



JOINT COMMITTEE OF THE EUROPEAN
SUPERVISORY AUTHORITIES

9 July 2019
JC/2019-22

Report

on cross-border supervision of retail financial services

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Executive summary

1. One of the tasks of the European Banking Authority (EBA), the European Securities and Markets Authority (ESMA) and the European Insurance and Occupational Pensions Authority (EIOPA), collectively known as the three European Supervisory Authorities (ESAs), is to monitor any emerging risks for consumers and financial institutions as well as new and existing financial activities and to adopt measures, where needed, with a view to promoting consumer protection and the safety and soundness of markets and convergence in regulatory practices.
2. Over the last few years, the regulatory reforms that followed the financial crisis have produced a robust and integrated regulatory framework that bolstered the single market in financial services. In addition, innovative online services and the digitalisation of traditional financial services have driven progress towards a more integrated market for financial services, making it easier for financial institutions to provide services across borders and giving European consumers a greater choice and better access to financial services across the European Union (EU).
3. However, the ESAs have noted that the cross-border provision of financial services to consumers has also resulted in new, and a more acute increase in, issues that national competent authorities (CAs) have to face and in the need to enhance cooperation among CAs to tackle those issues. This is, however, in a context where some of the most recent legislation that has been applied since 2018, such as the Markets in Financial Instruments Directive II (MiFID2)/the Markets in Financial Instruments Regulation (MiFIR), the Insurance Distribution Directive (IDD) and the Revised Payments Services Directive (PSD2), as well as some other ESA-specific measures,¹ seek to tackle some of the issues that CAs have been facing.
4. Separately, the ESAs have each prioritised work on supervisory convergence, to facilitate consistency in practical implementation and supervisory outcomes. Supervisory convergence is critical for the proper functioning of the single market and for ensuring that financial stability and strong consumer protection are reliably achieved across the EU.
5. This report aims to describe the main issues that CAs are facing and to provide an overview of the main consumer protection and retail conduct of business rules that apply to the cross-border provision of financial services, with a view to analysing how the current legislation addresses those issues. The report concludes with a number of observations arising from the analysis of the issues and the current legal framework and with some recommendations for EU co-legislators and CAs.
6. The report does not expand on the wider work of the ESAs on supervisory convergence, and does not therefore address wider supervisory issues that CAs face, for instance in their fulfilment of market monitoring obligations, measures for identifying conduct risks and the supervisory

¹ In the insurance sector, the EIOPA Board of Supervisors (BoS) adopted three Decisions on collaboration of the supervisory authorities: EIOPA-BoS-17/014 from 30 January 2017 (Solvency II), EIOPA-BoS-18/320 from 27 September 2018 (IORP) and EIOPA-BoS/18-340 from 28 September 2018 (IDD).

tools for addressing these risks. Convergence in supervision is, however, of vital importance as a precondition for the sound functioning of the single market and ensuring flourishing cross-border business. The ESAs anticipate a need for an increasingly material focus on supervisory convergence in their work and between CAs. This report instead focuses on the challenges arising specifically in view of the regulatory framework and cross-border activities.

7. The ESAs have classified the issues CAs face into three categories: i) institutional and organisational issues; ii) supervision and enforcement; and iii) regulatory gaps and arbitrage. The main institutional and organisational issues are related to the distribution of responsibilities between home and host CAs, which is not always clear, and to the notifications and exchange of information between CAs, where passport procedures either are not followed consistently by CAs or the legislation does not provide for exchanges of all information that CAs might need.
8. With regard to supervision and enforcement issues, the most important are related to the risk that home CAs prioritise financial institutions that represent a higher risk in their own territories. This can lead to supervisory and enforcement issues, especially where the activity of a financial institution is carried out exclusively or almost exclusively on a freedom of services basis outside the home jurisdiction. Other issues identified include the use of third parties by financial institutions in host Member States and the aggressive and misleading cross-border marketing of complex financial products to retail clients.
9. The third category of issues is related to regulatory gaps and regulatory arbitrage. The ESAs consider that some of the major differences in the implementation of EU legislation at national level are due to the insufficient harmonisation and/or clarity of some EU laws.
10. The report also describes the main directives and regulations that the ESAs have reviewed and for which they have identified those provisions related to i) the definition of cross-border provision of services; ii) passporting (services and products); iii) notifications and exchange of information; iv) home and host responsibilities; v) information reporting requirements for statistical/supervisory purposes for host CAs; vi) simultaneous exercise of the freedom to provide services (FPS) and the right of establishment (ROE); vii) exercise of the FPS by a branch or another establishment in a host Member State for providing services in a third Member State; and viii) 'jurisdiction shopping'.
11. The ESAs have also considered the relevant technical standards arising from the reviewed Level 1 texts and European Commission interpretative Communications whenever deemed appropriate to better understand how secondary legislation and other relevant material have developed some of the requirements contained in the Level 1 texts.
12. As a result of the analysis of the most relevant pieces of legislation, the ESAs have arrived at a number of observations, based on which they have elaborated some recommendations for the EU co-legislators and the CAs. The most relevant recommendations for EU co-legislators are:
 - to consider reinforcing the harmonisation of Level 1 provisions governing the marketing and sale of services and products, especially in the banking sector, and to clearly set out

- and allocate responsibilities between the home and host CAs with regard to the application of consumer protection and conduct of business provisions;
- to provide more clarity on when activities carried out through digital means fall under passporting (either within the remit of the FPS or of the ROE) due to the lack of definition of cross-border provision of financial services and in the light of the continuous growth in the digitalisation of financial services;
 - to consider possible ways to overcome supervisory difficulties that CAs face when there is simultaneous exercise of the FPS and the ROE, or when a branch exercises the FPS in another EU Member State;
 - to encourage EU co-legislators to follow the path laid out in MiFID2, the Mortgage Credit Directive (MCD) and PSD2, which aims to prevent financial institutions opting to comply with the legal system of one Member State in order to avoid stricter standards in another Member State where it intends to carry out or does carry out the greater part of its activities;
 - to consider requiring that a passport regime includes the proportionate provision of information on whether the products and/or services covered by the notification are, in practice, provided;
 - to consider the high-level principles on cooperation identified in this report as the basis for any new legislation or possible amendment to current legislation;
 - to consider clarifying the diligences that a home CA should undertake prior to granting a passport;
 - to introduce, where relevant, supervisory powers in the event of significant divergences from an initial business plan, including the withdrawal of a granted authorisation if the relevant services and activities are not provided for a given period of time.

13. It should be noted that EIOPA has recently provided additional recommendations for the insurance sector² to the European Commission. These included recommendations for further enhancing supervisory reporting requirements regarding information on cross-border business, the establishment of cooperation platforms, an enhanced role for EIOPA in mediating certain cross-border issues, as well as for the obligations of a CA to share information with EIOPA at the earliest stage on cross-border developments that can be a source of potential issues.

14. The most relevant recommendations for CAs are:

- to ensure an effective collaboration and regular exchange of information to establish appropriate preventative measures and to identify at an early stage any potential issues;
- to follow the high-level principles on cooperation set out in this report in the absence of any detailed requirements on cooperation in the applicable legislation;
- to liaise with the ESAs to ensure that registers of contact points for notifications and the exchange of information are kept up to date, including the accepted means of communication, in accordance with the relevant sectoral rules;

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https://eiopa.europa.eu/Publications/Reports/Report%20on%20Article%20242%20COM%20Request_FINAL%2014%20Dec%202018.pdf#search=EIOPA%20BoS%2D18%2D485

- to work together with the ESAs to improve the framework for cooperation in consumer protection between CAs, especially in the banking sector.³

³ In the insurance sector, specific BoS Decisions on collaboration were recently issued to strengthen the supervision of cross-border business, with effective application being monitored by EIOPA.

Background

15. One of the tasks of the EBA, ESMA and EIOPA, collectively known as the ESAs, is to monitor any emerging risks for consumers and financial institutions, as well as new and existing financial activities, and to adopt measures, where needed, with a view to promoting consumer protection and the safety and soundness of markets and convergence in regulatory practices. The coordination of the ESAs' actions in these areas takes place within the Joint Committee (JC).
16. In monitoring consumer protection developments and financial innovations, the ESAs have noted the continued increase in the cross-border provision of financial services to consumers across the EU. This increase is the result of both the development of the single market in financial services (to which the ESAs have contributed since their foundation) and the digitalisation of financial services across the banking, insurance and securities sectors, which further enables financial institutions to provide their services across borders.
17. The increase in the cross-border provision of financial services has benefits for consumers, as it fosters competition and expands the offer available to consumers, who then have a broader number of financial institutions among which to choose. However, it also poses challenges for CAs that are responsible for supervising those financial institutions and their activities.
18. In order to tackle the issues arising in this area, the JC of the ESAs agreed that it would be useful to assess i) the issues and challenges experienced by CAs in the supervision of the cross-border provision of financial services that may negatively impact customer protection and/or the proper functioning of the single market for consumers; and ii) the current framework for cooperation between home and host CAs in the supervision of financial institutions that provide cross-border retail financial services.
19. To that end, the ESAs have i) identified the main issues experienced by supervisors in relation to home-host supervision; ii) carried out a mapping of the consumer protection and retail conduct rules on cross-border provision of financial services that apply in the banking, securities and insurance/pension sectors; and iii) assessed the current requirements for cooperation between home and host CAs in the supervision of financial institutions providing cross-border services.
20. In order to keep the scope of the work manageable, the ESAs, however, have not sought to address wider issues on supervisory convergence and have not therefore addressed wider supervisory issues that CAs face that are relevant for both home and host supervision, for instance the fulfilment of market monitoring obligations, measures for identifying conduct risks and supervisory tools for addressing these risks. Convergence in supervision is however of vital importance as a precondition for the sound functioning of the single market and in ensuring the flourishing of cross-border business. The ESAs anticipate a need for an increasingly material focus on supervisory convergence between CAs as the regulatory framework becomes more settled. Progress on this is essential as a foundation for the single market.

