

**COMMON UNDERSTANDING BETWEEN EU MEMBER STATES
ON THE PROCEDURE AND CRITERIA FOR THE RECOGNITION OF THIRD COUNTRIES¹
EQUIVALENCE UNDER DIRECTIVE 2005/60/EC ON THE PREVENTION OF THE USE OF THE
FINANCIAL SYSTEM FOR THE PURPOSE OF
MONEY LAUNDERING AND TERRORIST FINANCING**

PREAMBLE

I. LEGAL FRAMEWORK

Considering that:

Article 11(1) of Directive 2005/60/EC allows institutions and persons covered by the Directive to apply simplified customer due diligence procedures towards credit and financial institutions covered by the Directive, and credit and financial institutions situated in third countries imposing requirements equivalent to those laid down in the Directive²;

Articles 15(1) and (2) juncto article 16 of Directive 2005/60/EC allow institutions and persons covered by the Directive to rely on third parties to meet the requirements laid down in article 8(1)(a) to (c), as far as the third party is an institution or person covered by the Directive or situated in a third country imposing requirements (including professional registration) equivalent to those laid down in the Directive³;

Article 28(3) of Directive 2005/60/EC provides for exceptions on the prohibition of disclosure, that can be applied towards credit and financial institutions belonging to the same group, that are covered by the Directive or situated in third countries imposing requirements equivalent to those laid down in the Directive⁴;

The above mentioned articles contain a faculty⁵, not an obligation, for credit and financial institutions, to apply simplified AML/CFT procedures or to make use of specific rules towards third countries that are not assessed as equivalent, standard procedures and rules contained in Directive 2005/60/EC apply;

Directive 2005/60/EC does not grant the European Commission (the Commission) a mandate to establish or to revise a binding (positive) list of equivalent third countries;

¹ "Third countries" means non EU and non EEA countries or jurisdictions.

² Hereafter referred to as "equivalent third countries".

³ Cf. footnote 2.

⁴ Cf. footnote 2.

⁵ It should be noted that the list does not override the need to continue to apply the risk-based approach. The fact that a financial institution is based in a third country featuring on the list only constitutes a refutable presumption of the applicability of simplified CDD. Moreover, the list does not override the obligation under article 13 of the Directive to apply enhanced customer due diligence measures in all situations which by their nature can present a higher risk of money laundering or terrorist financing, when dealing with credit and financial institutions, as customers, based in an equivalent jurisdiction.

Consequently:

There is a need to define the concept of "equivalent third countries" as referred to in article 11 (1), article 15 (1) and (2) juncto article 16, and article 28 (3) of Directive 2005/60/EC;

Taking into account the fact that:

- assessing whether a third country imposes equivalent AML/CFT requirements on its financial and credit institutions is a time consuming exercise;
- a high degree of consistency between Member States is desirable;

Member States of the European Union have decided to enter into a common exercise⁶ to establish, on a voluntary basis, a common procedure for this financial sector-specific equivalence assessment, resulting in a common list of equivalent third countries for the application of the aforementioned Articles of the Directive;

However, it should be noted that the Common Understanding does not override Member States' decision to consider other third countries as equivalent, or to limit the application of the Common Understanding under their national law. In addition, Member States who decide to treat additional countries as "equivalent" should also inform other Member States and the Commission (Article 16 2).

II. METHODOLOGY

In order to define a common list of equivalent third countries for the purpose set out in this Common Understanding, Member States have decided to establish an assessment procedure, based on objective, measureable, and relevant criteria;

Concerning the procedure:

Each Member State is allowed to invite Member States (hereinafter referred to as "parties to this Common Understanding") to enter into an assessment procedure for a named third country, as laid down in this Common Understanding;

Any decision on equivalence should reflect the fact that obtaining the "equivalent" status is a privilege, allowing application of the relevant rules contained in the Directive, which can only be granted after careful examination;

Concerning the criteria:

As the abovementioned articles of Directive 2005/60/EC only concern credit and financial institutions (and not DNFBPs) as customers, the equivalence test should aim at assessing the equivalence of the AML/CFT-regime applicable to those institutions;

Consequently, the assessment-criteria should focus on, and can be limited to, FATF Recommendations 3, 5, 9, 10, 11, 20, 35, 26, 27, 40 (formerly Recommendations 1, 4, 5, 10, 13, 17, 23, 29, 30 and 40, and Special Recommendations II and IV) , being the relevant international standards applicable to those institutions for the time being;

⁶ Hereafter referred to as the "Common Understanding".

