



EBA/Op/2015/19

10 December 2015

Opinion of the European Banking Authority on cooperation with third countries – Article 161(7) CRD

Introduction and legal basis

Article 161(7) of Directive 2013/36/EU¹ (CRD) requires the EBA to review and submit a report to the Commission on the application of the CRD and of Regulation (EU) No 575/2013² (CRR) on the cooperation of the Union and Member States (MS) with third countries, identifying any areas which require further development as regards cooperation and information sharing.

The EBA competence to deliver an opinion is based on Article 34(1) of Regulation (EU) No 1093/2010³, as the application of the CRD and CRR relates to the EBA's area of competence.

In accordance with Article 14(5) of the Rules of Procedure of the Board of Supervisors⁴, the Board of Supervisors has adopted this opinion, which is addressed to the European Commission.

General comments

The EBA considers that there are no major concerns with regard to cooperation with third country supervisory authorities; however, the EBA identifies, in accordance with Article 161(7) CRD, the following areas which require further development with a view to enhancing cooperation and information sharing among Member States, the Union and third countries, thereby better facilitating prudential supervision of institutions within and outside colleges:

¹ Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ L 176, 27.6.2013, p. 338).

² Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ L 176, 27.6.2013, p. 1).

³ 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).

⁴ Decision adopting the Rules of Procedure of the European Banking Authority Board of Supervisors of 27 November 2014 (EBA/DC/2011/01 Rev4).

1. On equivalence issues:

- a. Where it is provided that the Commission may or shall adopt implementing decisions on equivalence, for example in Articles 107(4), 114(7), 115(4), 116(5), 132(3) and 142(2) of the CRR, but also in other similar current or future provisions of Union banking legislation, an explicit reference to EBA assistance and to Article 33 of the EBA Regulation should be made in a manner similar to the reference to EIOPA in Article 172 Solvency II. Such an amendment will enable a coordinated, streamlined, timely, efficient, consistent and ongoing EBA contribution with regard to equivalence assessments and will also align with EIOPA, bringing about ESA consistency.
- b. With regard to supervision on a consolidated basis, which is a particularly sensitive, technical and complex issue but of utmost importance for prudential monitoring of banking groups and financial stability as a whole, the EBA considers that Article 127 CRD should be extensively amended to include:
 - i. a mandate for the Commission enabling it to issue implementing decisions on equivalence assisted by the EBA in accordance with Article 33 of the EBA Regulation;
 - ii. a fall back clause whereby, in the absence of such a Commission decision, the relevant equivalence assessment shall be made by the competent authorities involved in the supervision of the relevant institution, where applicable within the college established in accordance with Article 116 CRD, following a recommendation issued by the EBA in accordance with Articles 16 and 33 of the EBA Regulation on equivalence of the consolidated supervision regime of that third country.
- c. With regard to equivalence of confidentiality regimes within and outside colleges, the EBA should be explicitly mandated to issue recommendations in accordance with Articles 16 and 33 of the EBA Regulation and in particular a second paragraph should be added to Article 55 CRD stipulating that the EBA may issue recommendations assessing the equivalence of the confidentiality of third country regimes for the purposes of applying that article and Article 116(6) CRD.

2. On other issues:

It is recommended, solely for the purpose of aligning CRD and RRD texts, that Article 116(6) CRD be amended to explicitly make reference to the status of 'observers' of third country supervisory authorities where they participate in colleges.

The findings conclude that overall there are no significant concerns with regard to cooperation with third countries; however, there are some changes that would facilitate better cooperation between the EU and third countries. Certain legislative amendments would provide more clarity

and consistency and a more coordinated approach to equivalence assessments of third countries, thus better facilitating college participation, information sharing and a consistent and uniform approach in the Single Market to cooperation with third countries.

Specific comments/proposals

Specific comments are set out in the report in the Annex.

This opinion will be published on the EBA's website.