21. The focus of this report is on issues arising of a cross-sectoral nature, and there may be more specific issues of a sector-specific nature. The report cannot therefore be read as a full survey of all potential issues, and it should be considered also in the context of each ESA's own work on cross-border supervision and supervisory convergence.
22. This report is arranged as follows. First, it provides a description of the main issues that CAs face when they have to supervise financial institutions that provide financial services across borders, as indicated by the CAs. It continues with the legal mapping exercise carried out by the ESAs. This is followed by the current framework for cooperation between CAs and a proposal for high-level principles for cooperation between CAs. The report concludes by presenting the main observations arising from the legal mapping exercise and some recommendations on how to try to tackle the issues identified.

Main issues that CAs face in relation to supervision of cross-border provision of retail financial services

23. The ESAs approached CAs in order to get their input on the main issues they face when they supervise financial institutions providing financial services to retail customers across borders. Based on the assessment of the input provided by CAs following a survey performed in February 2017, the ESAs have identified and classified the issues into different categories. Not all issues affect all the sectors equally: indeed, while some of them seem to be more related to one sector, others seemed to be relevant across the different sectors but with varying degrees of significance or intensity.

24. The following section describes the main issues identified. These can be classified into three categories: i) institutional and organisational issues; ii) supervision and enforcement; and iii) regulatory gaps and arbitrage.

Institutional and organisational issues

Notifications and exchange of information between home and host competent authorities

25. Some CAs consider that passporting notifications do not always contain all the compulsory information or do not comply with the standard forms established by the relevant regulatory provisions. Moreover, in some cases, when the host CA asks for additional information from the home CA, the latter does not always reply or does it with an unjustified delay. These delays can impact financial institutions' access to the market and/or hamper the effective supervision of the financial institution in the host Member State (MS), thus exposing consumers to the risk of detriment. Moreover, the lack of or delay in receiving a reply can undermine the effectiveness of ongoing cooperation between home and host CAs.

26. Furthermore, the passport notification itself does not give any information on whether a financial institution will in practice offer all, some or none of the products and services for which it had been authorised to and has applied for passporting, resulting in a situation where neither the home nor the host CA knows to what extent the cross-border provision of services will actually and effectively take place.

27. Other CAs point out that it can be difficult to identify the most appropriate contact points at CA level for the exchange of supervisory information, especially on an informal basis. This lack of awareness of where and to whom to address an enquiry is even greater among supervisory staff

at CAs, as they might be unfamiliar with the procedures for the exchange of information at the EU level and might be located in units not responsible for licensing/passporting.⁴

Distribution of responsibilities between home and host supervisors

28. Some CAs are of the view that the allocation of responsibilities between home and host supervisors remains unclear in many instances and that additional clarity would be very useful for both market participants and supervisors. This lack of clarity is in part due to the different approaches that the various EU directives and regulations have taken in assigning responsibilities, both across the securities, insurance and banking sectors and within each sector. While some legislation states that supervisory competence falls under the exclusive remit of the home MS, other legislation splits the responsibilities between home and host MS.

29. Additionally, some CAs remark that, as host CAs, they are encountering problems in delivering the appropriate level of protection to their consumers when services are being provided to them by financial institutions established in other Member States under the FPS because they do not have the appropriate tools available.

30. Furthermore, some CAs consider that it is increasingly difficult to determine whether activities carried out through digital means are taking place across borders and fall within the FPS or the ROE and therefore which CA is responsible for supervising how the service is provided. Moreover, some CAs also highlight the difficulties in supervising the activities of those financial institutions that provide services in one MS by making use of both the ROE, with an established branch, and the FPS. Similar challenges arise when the service is provided under the FPS by a branch located in another MS and not by the parent company. In these cases, it is very difficult for CAs to determine which part of the financial institution is providing the service, as financial institutions are not always able to clearly relate their activities properly to the different methods of providing services across borders, the FPS and the ROE.

31. In addition, some CAs point out that the absence of a body of law covering general conduct matters in the banking sector and insufficient harmonisation of Level 1 provisions governing the marketing and sale of banking services and products results in an unclear distribution of responsibilities between home and host CAs.

Supervision and enforcement

Misleading cross-border marketing of complex financial products to retail clients

32. Some CAs note that there is an increase in the number of financial services providers offering, on a cross-border basis, products not suitable for consumers. The marketing of such products to customers is often very aggressive. These financial institutions typically offer such products online under the FPS and in the language of the host MS.

⁴ In the insurance sector, CAs are required by EIOPA BoS Decision to keep up to date on EIOPA's extranet the details of the contact point, including name, email address and phone number.

Use of third parties

33. Some CAs highlight the use by financial institutions, and investment firms in particular, of third parties different from tied agents or other regulated entities, especially when providing services under the FPS. In such cases, financial institutions with a limited or no physical presence in the host MS sign introducing broker agreements with local entities or individuals to help them in distributing their products and services.
34. However, these third parties sometimes provide regulated services that are allowed to be provided by tied agents or branches. As there is no obligation for the financial institution to notify the use of these third parties (which is different from the requirements applicable to tied agents), it is more difficult for the home and host CAs to supervise how the financial institution is operating.
35. Some CAs also mention that, in their view, some home CAs do not assess sufficiently the organisation and resources of financial institutions when they apply for authorisation to passport their services under the ROE, especially in cases where financial institutions intend to make use of third parties to provide those services. This phenomenon, as well as the above-mentioned increase in the aggressive marketing of complex and unsuitable products to consumers in host MSs, is related to the issue of prioritising supervision of national markets that is explained below.

Prioritisation of supervision of national markets

36. Some CAs note that, in their view, there can be a risk of prioritising supervision of domestic markets. In such circumstances, prioritising the supervision of financial institutions' activities in the home MS, following its risk assessment framework, may lead to less attention being paid to the activities carried out in other Member States. This is especially noted in cases of 'jurisdiction shopping', that is, where a financial institution decides to locate itself in a MS in which it does not carry out business but only passports out into other MSs. In these situations, where a financial institution does not actively market or sell products in the home MS but does so in the host MS only, the home CA may have little incentive, or prima facie reason, to supervise the conduct of the financial institution.
37. An example of such a risk of prioritisation is the cross-border marketing and selling of undertakings for the collective investment in transferable securities (UCITS), where, given that the supervisory competence of the host CA is limited, it may be difficult for the CA to determine whether or not the UCITS or their management companies are acting in line with the relevant regulatory requirements, despite having grounds for suspicion. The host CA would probably need the help of the home CA to make such a determination, but if the UCITS are only marginally offered and sold in the home MS, the home CA might have little incentive to assign adequate resources to the supervision of such UCITS.
38. Some CAs also highlight that home CAs should strengthen the verification that the activities performed by a financial institution on a cross-border basis comply with the scope of activities

specified in the passport notification to the host CA. A related issue mentioned is that the home CAs should increase their involvement in the initial enquiries conducted by host CAs. In their view, the home CA should not only ask for explanations from the financial institution under its remit and send the responses to the host CA, but should also verify those explanations and express its view on them to the host CA.

39. With regard to the use of third party agents, some CAs note difficulties experienced by host CAs in relation to engagement with home CAs in cases where local managing general agents (insurance intermediaries) are appointed by an insurance undertaking authorised in another jurisdiction to provide services in the host MS. Although it has been noted by EIOPA and CAs that collaboration on cross-border issues has improved following the adoption of the EIOPA Decision on the collaboration of the insurance supervisory authorities, there is still room for improvement in the operational application of that Decision across certain CAs.

Regulatory gaps and regulatory arbitrage

Regulatory arbitrage

40. Some CAs indicate that there are still considerable differences in the implementation of EU legislation at national level due to the insufficient harmonisation and/or clarity of some EU laws, hindering a level playing field for financial institutions and creating the risk of regulatory arbitrage. Uneven approaches by CAs can lead to financial institutions moving to jurisdictions where there is a more lenient approach in order to seek the required authorisation.
41. Some CAs also note circumstances where a financial institution that markets and sells products in a host MS might not be subject to the same conditions and/or restrictions as a local financial institution that is also marketing and selling the same products in that jurisdiction. On the basis that the local financial institution has been authorised by the home CA, restrictions and/or conditions can be applied to that financial institution at the authorisation stage in relation to the financial services that the financial institution is offering. However, the host CA cannot impose those same restrictions and/or conditions on the passporting financial institution. Accordingly, the situation can arise where two financial institutions, offering and providing the same products and services to the same consumers and in the same jurisdiction, could be subject to more or less strict regulatory requirements.