However, parties to this Common Understanding will at regular points in time review and update the criteria and the status of equivalence of identified third countries as they consider necessary.

CONSIDERING ALL THE ABOVE, MEMBER STATES HAVE ESTABLISHED THE FOLLOWING COMMON UNDERSTANDING⁷:

1. FATF COUNTRIES

Under a presumption of equivalence, all FATF members are included in the list of equivalent countries.

1.1. Except if, according to the procedure established in paragraph 4:

- (a) A FATF member has been assigned a “non-compliant” rating in respect of one or more of the following Financial Action Task Force (FATF) Recommendations: 3, 5, 9, 10, 11, 20, 35, 26, 27, 40 (formerly Recommendations 1, 4, 5, 10, 13, 17, 23, 29, 30 and 40 and Special Recommendations II and IV). Compliance is verified on the basis of an evaluation report, published in full, adopted by the FATF, the International Monetary Fund or the World Bank, according to the revised 2003 FATF Recommendations and Methodology; or
- (b) The country has been assigned a "partially compliant" rating in respect of one or more of the Recommendations outlined in 1.1.(a), and
 - (aa) the country is subject to enhanced follow-up; or
 - (bb) the country is subject to regular follow-up, and – based in particular on the information contained in a follow-up report – is not making satisfactory progress as regards the identified deficiencies related to the Recommendations outlined in 1.1(a); or
- (c) The country or jurisdiction has been identified as having strategic AML/CFT deficiencies by an FATF public statement that includes a call on FATF members to take action accordingly.

⁷ These criteria do not address non financial institutions and persons as customers.

- 1.2. The inclusion/exclusion of a FATF country resulting from the application of the above mentioned criteria could however be challenged by a party to this Common Understanding's assessment, based on the information available on the ML/TF situation in the particular country. In this respect, the following factors could be taken into account:
- (a) the quality of international co-operation related to AML/CFT, e.g.:
 - FIU co-operation (such as providing sufficient information about the nature of the predicate offence);
 - co-operation in terms of identifying beneficial owners, co-operation in communications about bank accounts, tax co-operation;
 - (b) the level of compliance with AML/CFT standards, in particular if expressed in public statements by the FATF (without prejudice to criterion 1.1(c) above) or by an FATF-Style Regional Body (FSRB), and on the effectiveness of the measures in place should be taken into account, according to the procedures outlined under Section 4.
 - (c) the level of threats of money laundering or terrorist financing and their associated predicate offences, including level of corruption, level of organised crime, vulnerability to criminal ownership of financial institutions, and capacity of investigative and judicial systems to address those problems. The level of threat should be determined based on reliable sources, which could include NGOs⁸, EUROPOL, INTERPOL or FATF reports.

2. OTHER COUNTRIES OR JURISDICTIONS

- 2.1. Countries or jurisdictions which are not members of the FATF can be included in the list of equivalent countries if:
- (a) Those countries or jurisdictions fully or largely comply with Financial Action Task Force (FATF) Recommendations 3, 5, 9, 10, 11, 20, 35, 26, 27, 40 (formerly Recommendations 1, 4, 5, 10, 13, 17, 23, 29, 30 and 40 and Special Recommendations II and IV). This compliance is assessed on the basis of an evaluation report, published in full, adopted by an FATF-Style Regional Body (FSRB), the International Monetary Fund or the World Bank, according to the revised 2003 FATF Recommendations and Methodology; or
 - (b) The country or jurisdiction has been assigned a "partially compliant" rating in respect of one or more of the Recommendations outlined in 2.1.(a), and
 - (aa) the country or jurisdiction is subject to regular follow-up (or equivalent FSRB concept) and – based in particular on the information contained in a follow-up report – is making satisfactory progress as

⁸ e.g. Transparency International's Corruption Perceptions Index

regards the identified deficiencies related to the Recommendations outlined in 1.1(a); or

(bb) the country or jurisdiction has been considered for removal from follow-up to biennial updates (or equivalent FSRB concept) and such removal is granted; and

(c) The country or jurisdiction has not been identified as having strategic AML/CFT deficiencies by a FATF public statement that includes a call on FATF members to take action accordingly.

