

## Data protection

The protection of individuals with regard to the processing of personal data by the ESAs is based on Regulation (EC) N° 45/2001 of the European Parliament and of the Council of 18 December 2000 as implemented by the ESAs in their implementing rules adopted by their Management Boards. Further information on data protection can be found under the Legal notice section of the ESAs' website.



## 2. Executive Summary

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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.

### Next steps

4. The ESAs will be reviewing these draft technical standards based on the responses received. They will then be submitted to the Commission for endorsement before being published in the Official Journal of the European Union.
5. Should the scope of the ESAs' legal mandate change as a result of amendments to Directive (EU) 2015/849, the ESAs will review and if necessary, update these draft technical standards and consult on any changes.



## 3. Background and rationale

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### 3.1 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.

### 3.2 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.



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### 3.3 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.

### 3.4 Next steps

14. The ESAs will be reviewing these draft technical standards based on the responses received. They will then be submitted to the Commission for endorsement before being published in the Official Journal of the European Union.

15. Amendments to Directive (EU) 2015/849 are currently being negotiated and it is possible that the scope of the ESAs' mandate under Article 45(6) of this Directive will be affected. Should this be the case, these draft Regulatory Technical Standards will be revised as appropriate.



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## 4. Draft joint regulatory technical standards

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## COMMISSION DELEGATED REGULATION (EU) No .../..

of XXX

[...]

**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<sup>1</sup>, 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.

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<sup>1</sup> 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).



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- (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 include obtaining consent from customers, which can serve to overcome certain legal obstacles to the 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) At the same time, credit institutions and financial institutions and national competent authorities should be mindful of individuals' right to privacy. When exchanging, or accessing relevant customer information in the AML/CFT context, credit institutions and financial institutions should therefore comply with Chapter V of Directive (EU) 2015/849.
- (7) 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.
- (8) 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.
- (9) 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.
- (10) The ESAs 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<sup>2</sup>.

<sup>2</sup> 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, 15.12.2010, p. 12).



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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 prevents 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, including minimum action, that credit institutions and financial institutions take in addition to, or instead of, 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 does not permit 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.



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## ***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 letter (a) is reflected appropriately in their group-wide AML/CFT policies and procedures;
- c) obtain senior management approval for the risk assessment referred to in letter (a) and for the group-wide AML/CFT policies and procedures referred to in letter (b);
- d) provide targeted training to relevant staff members in the third country to ensure they are able effectively to identify ML/TF risk indicators.

## ***Section 3: 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 delay of:
    - i) 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 (ii) of letter (a); 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 (ii) of letter (a) to the extent that this is compatible with the third country's law.



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- 2) In cases where consent referred to in paragraph (1) letter (c) 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 one or more of the following:
  - a) 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;
  - b) ensuring that their branches or majority-owned subsidiaries that are established in the third country determine the source of funds to be used in the business relationship or occasional transaction;
  - c) 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;
  - d) 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;
  - e) 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 other entities of the same group.
  
- 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.



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### *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 delay of:
    - i) the third country concerned;
    - 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 (ii) of letter (a); 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 (ii) of letter (a) to the extent that this is compatible with the third country's law.
- 2) In cases where consent referred to in paragraph (1) letter (c) 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 one or more of the following:
  - 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 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 other entities of the same group;
  - 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 implements group-wide policies and procedures and that it adequately identifies, assesses and manages the ML/TF risks.
- 3) Where a credit institution or financial institution cannot effectively manage the ML/TF risk by applying measures stipulated in Paragraph 1 and 2, it shall close down some or all



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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) 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;
    - ii) aggregated statistical data providing an overview of the circumstances that gave rise to suspicion; and
  - b) without delay, inform the competent authority of the home Member State of:
    - i) the third country concerned;
    - 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.
- 2) Credit institutions and financial institutions shall take additional measures as well as their standard AML/CFT measures and the measures in paragraph 1 take to manage the ML/TF risk. These additional measures shall include one or more of the following:
  - a) ensuring that the branch or majority-owned subsidiary established in the third country shares with the credit institution or financial institution information that gave rise to the knowledge, suspicion, or reasonable grounds to suspect that ML/TF was being attempted or had occurred, to the extent that this is legally possible;
  - 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 the third country who wishes to be provided with products or services by other entities of the same group;
  - c) 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;



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- d) ensuring that the branch or majority-owned subsidiary established in the third country has effective systems and controls in place to identify and report suspicious transactions;
  - e) 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 effectively implements group-wide policies and procedures and that it adequately identifies, assesses and manages the ML/TF risks.
- 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- Ttransfer 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 delay of:
    - i) the third country concerned;
    - ii) how the implementation of the third country's law prohibits or restricts the transfer of data related to customer for the purpose of AML/CFT supervision;
  - b) 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 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 letter 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, such as:
    - i) the number of high risk customers;



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- ii) the number of suspicious transactions identified and reported;
  - iii) aggregated statistical data providing an overview of the reasons why customers have been classified as high risk;
- e) make the information referred to in letter (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 delay of:
    - i) the third country concerned;
    - 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 (ii) of letter (a); 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 (ii) of letter (a) to the extent that this is compatible with the third country's law.
- 2) In cases where consent referred to in paragraph (1) letter (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 following:
- a) 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;
  - b) 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 to those that present a low ML/TF risk and have a low impact on the group's ML/TF risk exposure;
  - c) 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



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branch or majority-owned subsidiary established in the third country who wishes to be provided with products or services by other entities of the same group.

- 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*

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 [...]. However, Articles x and y shall apply from [...].]

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]*



## 5. Accompanying documents

### 5.1 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.<sup>3</sup>

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<sup>4</sup>

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.

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

<sup>4</sup> See also EBA: Annual Report 2016 (forthcoming);



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### 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 Option 2 would be a harmonised approach and a level playing field across the Union's financial sector.

The disadvantage of Option 2 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.

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## 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 choose 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.



## 5.2 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?



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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.