Legal mapping

42. The ESAs carried out a general mapping of the main Level 1 provisions for the different financial institutions operating across borders. The EU directives and regulations that the ESAs have reviewed are:

- Insurance Distribution Directive⁵ (IDD);
- Solvency II (SII) Directive;⁶
- Markets in Financial Instruments Directive II⁷ (MiFID2);
- Markets in Financial Instruments Regulation⁸ (MiFIR);
- Packaged Retail and Insurance-based Investment Products (PRIIPs) Regulation;⁹
- Undertakings for the collective investment in transferable securities (UCITS) Directive¹⁰ (UCITS4);
- Alternative Investment Funds Managers (AIFM) Directive¹¹ (AIFMD);
- Payment Services Directive II¹² (PSD2);
- E-money Directive¹³ (EMD);
- Capital Requirements Directive¹⁴ (CRD4) and Capital Requirements Regulation (CRR);¹⁵

⁵ Directive (EU) 2016/97 of the European Parliament and of the Council, of 20 January 2016 on insurance distribution (recast), OJ L 26, 2.2.2016, p. 19-59, at the following website: <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32016L0097>

⁶ Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II), at the following website: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32009L0138>

⁷ Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, OJ L 173, 12.6.2014, p. 349-496, at the following website: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014L0065>

⁸ Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012, OJ L 173, 12.6.2014, p. 84-148, at the following website: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014R0600>

⁹ Regulation (EU) No 1286/2014 of the European Parliament and of the Council of 26 November 2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs), OJ L 352, 9.12.2014, p. 1-23, at the following website: <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32014R1286>

¹⁰ Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS), OJ L 302, 17.11.2009, p. 32-96, at the following website: <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32009L0065>

¹¹ Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010, OJ L 174, 1.7.2011, p. 1-73, at the following website: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32011L0061>

¹² Directive (EU) 2015/2366 of the European Parliament and of the Council on payment services in the internal market, of 25 November 2015, OJ L 337, p. 35-127 at the following website: <http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32015L2366>

¹³ Directive 2009/110/EC of the European Parliament and of the Council of 16 September 2009 on the taking up, pursuit and prudential supervision of the business of electronic money institutions amending Directives 2005/60/EC and 2006/48/EC and repealing Directive 2000/46/EC, OJ L 267, 10.10.2009, p. 7-17, at the following website: <http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:32009L0110>

¹⁴ 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. 338-436, at the following website: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32013L0036>

¹⁵ 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,

- Mortgage Credit Directive¹⁶ (MCD);
- Payment Accounts Directive¹⁷ (PAD);
- European Venture Capital Funds (EuVECA) Regulation;¹⁸
- European Social Entrepreneurship Funds (EuSEF) Regulation;¹⁹
- European Long-Term Investment Funds (ELTIF) Regulation;²⁰
- Consumer Protection Cooperation Regulation²¹ (CPCR).

43. The ESAs reviewed the aforementioned legislation with the aim of identifying those provisions that are related to i) definition of cross-border provision of services; ii) passporting (services and products); iii) notifications and exchange of information; iv) home and host responsibilities; v) information reporting requirements for statistical/supervisory purposes for host CAs; vi) simultaneous exercise of the FPS and the ROE; vii) exercise of the FPS by a branch or another establishment in a host MS for providing services in a third MS; and viii) 'jurisdiction shopping'.

44. In addition, the ESAs also considered the relevant delegated regulation and technical standards arising from the Level 1 texts reviewed and the European Commission interpretative Communications whenever deemed appropriate, as they are key to understanding how secondary legislation and other relevant material have been used to develop some of the requirements contained in the Level 1 texts.

45. The identified provisions of the different legal acts that have been reviewed are presented in Annex 1 of this report, and the analysis of those provisions can be found in Annex 2.

46. The ESAs have noted that some of the most recent legislation reviewed, such as MiFID2, PSD2, the PRIIPs Regulation or the IDD, which started to apply at different points in time in 2018, will be helpful for tackling some of the above-mentioned issues that CAs have to face. In particular, the ESAs consider that the product intervention powers conferred on ESMA, the EBA and CAs in Title VII of the MiFIR, and on EIOPA and CAs in Chapter III of the PRIIPs Regulation, are very powerful and useful tools for protecting European consumers, as shown in the recent measures

27.6.2013, p. 1-337, at the following website: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32013R0575>

¹⁶ Directive no. 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010, OJ L 60, 28.2.2014, p. 34-85, at the following website: <http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:32014L0017>

¹⁷ Directive 2014/92/EU of the European Parliament and of the Council of 23 July 2014 on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features, OJ L 257, 28.8.2014, p. 214-246, at the following website: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32014L0092>

¹⁸ Regulation (EU) No 345/2013 of the European Parliament and of the Council of 17 April 2013 on European venture capital funds, OJ L 115, 25.4.2013, p. 1-17, at the following website: <http://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex%3A32013R0345>

¹⁹ Regulation (EU) No 346/2013 of the European Parliament and of the Council of 17 April 2013 on European social entrepreneurship funds, OJ L 115, 25.4.2013, p. 18-38, at the following website: <http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:32013R0346>

²⁰ Regulation (EU) 2015/760 of the European Parliament and of the Council of 29 April 2015 on European long-term investment funds, OJ L 123, 19.5.2015, p. 98-121, at the following website: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32015R0760>

²¹ Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 cooperation between national authorities responsible for the enforcement of consumer protection laws, OJ L 364, 9.12.2004, p. 1-11, at the following website: <http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:32004R2006>

adopted by ESMA on the marketing, sale and distribution of contracts for differences (CFDs) and binary options to retail investors.

Cooperation between home and host CAs

47. As part of the legal mapping exercise, the ESAs also reviewed the above-mentioned EU directives and regulations with the aim of identifying those provisions that are related to cooperation between home and host CAs. In addition, the ESAs also considered the relevant technical standards, guidelines and any other Level 3 texts arising from the reviewed Level 1 texts whenever deemed appropriate, as they are key to understanding how secondary legislation and other relevant material have been used to develop some of the requirements contained in the Level 1 texts.
48. All the Level 1 texts contain some provisions regarding cooperation between CAs. However, the number of provisions and the level of detail of those provisions differ considerably from one text to another. On the one hand, some of the directives have numerous and very detailed requirements on cooperation, the details of which are then developed further still in some cases by technical standards or guidelines, such as MIFID2, PSD2, EMD and UCITS.
49. On the other hand, other Level 1 texts, such as the IDD, the SII Directive, the AIFMD, and the EuVECA, EuSEF, ELTIF and PRIIPs Regulations, have a more generic reference requiring CAs to cooperate and exchange information, but there are also Level 3 texts in these fields, such as EIOPA's BoS Decision on the cooperation of CAs under the IDD,²² EIOPA's BoS Decision on the collaboration of the insurance supervisory authorities,²³ EIOPA's BoS Decision on the collaboration of the CAs with regard to the application of the new EU Directive on the activities and supervision of institutions for occupational retirement provision (IORP II)²⁴ or the ESMA Guidelines on cooperation arrangements and information exchange.²⁵
50. The remainder of the Level 1 texts reviewed either contain only general provisions encouraging CAs to cooperate and exchange information and have no Level 2 or Level 3 measures under them related to cooperation and exchange of information, such as the MCD and the PAD, or those provisions are focused on cooperation and exchange of information for prudential matters, as in the case of CRD4.

²² EIOPA's BoS Decision on the cooperation of competent authorities under the IDD, at the following website: <https://eiopa.europa.eu/Publications/Protocols/Decision%20on%20the%20Cooperation%20of%20Competent%20Authorities.pdf>

²³ EIOPA's BoS Decision on the collaboration of the insurance supervisory authorities (the previous 'General Protocol'), at the following website: <https://eiopa.europa.eu/Publications/Protocols/EIOPA-BoS-17-013%20Decision%20of%20the%20Board%20of%20Supervisors%20on%20the%20collaboration%20of%20insurance%20supervisory%20authorities.pdf>

²⁴ https://eiopa.europa.eu/Publications/Protocols/EIOPA-BoS-18-320_Decision_IORPII_cross-border_collaboration.pdf

²⁵ ESMA Guidelines on cooperation arrangements and information exchange between competent authorities and between competent authorities and ESMA (ESMA/2017/298), at the following website: <https://www.esma.europa.eu/document/guidelines-cooperation-arrangements-and-information-exchange-between-competent-authorities>

51. In short, there are currently detailed binding requirements on cooperation in the majority of Level 1 texts or in Level 2/Level 3 texts that further develop them, and especially, in the securities and insurance sectors. However, there is room for developing more detailed requirements on cooperation in relation to business conduct and consumer protection matters.
52. A table with an overview of the relevant provisions in the aforementioned reviewed texts and an in-depth description of the main requirements on cooperation between home and host CAs for the different legal texts can be found in Annex 3 and Annex 4, respectively.
53. During the review of the current requirements in place for cooperation between home and host CAs, the ESAs have identified some principles that are embedded in the majority of Level 1, Level 2 and Level 3 texts and that could be the basis for any further development, especially in the banking sector. These principles are stated in the next section of the report.
54. In addition to the requirements for cooperation currently in place, the ESAs have identified supervisory convergence in general, in consumer protection as well as other areas, as a strategic priority. Supervisory convergence does not mean a one-size-fits-all approach but rather a process for achieving comparable supervisory practices in Member States that are based on compliance with the EU rules and which lead to consistent supervisory outcomes.
55. The supervisory convergence activities of the ESAs include, among others, the elaboration of guidelines, opinions and best practices, questions and answers, active participation in colleges of supervisors, the facilitation of peer reviews, the development of practical supervisory handbooks to support CAs in supervision, the organisation of dedicated training and workshops, and other similar tools to facilitate cooperation between home and host CAs. Examples of some of the most recent and relevant supervisory convergence activities that have contributed to fostering cooperation and alignment of approaches between CAs and the ESAs are as follows:
- The CFD Task Force was established by ESMA to deal with general convergence issues concerning the distribution of CFDs and other speculative products.
 - In the period 2015-2018 ESMA coordinated the establishment and the management of a Joint Group that was set up to analyse and solve issues emerging from investment firms in one jurisdiction that undertook significant cross-border activities relating to CFDs and binary options in other EU countries and that were identified as the cause of significant investor detriment in those jurisdictions.
 - The development of cooperation platforms in those cases where supervision of cross-border business cannot be supported by colleges of supervisors, the use of proto-colleges where insurance undertakings are licensed in different European Economic Area Member States and are owned by the same or by several related undertakings located in third countries, and the provision of recommendations to CAs and group supervisors following bilateral interaction and work with colleges were among the measures used by EIOPA to facilitate cooperation among CAs to effectively address together, from both home and host perspectives, issues of a cross-border nature arising with specific undertakings and cases.