2.2 The inclusion/exclusion of a country or a jurisdiction resulting from the application of the above mentioned criteria could however be challenged by a party to this Common Understanding's assessment, based on the information available on the ML/TF situation in the particular country. In this respect, the following factors could be taken into account:

(a) the quality of international co-operation related to AML/CFT, e.g:

- FIU co-operation (such as providing sufficient information about the nature of the predicate offence);
- co-operation in terms of identifying beneficial owners, co-operation in communications about bank accounts, tax co-operation;

(b) the level of compliance with AML/CFT standards, in particular if expressed in public statements by the FATF (without prejudice to criterion 1.1(c) above) or by an FATF-Style Regional Body (FSRB), and on the effectiveness of the measures in place should be taken into account, according to the procedures outlined under Section 4.

(c) the level of threats of money laundering or terrorist financing and their associated predicate offences, including level of corruption, level of organised crime, vulnerability to criminal ownership of financial institutions, and capacity of investigative and judicial systems to address those problems. The level of threat should be determined based on reliable sources, which could include NGOs⁹, EUROPOL, INTERPOL or FATF reports.

3. REVISION OF THE LIST

The equivalence status cannot be upheld if:

- (a) a country or jurisdiction at any given time does not fulfil the conditions specified in paragraphs 1 and 2, or
- (b) an evaluation report is not published in full or is withdrawn after its publication, regardless of the ratings expressed in the report itself.

⁹ e.g. Transparency International's Corruption Perceptions Index

The equivalence status can be regained only upon compliance with the respective criteria for recognition of equivalence.

4. PROCEDURE

Any decision on the equivalence will be based on the consensus of parties to this Common Understanding.

Consensus shall be understood as meaning that agreement of all parties to this Common Understanding is needed for a country to continue to be on the third country equivalence list.

Any party to this Common Understanding may raise an objection to a third country's continued presence on the list. Removal of a third country from the list shall require that at least one other party to this Common Understanding seconds the proposed removal. Any request for removal from the equivalence list must be substantiated with recognised, credible and independent sources of information.

The list shall be reviewed and if necessary revised on the occasion of each meeting of the CPMLTF. The review of the list will be based on relevant evaluation reports issued and information available to the Commission or to parties to this Common Understanding.

Parties to this Common Understanding will set up a "review group", to be tasked with analysing information available and making recommendations to the other parties to this Common Understanding as to the equivalence/non-equivalence of third countries. The composition of this review group will be reviewed annually.

Parties to this Common Understanding will consider as a priority issue the equivalence status of countries which are members of Moneyval, a body of the Council of Europe.

Countries or jurisdictions which are not a member of the FATF should only be considered for inclusion in the list upon the express request of a party to this Common Understanding.

Once decided, withdrawal from the list will be immediate. Parties to this Common Understanding can propose that the equivalence status is maintained or reinstated according to Section 1.2 or 2.2, on the basis of the elements or information available.

5. PUBLICATION OF THE LIST

Apart from the obligation of Member States to inform each other and the Commission of third countries they regard as equivalent (e.g. Art. 11(4) of the AMLD), parties to this Common Understanding commit to making the list of equivalent countries public at national level.

Additionally, the Commission will publish this Common Understanding and the updated list of equivalent third countries established under this Common Understanding.

6. INFORMING THIRD COUNTRIES

Third countries which are in the process of being reviewed for addition to or removal from the list shall be informed that they are under consideration and have the opportunity to present written evidence. They should also be informed of the outcome of the review and of the list of the factors in paragraphs 1 or 2 of the above rules of procedure that were relevant to this decision. The modalities of communication are to be agreed on a case by case basis.