Done at London, DD Month YYYY

[signed]

Andrea Enria

Chairperson

For the Board of Supervisors

Annex: Report on cooperation with third countries – Article 161(7) CRD

1. Background

1. In accordance with Article 161(7) of Directive 2013/36/EU (CRD) ‘By 31 December 2015, EBA shall review and submit a report to the Commission on the application of this Directive and of Regulation (EU) No 575/2013 on the cooperation of the Union and Member States (MS) with third countries. That report shall identify any areas which require further development as regards cooperation and information sharing. EBA shall publish this report on its website.’
2. Cross-border banking, both within the Union and beyond, is fundamental to banks’ business models. With a vast number of Union, and broadly of EEA, banks having a presence outside of the EEA and large numbers of third country institutions operating within the EEA, good information exchange and cooperation between MS and third countries is necessary for effective supervision of European financial institutions and for EU stability as a whole. For the purpose of the Single Market it is also important that any deficiencies in the regulatory framework regarding cooperation with third countries are addressed so that consistency of treatment can be facilitated, avoiding regulatory arbitrage.
3. There are a number of provisions in the CRD and Regulation (EU) No 575/2013 (CRR) which set out requirements for such cooperation. Based on these provisions, this report identifies three key areas of cooperation with third countries, considering specifically whether the provisions in the CRD and CRR are sufficient to facilitate cooperation and whether they safeguard confidential information while ensuring that the EU competent authorities have the information necessary to perform their tasks:
 - i. college participation;
 - ii. information exchange; and
 - iii. equivalence of third countries.

The report also considers whether any legislative changes are needed as a result and includes proposals.

2. Findings

2.1 Third country supervisory authorities’ participation in supervisory colleges

4. Currently, third country supervisory authorities may participate in colleges based on Article 116(6) CRD, which states that their participation in colleges is permissible where

appropriate and subject to equivalent confidentiality provisions. The process relating to this legal requirement is further elaborated in Article 4(1)(c) of the EBA draft ITS on the operational functioning of supervisory colleges⁵, according to which each invitation to a third country supervisory authority to participate in a college should be based on the assessment of the equivalence of the third country's confidentiality regime. We will look more closely at this type of equivalence in section 2.3.1 but, first, this section (2.1) focuses on the provisions relating to third country participation in colleges.

5. As mentioned above, the Level 1 text currently specifies the basis upon which third country supervisory authorities may participate in a supervisory college but does not specify that they participate as 'observers'. On the basis of Article 88(3) of the Bank Recovery and Resolution Directive⁶ (BRRD) third country resolution authorities participate as 'observers' in resolution colleges, reflecting the fact that they should be involved in these colleges but are not bound by Union Law. It should be clarified that the use of the term 'observer' does not signify the importance of the third country institution for the banking group. It would be appropriate and consistent to have this status reflected in the CRD also, on the basis of the content of the EBA's draft RTS⁷ and ITS on the functioning of supervisory colleges, where third countries are explicitly designated as 'observers'. We therefore propose to remedy this and align the two directives for the sake of consistency and legal certainty.
6. Observations from EBA college participation and feedback from MS demonstrate that the basis for third country participation in Article 116(6) and the process for third country participation outlined in the ITS on the functioning of colleges are broadly followed and, in practice, third countries are invited to participate in colleges based on assessment of the equivalence of confidentiality provisions, their relevance for the banking group, the relevance of discussions in the meeting, and agreement by the college to invite them. Often a bilateral MoU is put in place between the EEA competent authority and the third country supervisory authority for their participation. It is expected that the EBA Recommendations on the equivalence of third country confidentiality regimes, which have been well received to date, will alleviate the burden and sensitive task of the assessment on the part of competent authorities and will help competent authorities formulate multilateral agreements in the form of written cooperation and coordination agreements specifying the terms of their participation⁸. Where third country supervisory authorities participate in colleges, observations from college participation show that those third countries often participate to a large extent demonstrating good cooperation, for example by contributing to the annual risk assessment of the institution and more generally sharing information. This open participation is positively received by EU competent authorities, especially where there are significant operations of an EU banking group in a third country. In conclusion, the provisions of Article 116(6) are considered sufficient to govern the involvement of third country

⁵ EBA/ITS/2014/07.

⁶ Directive 2014/59/EU.

⁷ EBA/RTS/2014/16.

⁸ Article 4(1)(c) of the EBA draft ITS on the operational functioning of the colleges of supervisors (EBA/ITS/2014/07).

supervisory authorities in supervisory colleges as the requirement for equivalent confidentiality provisions safeguards banking groups' sensitive information; however, in section 2.3.1 some amendments are proposed in relation to the assessment of the equivalence of third country confidentiality regimes for college participation.