- Additionally, EIOPA's BoS Decision on the collaboration of the insurance supervisory authorities has underlined the importance in the insurance sector in view of the business models of insurance undertakings of certain specific information exchanges between home and host CAs (notably, in previous rejections and withdrawals of authorisation when considering the application of an insurance undertaking for authorisation and during the notification phase, and in cases where an applicant intends to operate exclusively or almost exclusively on a FPS basis). The BoS Decision further underlines the importance of CAs asking applicants for specific information in these situations.

High-level principles for cooperation between home and host CAs

56. These high-level principles are intended to be applied by home and host CAs when cooperating in relation to the supervision of a financial institution providing services on a cross-border basis within the EU. As mentioned in Annex 4 of this report, these principles are also already reflected in some existing CA arrangements, such as those under the ESMA Guidelines on cooperation arrangements and information exchange.

57. CAs should aim to comply with these high-level principles without prejudice to the applicable sectoral legislation or cooperation agreements currently in place. Should any EU legal act require different cooperation arrangements or information exchange, whether directives/regulations, technical standards or guidelines, the applicable EU legislation will prevail.

Contact points

- i. CAs should communicate with each other in a timely manner via the designated contact points, as indicated in the registers kept by the ESAs, to make requests for cooperation or exchange of information under the relevant sectoral legislation. Communications between home and host CAs should be in a language customary in the financial sector, or in any other language accepted by both home and host CAs. The ESAs' registers should include information, as indicated by the CA, about the language(s) in which each CA accepts documents in respect of the notification of cross-border activities.

Requests for cooperation or exchange of information

- ii. In order to address any issues affecting consumers arising as a result of the activity of a financial institution providing financial services in a MS under the FPS or the ROE, the host CA should be able to make a request for cooperation or exchange of information, in addition to the information part of the notification as set out in the EU legislation or in specific sectoral agreements reached by ESAs (such as EIOPA's BoS Decisions²⁶), to the home CA of the financial institution, both at the point of notification and on an ongoing basis.
- iii. The host CA should make its requests in writing but, if the host CA considers the request to be urgent, the host CA could make the request for cooperation or exchange of information verbally, provided that subsequent confirmation of the request is made in writing, unless the home CA agrees otherwise. Information should be transmitted by electronic means where possible and in a format acceptable to the relevant CAs. The CAs should agree on any applicable requirements and the security of data transmission.

Reply to a request for cooperation or exchange of information

- iv. Where the home CA receives a request for cooperation or exchange of information, the home CA should acknowledge receipt of the request as soon as possible. Both home and host CA

²⁶ For further details and the most relevant principles of EIOPA's BoS Decisions, please refer to 'Cooperation between home and host CAs' in this report.

should agree on the frequency with which the home CA should update the host CA on its handling of the request and on the date when it expects to provide a response.

- v. Where the home CA is not in a position to provide the additional information requested by the host CA, it will inform the host CA and give its reasons. In the specific case of MiFID2, where there is a specific provision under Article 83 on refusal to cooperate, the home CA should notify the host CA of its decision and should explain the reasons for its decision.

Request to open an investigation or carry out an on-site inspection

- vi. Where the home CA decides to carry out on-site inspections in a branch situated in another MS, it should communicate this to the host CA in advance, indicating, among other elements, the reason(s) and the programme for the investigation. Without prejudice to the home CA, the host CA should be allowed to take part in the on-site inspection and provide its views on its scope and outcomes.
- vii. In order to address any issues affecting consumers arising as a result of the activity of a financial institution providing financial services in a MS under the FPS or the ROE, the host CA should be able to request that the home CA opens an investigation or carries out an on-site inspection on its territory.
- viii. Where the home CA receives a request from the host CA to open an investigation or carry out an inspection of a financial institution headquartered in the home MS, the home CA should assess the information provided by the host CA in order to understand and assess the merits of opening an investigation or carrying out an inspection. In doing so, the home CA should take into account the duty to cooperate in the best interest of consumers. The home CA may also consider starting a dialogue with the host CA in order to better understand the request from the host CA and the issues and rationale behind its request.
- ix. Where the home CA receives a request to open an investigation or carry out an on-site inspection, the home CA should consider:
 - a. carrying out the investigation or on-site inspection itself;
 - b. allowing the host CA to carry out the investigation or on-site inspection itself;
 - c. allowing auditors or experts to carry out the investigation or on-site inspection.
- x. The host CA should be able to request that its own officials accompany the officials of the home CA when the latter decides to carry out the investigation or on-site inspection itself. In the same way, where the home CA decides to allow the host CA to carry out the investigation or on-site inspection, the home CA should be able to request that its own officials accompany the officials carrying out the investigation or on-site inspection.
- xi. The home CA should be able to refuse a request to open an investigation or carry out an on-site inspection. Where the home CA decides to refuse such a request, the home CA should notify the host CA of its decision and should explain the reasons for its decision.

- xii. Where legally possible, in order to investigate compliance with the legal provisions applicable in the host MS, the host CA can carry out on its own initiative an on-site inspection, it should communicate this to the home CA in advance, indicating, among other elements, the reason(s) and the programme for the investigation. The home CA should be allowed to take part in the on-site inspection.
- xiii. After concluding the on-site inspection, CAs should communicate the observations from the investigation and any consequences that may arise.

Settlement of disagreements

- xiv. CAs should endeavour to resolve any disagreements between them. However, where a CA considers that, in a particular matter, cooperation with the CA of another MS does not comply with this general procedure or that it disagrees with any decision made by the other CA, it may refer the matter to the corresponding ESA and request its assistance in accordance with the mediation role conferred on the ESA in its founding regulations.

Conclusions and suggestions

58. The ESAs arrived at a number of observations about how the legislation reviewed above tackles the main issues that CAs are facing with regard to the supervision of cross-border provision of retail financial services. In addition, the ESAs would like to draw the attention of EU co-legislators and CAs to a number of suggestions that might help in addressing the issues CAs are facing.

Observations

Responsibilities of the home and host CAs

59. As a general principle, the home CAs are responsible for the prudential supervision of a financial institution and the host CAs have some differing responsibilities for supervising compliance with conduct of business rules, including those related to information to be provided to consumers and transparency of conditions.

60. With regard to home CAs, they are usually responsible for licensing entities, ensuring compliance with organisational requirements and enforcing the relevant regulatory provisions. In addition, according to certain sectoral EU legislation, home CAs are also responsible for enforcing compliance with rules related to customer protection by those financial institutions that provide financial services on a cross-border basis under the FPS. Although home CAs are close to the financial institutions providing such services from their jurisdictions, home CAs might face some difficulties in discharging this task due to language barriers that might exist, the distance from the host country, not having detailed knowledge of the specificities of the market and of the key people involved in the market, and the lack of uniform harmonised provisions in some areas (e.g. the banking sector), which may result in the home CA not being familiar with all the applicable provisions set out under the host MS legislation.

61. The responsibilities allocated to host CAs differ across the different Level 1 texts, but generally the host CA is responsible for monitoring compliance with information and transparency of conditions requirements and other rules of conduct for branches or any other entity operating under the ROE within the host MS. In addition, most of the pieces of legislation reviewed foresee that in emergency situations, the host CAs may take precautionary measures against a financial institution providing financial services in the host MS under the FPS or the ROE, where immediate action is necessary to address a threat to the consumers in the host MS.

62. Finally, there is no general Level 1 text harmonising the conduct rules that are applicable to the provision of banking activities. While a number of directives include conduct rules for specific banking activities and products, i.e. PSD2, the MCD, the PAD and the Consumer Credit Directive²⁷ (CCD), or only for specific circumstances, such as the Distance Marketing of Financial Services

²⁷ Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102, OJ L 133, 22.5.2008, p. 66-92, at the following link: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:32008L0048>

Directive²⁸ (DMFSD), there are no generally applicable provisions applying to the offering of banking services to customers.

Simultaneous exercise of the FPS and the ROE

63. In accordance with the European Commission interpretative Communications, there is no restriction to the simultaneous exercise of the FPS and the ROE in any of the Level 1 texts reviewed. Therefore, a financial institution with a head office located in one MS can provide financial services in another MS by making use, at the same time, of the FPS and the ROE, provided that the financial institution is able to relate the service provided to one of the methods of carrying out business, either the FPS or the ROE.

Exercise of the FPS by a branch or another establishment in a host MS for providing services in a third MS

64. In accordance with the European Commission interpretative Communication on the Second Banking Directive, the FPS may also be exercised by a branch to provide services in a third MS, provided that the branch's home MS sends a notification to the CA of that third MS.

Digital provision of financial services

65. The ESAs have noted that the cross-border provision of retail financial services to customers is growing quickly and that there are more and more cases where financial institutions are providing their services to customers residing in other MSs, especially through digital means and using digital platforms. Therefore, there are more and more situations where CAs need to assess whether the provision of the services is taking place across borders and falls within the FPS or the ROE.

66. However, there is no definition of cross-border provision of financial services in any of the Level 1 texts reviewed. The ESAs have noticed that the legislation reviewed lacks clear criteria for determining the location where the service is provided, which is key to determining whether there is cross-border provision of services and whether it falls under the FPS and the ROE, and, as a consequence, which CA is responsible for its supervision. This lack of clear criteria is even more problematic when services and products are provided through digital means.

