

**ALFI response to the ESA joint consultation on a draft joint RTS on measures to take to mitigate AML/CFT risks where a third country's law does not permit the application of group-wide policies and procedures**

## **Introduction**

The Association of the Luxembourg Fund Industry (ALFI) is the representative body of the Luxembourg investment fund community. Created in 1988, the Association today represents over 1300 Luxembourg domiciled investment funds, asset management companies and a wide range of service providers such as custodian banks, fund administrators, transfer agents, distributors, legal firms, consultants, tax experts, auditors and accountants, specialist IT providers and communication companies. The Luxembourg Fund Industry is the largest fund domicile in Europe and a worldwide leader in cross-border distribution of funds. Luxembourg-domiciled investment structures are distributed on a global basis in more than 70 countries with a particular focus on Europe, Asia, Latin America and the Middle East.

## **General remarks**

We understand that the consultation concerns only the actors that have subsidiaries and/or branches in countries where local laws do not permit the application of the group AML policies and procedures, including those countries that still have a banking secrecy legal protection. Regarding the latter, it must be noted that such countries only pose an issue in case banking secrecy legislation prohibits the fight against money laundering and terrorist financing.

The suggestions made in this paper look reasonable from an academic perspective. However some recommended measures may impact significantly the financial industry actors (including investment funds assuming they fall in the abovementioned scenario) from a business perspective or from a compliance function perspective (e.g. enhanced on going monitoring, carrying on enhanced reviews on the branch/subsidiary including on site checks or independent audits, etc ...). Therefore we would advocate to always keep in mind the need to adopt a risk-based approach when implementing the guidelines.

## **Specific remarks**

### **1) Do you agree with the scope of the draft RTS as described in Article 1?**

ALFI agrees with the scope of the draft RTS.

### **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?**

ALFI agrees with the abovementioned statement, which is in line with the 4th Anti-money laundering directive and the FATF Recommendations.

- 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.**

ALFI is of the view that the minimum action in Article 3 is appropriate. However it might be useful to suggest that the entity located in the third-country also identifies and perform a gap analysis of the group policies and procedures against the third-country legal requirements and report on the outcome. This may be contained in Article 4 1b). Finally the compliance of third countries with the FATF Recommendations could also be assessed with a review of the latest FATF or regional body-like report concerning the jurisdiction concerned.

- 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.**

ALFI doesn't agree with the minimum action in article 4. Some doubts could indeed be raised concerning the inclusion of such an article in the guidelines. The compliance officers employed by a branch or majority-owned subsidiary in a third country should always be able to perform individual ML-TF risk assessments locally by taking into account the standards of the group policies. These local compliance officers should then be able to report at least metrics of these individual ML-TF risks assessments to their global headquarters.

For example, the following measures could be taken by way of a statistical reporting:

- a. Number of PEPs
- b. Number of high risk customers
- c. Number of suspicious transactions
- d. Number of "true hits"
- e. Number of STRs filed
- f. Number of blocked accounts
- g. Number of blocked transactions

We wouldn't recommend any further minimum actions under article 4.

- 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.**

ALFI agrees with the minimum actions and additional measures under article 5. We would like to underline that following the consents granted by the customer and the beneficial owner, the branch or majority-owned subsidiary in the third-country could also be in a position to leverage the KYC due diligences performed by another entity of the group located in another jurisdiction, when this entity does already have a business relationship with the same customer.

- 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.**

ALFI agrees with the minimum action mentioned in article 6. We would request in addition a monthly reporting in the number of clients and/or beneficial owners who refused to provide their KYC documentation. Finally one could also assess whether the FIU of the third country can share intelligence with foreign FIUS via networks such as FIU.NET (Europol), GoAML (UN Office on Drugs and Crime) or the Egmont Group.

- 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.**

We agree with the minimum action proposed. However we would ask for an AML/CTF risk assessment of the customer to be performed on an annual basis since customers in a third country with limitations of data transfer possibilities cannot reasonably be classified as low risk. It is important to have a risk identification and assessment framework and a proper setup for mitigating the identified risk.

- 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.**

In our view there are no additional scenarios to address. The consultation is exhaustive.

As an additional remark, we would like to underline that in certain countries the on-going screening of the employees may be abusive under privacy law whereas the measure can be acceptable during the recruitment process. Therefore it is not certain that constantly monitoring the employees is necessarily admitted. It could eventually be perceived as an intrusive procedure even with the employee consent which in that case has not been given freely.

- 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.**

ALFI agrees with the impact assessment. In particular, in the USA, Russia and Algeria local AML rules impede the disclosure of information on SARs and STR done to the local FIUs by local branches or majority-owned subsidiaries to the global headquarter located overseas.

We also agree with option 3 and the conclusion that by identifying different legal impediments, it is possible to propose targeted measures to address the resultant risk.