2.2 Information exchange

7. Article 55 CRD supports information exchange with third countries, allowing MS and the EBA to put in place cooperation agreements for information exchange where there is a guarantee of professional secrecy. Additionally Article 48 CRD allows the Council to negotiate agreements on cooperation for supervision on a consolidated basis with third countries, also for the purpose of obtaining information. Furthermore, Article 116 CRD and the provisions in the EBA RTS and ITS on the functioning of colleges also facilitate information exchange within colleges. In light of existing provisions on information exchange, we broadly note good experiences of information sharing with third country supervisory authorities both in the college setting - where a college has been established - and outside - where no college has been established (i.e. with regard to ad hoc information requests). Due to the extent of good information sharing, Article 48 has not been used.
8. Some less positive experiences of information sharing with third countries have been reported by competent authorities in a limited number of international colleges where the EEA authority is a host authority to a third country parent institution; here the third country consolidating supervisory authority has appeared reluctant to provide general information about the supervised banks or about their regulatory view on them. The provisions of Article 48 could have been exercised but due to the limited impact of these concerns this was not the case. In such cases, the Commission may deem it appropriate to activate Article 48; should this be taken forward the EBA stands ready to assist where necessary. Overall, however, relations for the purpose of information exchange with third countries are well functioning and no legislative changes are proposed.

2.3 Equivalence

9. There are three types of equivalence of third country supervisory authorities mentioned in the CRD and CRR. Below we consider the cooperation in line with the provisions for each:
 - Equivalence of confidentiality and professional secrecy regimes applicable to third country supervisory authorities;
 - Equivalence of prudential requirements applicable to institutions established in third countries; and
 - Equivalence of consolidated supervision regimes applicable in third countries.

2.3.1 Equivalence of confidentiality and professional secrecy regimes

10. The EBA Network of Experts on equivalence was activated in the first half of 2014 to undertake work on equivalence assessments of third countries' professional secrecy regimes and to prepare a response to the Commission's Call for Advice on third country equivalence for certain provisions in Regulation No 575/2013 (CRR). As mentioned above, on 1 April 2015 the EBA published recommendations specifying its opinion on the confidentiality regimes of 29 authorities from 13 countries, with the aim of facilitating their participation in supervisory colleges led by EU supervisors. This work aims to harmonise the application of Article 116(6) CRD in the composition of supervisory colleges. A second and third round of assessments will be undertaken in 2015 and 2016, covering a further 21 countries.
11. As previously mentioned, pursuant to Article 116(6) CRD third countries' supervisory authorities may only participate in colleges of supervisors subject to confidentiality requirements that are equivalent, in the opinion of all competent authorities, to the requirements for confidentiality and professional secrecy under the CRD. Assessing the equivalence of a third country supervisory authority's regime can often be labour intensive (reviewing legislation) and sensitive (in cases of non-equivalence), requiring uniform agreement from college members on a task that has often been undertaken only by the home supervisor, in a way that may differ from other competent authorities' approaches. Furthermore, each decision on whether to invite third country supervisors to colleges is taken without considering decisions taken within other colleges, which can lead to different treatment of third countries' supervisory authorities. As a result, as expected, the consistency of treatment of non-EU supervisory authorities brought about by the EBA recommendations has been very well received. It is a sensitive topic which had not been addressed as comprehensively as it was in the EBA's published recommendations, which almost all EEA Member States comply with⁹.
12. The impact of the recommendations in terms of participation of third countries is thought not to have created any major changes or significant costs for competent authorities; this is due to the fact that up till now there were many confidentiality agreements in place to enable the relevant third country supervisory authorities to participate. This has been necessary where those authorities are relevant to the banking group. In the future, though, as the EBA conducts further assessments of confidentiality regimes and the number of authorities covered by future recommendations increases the impact of these current recommendations, it is expected that consistency of treatment will be increased by introducing an 'official' equivalence assessment, and that this will facilitate participation of some third countries in colleges where membership for them was limited due to confidentiality concerns. Indeed, many MS consider that the EBA assessments will help to ease the formulation of written coordination and cooperation arrangements where the inclusion of third country supervisory authorities is based on these equivalence assessments.