Jurisdiction shopping

67. There are no provisions in the majority of the Level 1 texts reviewed that address the topic of 'jurisdiction shopping'. However, in order to avoid abuses of the ROE, three of the most recent directives, MiFID2, the MCD and PSD2, contain statements or requirements so that a financial

²⁸ Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC, OJ L 271, 9.10.2002, p. 16-24, at the following link:
<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32002L0065>

institution be authorised in a MS where it carries out at least part of its business. In particular, MiFID2 has a statement of this in one of its recitals and PSD2 in one of its articles.

Passporting

68. The passporting procedures set out in the Level 1 texts reviewed are quite similar, with the exception of the ones in the UCITS Directive. The ESAs consider that the differences detected in UCITS are justified due to the specificities of the Directive, where both the product itself and the management company can be passported.

69. However, the passport notifications do not give any information on whether the products and/or services for which passporting has been applied, once authorised, will be in practice provided by the financial institution. Furthermore, sectoral legislation does not usually oblige the financial institution to provide information on the distribution channels that are to be used, in particular when the FPS is at stake.

Information reporting requirements for statistical/supervisory purposes for host CAs

70. Five directives (MiFID2, PSD2, UCITS, CRD4, Solvency II), of all the reviewed Level 1 texts, allow host CAs to require information from branches, notably for statistical purposes. A few more Level 1 texts, including the five mentioned, allow host CAs to require information for supervisory purposes, although CRD4 does so only for prudential matters.

Cooperation

71. All the Level 1 texts reviewed have some provisions regarding cooperation and exchange of information between CAs. However, the number and level of detail of those provisions differ considerably from one text to another. Some directives, such as MiFID2, UCITS and PSD2 have numerous and very detailed requirements on cooperation, which have been further developed by technical standards, while others have only more generic Level 1 provisions requiring CAs to cooperate and exchange information. In addition, there are also other requirements for cooperation, in the form of guidelines or BoS decisions, which apply and develop some of the generic provisions on cooperation under certain Level 1 texts.

Use of third parties

72. The majority of the Level 1 texts reviewed allow the use of third parties by financial institutions to provide financial services across borders, provided that these third parties are registered and that they follow the passporting procedures set out in the legislation. This may create issues with regard to proving the legal liability of the principal for its agents in areas where the EU legislation is not harmonised, and even where it is harmonised (e.g. MiFID2), there may be issues with regard to differing registration and professional competence requirements, which have repercussions in supervision.

73. The ESAs have noted that many financial institutions also make use of third parties for marketing and selling their services. These activities are not usually subject to any licensing or registration

requirements and, therefore, are not subject to the direct supervision of any authority. However, the fact that some MSs allow this type of third party may cause regulatory arbitrage, when a financial institution makes use of the third party in a MS where they are not permitted to do so.

The ESAs' product intervention powers

74. The ESAs have noted that the recent product intervention powers conferred on ESMA and the EBA under the MiFIR, and on EIOPA under the PRIIPs Regulation, have been a very powerful and useful tool for protecting European consumers and have contributed to a significant decrease in misleading cross-border marketing of complex financial products to consumers, as in the case of CFDs and binary options.

Suggestions and recommendations for EU co-legislators

Responsibilities of the home and host CAs

75. The ESAs note that there is no general Level 1 text harmonising the conduct rules applicable to institutions carrying out business, especially in the banking sector. The ESAs are of the view that this situation might create differences in the level of regulation at national level due to insufficient harmonisation, thereby creating the risk of regulatory arbitrage. The ESAs encourage the EU co-legislators to consider reinforcing the harmonisation of the Level 1 provisions governing conduct of business rules in the banking sector and clearly setting out and allocating responsibilities between the home and the host CAs with regard to the application of consumer protection and conduct of business provisions. This would promote cross-border business, increase consumer welfare, simplify the legal framework and facilitate supervision, as financial institutions would have to comply with similar rules in all EU MSs.

76. The ESAs also note that, while some legislation specifically requires the home CA to assess the organisation and resources of a financial institution before granting a passport for the ROE, no legislation reviewed in this report requires such an assessment before granting a passport for the FPS. The ESAs encourage the EU co-legislators to introduce such a requirement, including with regard to the use of any third party in another MS, in the light of the rapid growth of the provision of online services to consumers using the FPS.

Simultaneous exercise of the FPS and the ROE

77. The ESAs are of the view that, the simultaneous exercise of the FPS and the ROE by a financial institution may be confusing for customers, as often they are not able to distinguish whether the service is provided by the branch or any other type of establishment in the host MS or by the parent company providing services in the host MS under the FPS. The ESAs also consider that this distinction may also create difficulties for some supervisors, as financial institutions might not be able to relate clearly the services they provide to the two different methods of carrying out their business. This situation creates uncertainty about whether the host or the home CA is responsible.

78. The ESAs encourage the EU co-legislators to study the feasibility of two potential ways that may be useful to overcome these difficulties. One way would be to study the legal possibility to consider that, unless proven otherwise, a service provided to retail clients in a host MS, where a branch of the provider exists and the branch has notified the provision of the same service and has been in contact with retail clients, shall be deemed to be provided by the branch. Another way could be to require the financial institution simultaneously exercising the FPS and the ROE to specify and clearly disclose to the customer whether the respective services are provided under the FPS or the ROE, for the sake of legal clarity.

Exercise of the FPS by a branch or another establishment in a host MS to provide services in a third MS

79. In accordance with the European Commission interpretative Communication on the FPS and the interest of the general good in the Second Banking Directive, the FPS may be exercised by a branch to provide services in a third MS, provided that the branch's home MS sends a notification to that third MS. The ESAs are of the view that this could also be confusing for customers in the third MS, as they might not be aware that the service is provided by a branch of a host MS and not by the head office that is located in the home MS. In addition, the identification of the CA responsible for the conduct of business supervision can also be difficult. The ESAs encourage the EU co-legislators to think about possible ways to overcome these difficulties.

Digital provision of financial services

80. The ESAs arrived at the view that the lack of a definition of cross-border provision of financial services leaves the door open for a range of interpretations that could result in protracted and unsuccessful discussions between CAs and/or between CAs and financial institutions. The ESAs consider that, under the applicable EU law, it is not always clear whether activities carried out through digital means fall within the remit of the FPS or of the ROE. The ESAs are of the view that more clarity on this issue cannot be provided through Level 3 work and that such clarity should be provided by the EU co-legislators, especially in the light of the growing phenomenon of the digitalisation of financial services.

Jurisdiction shopping

81. The ESAs encourage EU co-legislators to follow the path laid out in MiFID2, the MCD and PSD2, which contain statements or requirements aimed at avoiding that a financial institution is authorised when it opts for the legal system of one MS to evade stricter standards in force in another MS within the territory of which it intends to carry out or does carry out the greater part of its activities.

Passporting

82. The ESAs note that the passport notifications do not give any information on whether the products and/or services for which passporting has been applied, once authorised, are in

practice provided by the financial institution in the host MS. Furthermore, sectoral legislation does not usually oblige financial institutions to provide information about the distribution channels that they intend to use, in particular about where the services are provided under the FPS.

83. The ESAs are of the view that it would be desirable that host CAs receive this kind of information. This could be done either by amending the current passporting regimes or by allowing host CAs to require periodical reporting from those financial institutions that have passported into their territories. The ESAs encourage EU co-legislators to keep this in mind when amending current legislation or developing any new legislation.

84. The ESAs consider that, in line with provisions already in place in some sectors, CAs should be able to withdraw granted authorisations if the relevant services or activities are not provided for a given period.²⁹ Furthermore, any material changes to the conditions under which the initial authorisation was granted should be notified to CAs in order to enable timely supervisory action.³⁰

Information reporting requirements for statistical, market monitoring and supervisory purposes for host CAs

85. The ESAs are of the view that allowing host CAs to require information, not only for direct supervisory purposes but also for information/statistical purposes and for the purposes of better market monitoring, would help the host CAs to have a better understanding of how financial services are provided in the host MS. The ESAs encourage EU co-legislators to keep this in mind when amending current legislation or developing any new legislation.

Cooperation

86. The ESAs are of the view that the current requirements on cooperation and exchange of information offer a basis to allow smooth cooperation between home and host CAs, notably in the securities and insurance sectors, although there may be room for improvement in view of information needed for sound market monitoring (see section above on statistical and supervisory information). There is also some room for further development in the banking sector.

87. The ESAs also encourage the EU co-legislators to take into account the high-level principles on cooperation, identified and specified in this report, as the basis for any new legislation that might be developed in the future or when reviewing or amending the current legislation, in the absence of any more developed and detailed requirements on cooperation.

Use of third parties

²⁹ See Article 8(1) of MiFID II providing that CAs may withdraw an authorisation if an investment firm does not make use of it within 12 months or has not provided the services for the preceding six months.

³⁰ See Article 21(2) of MiFID II requiring investment firms to make such a notification.

88. The ESAs have noted that many financial institutions make use of third parties for marketing their services. The third parties performing those activities are often not subject to any licensing or registration requirements and, therefore, are not subject to the direct supervision of any authority. The ESAs encourage the EU co-legislators to consider the convenience of establishing any kind of requirements for these parties and, in particular, to reflect on the extent to which introducing broker agreements could be permitted by Member States.

Suggestions and recommendations for CAs

89. The suggestions and recommendations below are addressed to CAs and should be considered unless they contradict applicable sectoral legislation or cooperation agreements.

Passporting

90. The ESAs encourage CAs to liaise with them so that the ESAs keep an updated register of the contact points and means of communication accepted by the different CAs, in accordance with the relevant rules, for the passporting notifications.

91. The ESAs also encourage CAs to make use of electronic means for their notifications and to use functional email boxes for their contact points, as functional email boxes avoid the usual updating of email addresses when personal email addresses are used and have the advantage that several staff of the CA can have access to the information.

Cooperation

92. The ESAs are of the view that the current requirements on cooperation and exchange of information provide a basis for smooth cooperation between home and host CAs, notably in the securities and insurance sectors, although further improvements to ensure sufficient information is available for the purposes of sound market monitoring might be anticipated. There is some room for further development in the banking sector, which the EBA will assess in order to determine how it can be improved. The ESAs encourage CAs to work with the EBA to find possible ways for improving the framework for cooperation in consumer protection and conduct matters between CAs in the banking sector.

93. The ESAs also consider — as mentioned earlier in view of the scope of this report — that having a good legal framework is a necessary but not a sufficient condition for smooth cooperation and exchange of information between home and host CAs. The ESAs are of the view that cooperation is built upon confidence and that CAs must take all opportunities to engage with one another, including in the context of fora provided by the ESAs and on specific cases. The ESAs also encourage CAs to make use of the mediation role conferred on them by their founding regulations whenever a disagreement arises between them.

94. Finally, the ESAs have identified some principles on cooperation that are embedded in the majority of Level 1, Level 2 and Level 3 texts. These principles are detailed in Annex 4. The ESAs encourage CAs to follow these principles in the absence of any detailed requirements on cooperation in the applicable legislation.

Home CA supervision of third parties assisted by host CA cooperation

95. The ESAs encourage home CAs to assess, in a more in-depth way, the organisation and resources put in place by those financial institutions that intend to passport their services into other MSs under the ROE and/or to make use of third parties to help them to distribute and provide their services in other MSs. Moreover, the ESAs encourage home CAs to increase their attention to the supervision of those financial institutions that intend to passport their services into other MSs under the FPS, especially when these financial institutions make use of third parties in the host MS.

96. At the same time, the ESAs encourage host CAs to engage in ongoing dialogue and cooperation with home CAs in order to facilitate the supervision of these passporting financial institutions and, where relevant, of these third parties.

Annexes

Annex 1: Provisions identified in the EU legislation reviewed

Legislation	Passporting (services and products)
IDD	<ul style="list-style-type: none"> • Article 4: Exercise of the freedom to provide services • Article 5: Breach of obligations when exercising the freedom to provide services
SII	<ul style="list-style-type: none"> • Recital 11; Recital 129 • TITLE I, CHAPTER VIII — Right of establishment and freedom to provide services • Article 145: Conditions for branch establishment • Article 146: Communication of information • Article 147: Prior notification to the home Member State • Article 148: Notification by the home Member State • Article 149: Changes in the nature of the risks or commitments • Article 150: Compulsory insurance on third party motor vehicle liability • Article 151: Non-discrimination of persons pursuing claims • Article 152: Representative • Article 153: Language • Article 154: Prior notification and prior approval • Article 155: Insurance undertakings not complying with the legal provisions • Article 156: Advertising • Article 157: Taxes on premiums • Article 158: Reinsurance undertakings not complying with the legal provisions • Article 159: Statistical information on cross-border activities • Article 160: Winding-up of insurance undertakings • Article 161: Winding-up of reinsurance undertakings • Article 184: Additional information in the case of non-life insurance offered under the right of establishment or the freedom to provide services • Article 185: Information for policy holders • Article 306: Rights acquired by existing branches and insurance undertakings
MiFID2	<ul style="list-style-type: none"> • Article 34: Freedom to provide investment services and activities

Legislation	Passporting (services and products)
	<ul style="list-style-type: none"> Article 35: Establishment of a branch
PRIIPs	<ul style="list-style-type: none"> Recital 24
PSD2	<ul style="list-style-type: none"> Article 28: Application to exercise the right of establishment and freedom to provide services
MCD	<ul style="list-style-type: none"> Recital 72 Recital 73 Article 32: Freedom of establishment and freedom to provide services by credit intermediaries
PAD	<p>Please note that this Directive does not include a regime that allows financial institutions to passport account services to another country. Payment service providers should already hold an authorisation to carry out cross-border services under PSD2, the E-money Directive or CRD4. These Directives also include the relevant regime that financial institutions need to comply with in order to passport any services or products into a different EU country.</p> <p>However, please note that the PAD includes, among others, rules to facilitate opening cross-border payment accounts for consumers (please see Article 1)</p> <ul style="list-style-type: none"> Article 1: Subject matter and scope
CRD4	<ul style="list-style-type: none"> Recital 19 Recital 20 Article 33: Credit institutions Article 34: Financial institutions Article 35: Notification requirement and interaction between competent authorities Article 36: Commencement of activities Article 39: Notification procedure
CRR	<ul style="list-style-type: none"> Article 4: Definitions
UCITS4	<p>SECTION 4: Freedom of establishment and freedom to provide services</p> <ul style="list-style-type: none"> Article 16 Article 17 Article 18 Article 19 Article 20 Article 21 <p>CHAPTER XI: Special provisions applicable to UCITS which market their units in Member States other than those in which they are established</p> <ul style="list-style-type: none"> Article 91 Article 92 Article 93

Legislation	Passporting (services and products)
	<ul style="list-style-type: none"> • Article 94 • Article 95 • Article 96
AIFMD	<ul style="list-style-type: none"> • Article 6: Conditions for taking up activities as AIFM • Article 33: Conditions for managing EU AIFs established in other Member States • Article 31: Marketing of units or shares of EU AIFs in the home Member State of the AIFM • Article 32: Marketing of units or shares of EU AIFs in Member States other than in the home Member State of the AIFM
EuVECA	<ul style="list-style-type: none"> • Article 14 • Article 15 • Article 16
EuSEF	<ul style="list-style-type: none"> • Article 15 • Article 17
ELTIF	<ul style="list-style-type: none"> • Article 5: Application for authorisation as an ELTIF • Article 31: Marketing of units or shares of ELTIFs
CPCR	Not relevant

Legislation	Other notifications and exchange of information
IDD	<ul style="list-style-type: none"> • Article 8: Breach of obligations when exercising the freedom of establishment • Article 13: Cooperation and exchange of information between the competent authorities of Member States
SII	<ul style="list-style-type: none"> • Recital 126 • Article 30: Supervisory authorities and scope of supervision • Article 65: Exchange of information between supervisory authorities of Member States • Article 137: Non-compliance with technical provisions • Article 138: Non-compliance with the solvency capital requirement • Article 139: Non-compliance with the minimum capital requirement • Article 140: Prohibition of free disposal of assets located within the territory of a Member State • Article 248: Rights and duties of the group supervisor and the other supervisors — college of supervisors
MiFID2	<ul style="list-style-type: none"> • Article 79: Obligation to cooperate • Article 80: Cooperation between competent authorities in supervisory activities, for on-site verifications or investigations • Article 81: Exchange of information
PRIIPs	<ul style="list-style-type: none"> • Article 5 • Article 17
PSD2	<ul style="list-style-type: none"> • Article 26: Exchange of information • Article 29: Supervision of payment institutions exercising the right of establishment and freedom to provide services • Article 30: Measures in case of non-compliance, including precautionary measures • Article 96: Incident reporting
MCD	<ul style="list-style-type: none"> • Article 9: Knowledge and competence requirements for staff • Article 33: Withdrawal of admission of credit intermediaries • Article 36: Obligation to cooperate
PAD	<ul style="list-style-type: none"> • Recital 50 • Article 22: Obligation to cooperate
CRD4	<ul style="list-style-type: none"> • Recital 17 • Article 50: Collaboration concerning supervision • Article 157: Collaboration concerning supervision
CRR	<ul style="list-style-type: none"> • Article 415: Reporting obligation and reporting format
UCITS4	<ul style="list-style-type: none"> • Article 17 • Article 18 • Article 101

Legislation	Other notifications and exchange of information
	<ul style="list-style-type: none"> • Article 105
AIFMD	<ul style="list-style-type: none"> • Article 31: Marketing of units or shares of EU AIFs in the home Member State of the AIFM • Article 32: Marketing of units or shares of EU AIFs in Member States other than in the home Member State of the AIFM • Article 33: Conditions for managing EU AIFs established in other Member States • Article 50: Obligation to cooperate • Article 53: Exchange of information relating to the potential systemic consequences of AIFM activity
EuVECA	<ul style="list-style-type: none"> • Article 22
EuSEF	<ul style="list-style-type: none"> • Article 23
ELTIF	<ul style="list-style-type: none"> • Article 35: Cooperation between competent authorities
CPCR	<ul style="list-style-type: none"> • Article 6: Exchange of information on request • Article 7: Exchange of information without request • Article 8: Requests for enforcement measures • Article 9: Coordination of market surveillance and enforcement activities

Legislation	Home responsibilities
IDD	<ul style="list-style-type: none"> • Article 3: Registration • Article 10: Professional and organisational requirements • Article 8: Breach of obligations when exercising the freedom of establishment
SII	<ul style="list-style-type: none"> • Recital 11 • Recital 18 • Recital 24 • Recital 86 • Recital 120 • Recital 123 • Recital 125 • Recital 126 • Recital 129 • Article 13: Definitions • Article 14: Principle of authorisation • Article 18: Conditions for authorisation • Article 21: Policy conditions and scales of premiums • Article 25: Refusal of authorisation • Article 26: Prior consultation of the authorities of other Member States • Article 30: Supervisory authorities and scope of supervision • Article 33: Supervision of branches established in another Member State • Article 38: Supervision of outsourced functions and activities • Article 39: Transfer of portfolio • Article 144: Withdrawal of authorisation • Article 146: Communication of information • Article 148: Notification by the home Member State • Article 149: Changes in the nature of the risks or commitments • Article 159: Statistical information on cross-border activities • Article 269: Adoption of reorganisation measures applicable law • Article 270: Information to the supervisory authorities • Article 273: Opening of winding-up proceedings information to the supervisory authorities • Article 277: Subrogation to a guarantee scheme • Article 279: Withdrawal of the authorisation