⁹ <https://www.eba.europa.eu/regulation-and-policy/colleges-of-supervisors/recommendation-on-the-equivalence-of-confidentiality-regimes>

13. Assessment of the equivalence of confidentiality regimes is also important outside of supervisory colleges and in particular for the purposes of the home-host cooperation envisaged in Article 55 CRD. There, too, it is vital that consistent outcomes of the relevant assessments are achieved. Furthermore, equivalence assessments of professional secrecy and confidentiality regimes performed for the purposes of Article 116 CRD can also be useful for Article 55 CRD and vice versa. To that end, the EBA proposes a legislative amendment to be included in Article 55 CRD stipulating that the EBA may issue recommendations assessing the equivalence of third country confidentiality regimes for the purposes of applying that article and Article 116(6) CRD. Such an amendment would build on the work of the EBA and facilitate consistent and continued assessments with consistent outcomes for the benefit of MS and third country cooperation. It will also ensure that the EBA can plan resources accordingly for this mandate and enhance legal certainty, providing cross-referencing to Article 33 of the EBA Regulation.

2.3.2 Equivalence of prudential requirements applicable to institutions established in third countries

14. With regard to equivalence of third country supervisory authorities' prudential requirements, the EBA has been asked to respond to the Commission's Call for Advice and provide technical advice on the equivalence of these aforementioned regimes in specific third countries. Certain articles in the CRR¹⁰ state that, should the prudential supervisory and regulatory requirements in third countries be deemed at least equivalent to those applied in the Union, then certain categories of third country exposures can benefit from the same, often more favourable, treatment applied to EU exposures, meaning lower risk weights would be applicable. The exposures which are subject to this rule are non-EU credit institutions; investment firms; clearing houses and exchanges; central governments or central banks; regional governments or local authorities; public sector entities; exposures in the form of units or shares in CIUs and, finally, exposures to institutions falling under the definition of a large financial sector entity.

15. The decision to approve a third country as equivalent, for the purpose of preferential treatment for credit risk capital requirements, rested with national competent authorities until 31 December 2014¹¹ and a number of competent authorities relied on their own assessments. As stated in the relevant articles in the CRR, from 1 January 2015 this national treatment is no longer possible and third countries can only be considered equivalent if the EU Commission adopts a decision, in the form of an implementing act, on their equivalence. The Commission issued a first decision in December 2014 and assigned a status of equivalence to 17 jurisdictions. The Commission then asked, in its Call for Advice, the EBA to carry out further assessments on 38 countries. These assessments are being undertaken as from 2015 by the EBA's Network of Experts on equivalence. The assessments require resources and expertise, but the outcome has a real impact on banks not only in terms of

¹⁰ Articles 107(3) and (4), 114(7), 115(4), 116(5), 132(3) and 142(2) of the CRR.

¹¹ Providing that the power to approve was exercised by 31/12/2013.

capital requirements for third country exposures, but also for exemptions from the large exposure limits (Article 400 of the CRR). These assessments are particularly necessary given that the CRR states that competent authority assessments no longer apply.

16.As demonstrated by the Commission’s Call for Advice, there is a role for the EBA assessments to feed into Commission implementing acts. Through the Network of Experts on equivalence the EBA assessments provide comprehensive conclusions arrived at by staff and volunteers with technical expertise. As such we propose that, to ensure that such assessments continue going forward and to ensure that sufficient resource is dedicated to this task, a mandate to be included in the Level 1 text is proposed. Such an amendment will enable a coordinated, streamlined, timely, efficient, consistent and ongoing EBA contribution with regard to these equivalence assessments; it will also enhance legal certainty, providing cross-referencing to Article 33 of the EBA Regulation and will also align the relevant processes of the provision of assistance on equivalence with EIOPA (Article 172 of Solvency II¹² states that decision-making power lies with the Commission ‘assisted by EIOPA in accordance with Article 33(2) of Regulation (EU) No 1094/2010’).

2.3.3 Equivalence of consolidated supervision regimes applicable in third countries

17.Article 127 CRD specifies that competent authorities must assess third country supervisory authorities to decide whether they carry out consolidated supervision equivalent to that of the CRD and CRR, where the parent undertaking of an institution in their MS is outside of the Union. Assessing the equivalence of third country consolidated supervision regimes can often be a highly technical and sophisticated task. Achieving harmonisation and maximum convergence therein is also very important as it directly affects how solo and consolidated supervision is to be conducted in the Union for institutions which are subsidiaries of a third country parent undertaking.