Legislation	Home responsibilities
MiFID2	<ul style="list-style-type: none"> • Recital 46 • Recital 90 • Article 4: Definitions • Article 5: Requirement for authorisation • Article 16: Organisational requirements
PRIIPs	<ul style="list-style-type: none"> • Recital 24 • Recital 25
PSD2	<ul style="list-style-type: none"> • Article 29: Supervision of payment institutions exercising the right of establishment and freedom to provide services • Article 30: Measures in case of non-compliance, including precautionary measures • Article 100: Competent authorities
MCD	<ul style="list-style-type: none"> • Recital 33 • Recital 69 • Article 9: Knowledge and competence requirements for staff • Article 29: Admission of credit intermediaries • Article 33: Withdrawal of admission of credit intermediaries • Article 34: Supervision of credit intermediaries and appointed representatives
PAD	<p>This Directive does not allocate tasks between home and host authorities. The reason for this approach might be that this Directive does not clearly set out a passporting regime for products or services.</p>
CRD4	<ul style="list-style-type: none"> • Recital 25 • Recital 27 • Article 41: Measures taken by the competent authorities of the home Member State in relation to activities carried out in the host Member State • Article 43: Precautionary measures • Article 44: Powers of home Member States • Article 49: Competence of the competent authorities of the home and host Member States • Article 50: Collaboration concerning supervision • Article 51: Significant branches • Article 52: On-the-spot checking and inspection of branches established in another Member State • Article 153: Measures taken by the competent authorities of the home Member State in relation to activities carried out in the host Member State • Article 155: Responsibility • Article 158: Significant branches
CRR	<ul style="list-style-type: none"> • Article 4: Definitions

Legislation	Home responsibilities
	<ul style="list-style-type: none"> • Article 101: Specific reporting obligations • Article 337: Own funds requirement for securitisation instruments • Article 415: Reporting obligation and reporting format
UCITS4	<ul style="list-style-type: none"> • Article 10 • Article 19 • Article 97 • Article 108 • Article 109 • Article 110
AIFMD	<ul style="list-style-type: none"> • Article 45: Responsibility of competent authorities in Member States • Article 31: Marketing of units or shares of EU AIFs in the home Member State of the AIFM • Article 32: Marketing of units or shares of EU AIFs in Member States other than in the home Member State of the AIFM • Article 33: Conditions for managing EU AIFs established in other Member States
EuVECA	<ul style="list-style-type: none"> • Article 14 • Article 18 • Article 19 • Article 21
EuSEF	<ul style="list-style-type: none"> • Article 15 • Article 17 • Article 19 • Article 20 • Article 22
ELTIF	<ul style="list-style-type: none"> • Article 6: Conditions for granting authorisation as an ELTIF • Article 32: Supervision by the competent authorities
CPCR	<p>Under case A: request for enforcement measures</p> <ul style="list-style-type: none"> i) to take all necessary enforcement measures to bring about the cessation or prohibition of the intra-Community infringement without delay; ii) in particular, to exercise the powers set out under Article 4(6) of the CPCR and any additional power granted to it under national law to bring about the cessation or prohibition of the intra-Community infringement; iii) to determine the enforcement measures to be taken in a proportionate, efficient and effective way. <p>Under case B: exchange of information on request:</p> <ul style="list-style-type: none"> i) to supply without delay any relevant information required to establish whether an intra-Community infringement has occurred or to establish whether there is a reasonable suspicion it may occur;

Legislation	Home responsibilities
	<p>ii) to undertake the appropriate investigations or any other necessary or appropriate measure to gather the required information, and to permit a competent official of the host authority to accompany its officials in the course of the investigation.</p> <p>Under case C: exchange of information without request: To notify other Member States and the Commission, supplying all necessary information, without delay when aware of an intra-Community infringement, or reasonably suspecting that such an infringement may occur.</p> <ul style="list-style-type: none"> • Article 3: Definitions

Legislation	Host responsibilities
IDD	<ul style="list-style-type: none"> • Article 5: Breach of obligations when exercising the freedom to provide services • Article 7: Division of competence between home and host Member States • Article 8: Breach of obligations when exercising the freedom of establishment • Article 9: Powers in relation to national provisions adopted in the interest of the general good
SII	<ul style="list-style-type: none"> • Recital 77 • Recital 85 • Recital 86 • Recital 126 • Recital 129 • Article 13: Definitions • Article 30: Supervisory authorities and scope of authorisation • Article 33: Supervision of branches established in another Member State • Article 150: Compulsory insurance on third party motor vehicle liability • Article 151: Non-discrimination of persons pursuing claims • Article 152: Representative • Article 153: Language • Article 154: Prior notification and prior approval • Article 155: Insurance undertakings not complying with the legal provisions • Article 156: Advertising • Article 157: Taxes on premiums • Article 158: Reinsurance • Article 189: Participation in national guarantee schemes
MiFID2	<ul style="list-style-type: none"> • Recital 90 • Article 4: Definitions • Article 85: Powers for host Member States • Article 86: Precautionary measures to be taken by host Member States
PRIIPs	<ul style="list-style-type: none"> • Recital 24 • Recital 25 • Article 5 • Article 17
PSD2	<ul style="list-style-type: none"> • Article 29: Supervision of payment institutions exercising the right of establishment and freedom to provide services • Article 30: Measures in case of non-compliance, including precautionary measures

Legislation	Host responsibilities
	<ul style="list-style-type: none"> Article 100: Competent authorities
MCD	<ul style="list-style-type: none"> Recital 33 Article 9: Knowledge and competence requirements for staff Article 32: Freedom of establishment and freedom to provide services by credit intermediaries Article 34: Supervision of credit intermediaries and appointed representatives
PAD	<p>This Directive does not allocate tasks between home and host authorities. The reason for this approach might be that this Directive does not clearly set out a passporting regime for products or services.</p>
CRD4	<ul style="list-style-type: none"> Recital 27 Recital 28 Article 52: On-the-spot checking and inspection of branches established in another Member State Article 153: Measures taken by the competent authorities of the home Member State in relation to activities carried out in the host Member State Article 154: Precautionary measures Article 156: Liquidity supervision Article 158: Significant branches Article 159: On-the-spot checks
CRR	<ul style="list-style-type: none"> Article 4: Definitions Article 101: Specific reporting obligations
UCITS4	<ul style="list-style-type: none"> Article 10 Article 14 Article 17 Article 92 Article 94 Article 97
AIFMD	<ul style="list-style-type: none"> Article 12: General principles Article 13: Remuneration Article 14: Conflicts of interest Article 32: Marketing of units or shares of EU AIFs in Member States other than in the home Member State of the AIFM Article 45: Responsibility of competent authorities in Member States
EuVECA	<ul style="list-style-type: none"> Article 16 Article 18
EuSEF	<ul style="list-style-type: none"> Article 17 Article 19

Legislation	Host responsibilities
ELTIF	<ul style="list-style-type: none"> Article 32: Supervision by the competent authorities
CPCR	<p>Note: host authority is typically the ‘applicant authority’ requesting mutual assistance, i.e. the national competent authority that makes a request for mutual assistance.</p> <p>Under cases A (request for enforcement measures) and B (exchange of information on request):</p> <p>i) to ensure that all requests for mutual assistance contain sufficient information to enable the home authority to fulfil the request, including any necessary evidence obtainable only in its territory;</p> <p>ii) to send its requests through the Single Liaison Office (SLO), which will forward it as deemed appropriate.</p> <p>Under case C (exchange of information without request):</p> <p>To notify other Member States and the Commission, supplying all necessary information, without delay, when aware of an intra-Community infringement, or reasonably suspecting that such an infringement may occur.</p>

Legislation	Cooperation between CAs
IDD	<ul style="list-style-type: none"> • Article 5: Breach of obligations when exercising the freedom to provide services • Article 7: Division of competence between home and host Member States • Article 8: Breach of obligations when exercising the freedom of establishment • Article 13: Cooperation and exchange of information between the competent authorities of Member States
SII	<ul style="list-style-type: none"> • Recital 117 • Recital 126 • Article 30: Supervisory authorities and scope of supervision • Article 33: Supervision of branches established in another Member State • Article 38: Supervision of outsourced functions and activities • Article 39: Transfer of portfolio • Article 65: Exchange of information between supervisory authorities of Member States • Article 144: Withdrawal of authorisation • Article 146: Communication of information • Article 159: Statistical information on cross-border activities • Article 248: Rights and duties of the group supervisor and the other supervisors - College of supervisors • Article 249: Cooperation and exchange of information between supervisory authorities • Article 270: Information to the supervisory authorities • Article 273: Opening of winding-up proceedings information to the supervisory authorities
MiFID2	<ul style="list-style-type: none"> • Article 79: Obligation to cooperate • Article 80: Cooperation between competent authorities in supervisory activities, for on-site verifications or investigations • Article 81: Exchange of information • Article 82: Binding mediation • Article 83: Refusal to cooperate
PRIIPs	<ul style="list-style-type: none"> • Article 20 • Article 22
PSD2	<ul style="list-style-type: none"> • Article 26: Exchange of information • Article 27: Settlement of disagreements between competent authorities of different Member States • Article 29: Supervision of payment institutions exercising the right of establishment and freedom to provide services • Article 30: Measures in case of non-compliance, including precautionary measures
EMD	Same as in PSD2