18.Each competent authority undertaking its own assessment can result in a multiplication of efforts by competent authorities and, potentially, divergent outcomes; therefore, reducing divergences would be beneficial for a number of reasons, inter alia: for facilitating the operation of supervisory colleges where subsidiaries of the third country parent operate in more than one MS; and for promoting a unified Union approach towards third country regimes and facilitating the Commission task referred to in Article 48 CRD on the conclusion of cooperation agreements with supervisory authorities of third countries regarding supervision on a consolidated basis. The EBA, therefore, proposes an amendment to Article 127 CRD.

19.In particular, the EBA proposes, also having regard to Article 48 CRD, that the Commission be mandated by Article 127 CRD to issue implementing acts assisted by the EBA equivalence assessments on the third country consolidated supervisory regimes. Pending or in the

¹² Directive 2009/138/EC.

absence of such a decision on a particular regime, the EBA should be empowered to issue recommendations in accordance with Articles 16 and 33 of the EBA Regulation to assist competent authorities, and where applicable college members, in performing their relevant equivalence assessments. Furthermore, by amending the CRD in this way, it would broadly align with Article 260 of Solvency II which sets out the role of EIOPA in assisting the Commission - which may adopt a decision on the equivalence of consolidated supervision after consulting EIOPA.

3. Conclusion

3.1 Proposed legislative amendments

20. Based on the above considerations there are no major concerns with regard to cooperation with third country supervisory authorities; however, the EBA identifies, in accordance with Article 161(7) CRD, the following areas which require further development with a view to enhancing cooperation and information sharing among Member States, the Union and third countries, thereby better facilitating prudential supervision of institutions within and outside colleges:

- i. On equivalence issues:
 - (i) Where it is provided that the Commission may or shall adopt implementing decisions on equivalence, for example in Articles 107(4), 114(7), 115(4), 116(5), 132(3) and 142(2) of the CRR, but also in other similar current or future provisions of Union banking legislation, an explicit reference to EBA assistance and to Article 33 of the EBA Regulation should be made in a manner similar to the one referred to in Article 172 of Solvency II. Such an amendment will enable a coordinated, streamlined, timely, efficient, consistent and ongoing EBA contribution with regard to equivalence assessments and will also align with EIOPA, bringing about ESA consistency.
 - (ii) With regard to supervision on a consolidated basis, which is a particularly sensitive, technical and complex issue but of utmost importance for prudential monitoring of banking groups and financial stability as a whole, the EBA considers that Article 127 CRD should be extensively amended to include:
 - (a) a mandate for the Commission enabling it to issue implementing decisions on equivalence assisted by the EBA in accordance with Article 33 of the EBA Regulation;
 - (b) a fall back clause whereby, in the absence of such a Commission decision, the relevant equivalence assessment shall be made by the competent authorities involved in the supervision of the relevant institution, where applicable within the college established in accordance with Article 116 CRD, following a recommendation issued by the EBA in accordance with Articles 16 and 33 of the EBA Regulation on equivalence of the consolidated supervision regime of that third country.
 - (iii) With regard to equivalence of confidentiality regimes within and outside colleges, the EBA should be explicitly mandated to issue recommendations in accordance with Articles 16 and 33 of the EBA Regulation and in particular a second paragraph should be

added to Article 55 CRD stipulating that the EBA may issue recommendations assessing the equivalence of the confidentiality of third country regimes for the purposes of applying that article and Article 116(6) CRD.

(B) On other issues:

It is recommended, solely for the purpose of aligning CRD and RRD texts, that Article 116(6) CRD be amended to explicitly make reference to the status of ‘observers’ of third country supervisory authorities where they participate in colleges.

3.2 Final remarks

21. The findings conclude that overall there are no significant concerns with regard to cooperation with third countries; however, there are some changes that would facilitate better cooperation between the EU and third countries. Certain legislative amendments would provide more clarity and consistency and a more coordinated approach to equivalence assessments of third countries, thus better facilitating college participation, information sharing and a consistent and uniform approach in the Single Market to cooperation with third countries.