Legislation	Cooperation between CAs
MCD	<ul style="list-style-type: none"> Article 9: Knowledge and competence requirements for staff Article 36: Obligation to cooperate Article 37: Settlement of disagreement between competent authorities of different Member States
PAD	<ul style="list-style-type: none"> Article 22: Obligation to cooperate Article 23: Settlement of disagreements between competent authorities of different Member States
CRD4	<ul style="list-style-type: none"> Article 6: Cooperation within the European System of Financial Supervision Article 24: Cooperation between competent authorities Article 50: Collaboration concerning supervision Article 51: Significant branches Article 52: On-the-spot checking and inspection of branches established in another Member State Article 56: Exchange of information between authorities Set of Articles on consolidated supervision: Articles 111-127 Article 153: Measures taken by the competent authorities of the home Member State in relation to activities carried out in the host Member State Article 154: Precautionary measures Article 155: Responsibility Article 156: Liquidity supervision Article 157: Collaboration concerning supervision Article 158: Significant branches Article 159: On-the-spot checks
CRR	<ul style="list-style-type: none"> Article 21: Joint decisions on the level of application of liquidity requirements
UCITS4	<p><u>Regulated by Chapter XII, mainly Articles 101 and 108-110</u></p> <ul style="list-style-type: none"> Article 101 Article 105 Article 108 Article 109 Article 110
AIFMD	<ul style="list-style-type: none"> Article 50: Obligation to cooperate Article 53: Exchange of information relating to the potential systemic consequences of AIFM activity Article 54: Cooperation in supervisory activities Article 55: Dispute settlement
EuVECA	<ul style="list-style-type: none"> Article 22: Cooperation and exchange of information between NCAs and ESMA Article 24: Settlement in case of disagreements between NCAs

Legislation	Cooperation between CAs
EuSEF	<ul style="list-style-type: none"> • Article 23: Cooperation and exchange of information between NCAs and ESMA • Article 25: Settlement in case of disagreements between NCAs
ELTIF	<ul style="list-style-type: none"> • Article 35: Cooperation between competent authorities
CPCR	All the regulation is about cooperation.

Legislation		Information reporting requirements for statistical/supervisory purposes for host CAs
IDD	<ul style="list-style-type: none"> Article 7 	
SII	<ul style="list-style-type: none"> Recital 86 Article 33: Supervision of branches established in another Member State Article 137: Non-compliance with technical provisions Article 138: Non-compliance with the Solvency Capital Requirement Article 139: Non-compliance with the Minimum Capital Requirement Article 140: Prohibition of free disposal of assets located within the territory of a Member State Article 153: Language Article 154: Prior notification and prior approval Article 155: Insurance undertakings not complying with the legal provisions Article 159: Statistical information on cross-border activities 	
MiFID2	<ul style="list-style-type: none"> Article 85: Powers for host Member States 	
PRIIPs	<ul style="list-style-type: none"> Article 5 	
PSD2	<ul style="list-style-type: none"> Article 29: Supervision of payment institutions exercising the right of establishment and freedom to provide services 	
EMD	Same as in PSD2	
MCD	No provisions found	
PAD	No provisions found	
CRD4	<ul style="list-style-type: none"> Article 40: Reporting requirements Article 89: Country-by-country reporting Article 152: Reporting requirements 	
CRR	<ul style="list-style-type: none"> Article 101: Specific reporting obligations 	
UCITS4	<ul style="list-style-type: none"> Article 21 	
AIFMD	<ul style="list-style-type: none"> Article 46: Powers of competent authorities Article 45: Responsibility of competent authorities in Member States 	
EuVECA	No provisions found	
EuSEF	No provisions found	
ELTIF	No provisions found	
CPCR	No provisions found	



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Legislation	Use of third parties
IDD	<ul style="list-style-type: none"> • Article 3: Registration • Article 16: Restriction on use of intermediaries
SII	<ul style="list-style-type: none"> • Recital 12 • Recital 31 • Recital 37 • Recital 76 • Recital 120 • Recital 127 • Article 18: Conditions for authorisation • Article 34: General supervisory powers • Article 38: Supervision of outsourced functions and activities • Article 41: General governance requirements • Article 49: Outsourcing • Article 145: Conditions for branch establishment • Article 146: Communication of information • Article 148: Notification by the home Member State • Article 152: Representative • Article 184: Additional information in the case of non-life insurance offered under the right of establishment or the freedom to provide services
MiFID2	<ul style="list-style-type: none"> • Article 16: Organisational requirements • Article 23: Conflicts of interest • Article 29: Obligations of investment firms when appointing tied agents • Article 34: Freedom to provide investment services and activities • Article 35: Establishment of a branch
PRIIPs	<ul style="list-style-type: none"> • Article 13
PSD2	<ul style="list-style-type: none"> • Article 14: Registration in the home Member State • Article 19: Use of agents, branches or entities to which activities are outsourced • Article 28: Application to exercise the right of establishment and freedom to provide services
EMD	<ul style="list-style-type: none"> • Article 3: General prudential rules
MCD	<ul style="list-style-type: none"> • Article 29: Admission of credit intermediaries • Article 30: Credit intermediaries tied to only one creditor • Article 31: Appointed representatives

Legislation	Use of third parties
	<ul style="list-style-type: none"> Article 32: Freedom of establishment and freedom to provide services by credit intermediaries
PAD	No provisions found
CRD4	<ul style="list-style-type: none"> Article 65
CRR	<ul style="list-style-type: none"> Article 187: Risk management process and controls Article 190: Credit risk control
UCITS4	<ul style="list-style-type: none"> Article 13 Article 30
AIFMD	<ul style="list-style-type: none"> Article 20: Delegation Article 21: Depositary
EuVECA	<ul style="list-style-type: none"> Article 8
EuSEF	<ul style="list-style-type: none"> Article 8
ELTIF	No provisions found
CPCR	Not applicable

Annex 2: Analysis of the provisions identified in the legal mapping exercise

Definition of cross-border provision of services

97.No EU legislation reviewed by the ESAs has any definition of cross-border provision of financial services provided in any of the texts. This means that what is considered to be cross-border provision of retail financial services could be open to different interpretations in the different pieces of legislation and by the different CAs.

Passporting

98.First of all, it should be noted that passporting generally refers to activities at the moment of the entry into the market of the financial institution. The process for passporting the services/products from the home MS to the host MS is relatively similar across these texts. For example, an authorised financial institution that intends to carry out business for the first time in one MS or more under the FPS or when establishing a branch will inform the CA of its home MS.

99.Within a defined period of time after having been informed by the financial institution of its intention to passport under the ROE, usually between one and three months, the home CA, unless it has reasons to doubt the adequacy of the administrative structure or the financial situation of the financial institution, and taking into account the activities envisaged, is required to notify the CAs of the host Member States concerned of the intentions of the financial institution and will at the same time inform the financial institution concerned of that notification.

100. The host CA, within a defined period of time after receipt of the notification from the home CA, is required to communicate to the home CA any legal provisions that are applicable in its territory (for example, in the interest of the general good or in areas not harmonised in EU law). Additionally, the host CA is required to prepare itself for supervising the compliance of the financial institution with the rules under its responsibility, especially when the financial institution intends to establish a branch.

101. In the event of a change in any of the information originally communicated about the intention of the financial institution to start providing services in other Member States, such as the services envisaged, the financial institution is required to give written notice of that change to the CA of the home MS within a defined time, usually at least one month, before implementing the change. The CA of the host MS will also be informed of that change by the CA of the home MS.

102. However, there are two cases in which the passporting procedure is different. One of them is the passporting procedure under the UCITS Directive, which differs from those under the other

directives and regulations reviewed because, under this Directive, both the management company of the UCITS and the UCITS themselves can be passported. Moreover, UCITS are very standardised products and the level of detail of the information that must be notified is greater than in other cases. At the same time, and due to this high level of standardisation, the deadlines for the notifications are shorter.

103. The other case is the passporting regime for credit institutions under CRD4. In this case, as a result of the establishment of the Single Supervisory Mechanism (SSM), the passport procedure differs depending on whether the activities are to be passported inside or outside the euro SSM area, potentially implying the involvement of the European Central Bank (ECB).
104. Despite the similarities in the passporting procedures defined in the different legal acts reviewed, the ESAs note that the passport notification itself does not give any information on whether a financial institution will in practice actually offer all, some or none of the products and services for which it had been authorised and has applied for passporting. This results in a situation where both home and host do not know to what extent the cross-border provision of services that has been applied for by a financial institution is actually taking place.
105. Only the recently revised payment services directive, PSD2, introduced the requirement that the payment institution notifies the home CA of the date that it commences its activities through an agent or branch in the relevant host MS, and the home CA is required to inform the CA in the host MS accordingly. In addition, the EBA developed regulatory technical standards on passporting under PSD2 that are the basis of the Commission Regulation³¹ on passporting, in which the reporting template requires that when the payment institution commences its activities under the FPS and without any agents, it also communicates the intended date of the start of the provision of services in the host MS. This allows the host CA to know from which date the institution will start to provide certain services in the host MS and to have more information in order to allocate its resources for supervising institutions or to focus on certain areas, following a risk-based approach.

Notifications and exchange of information

106. The different directives and regulations reviewed contain provisions related to the exchange of information and cooperation between CAs. In accordance with these provisions, CAs of different Member States are required to cooperate with each other whenever necessary for the purpose of carrying out certain duties. CAs are required, inter alia, to render assistance to CAs of the other Member States. In particular, they are required to exchange information and cooperate in any investigation or other supervisory activities.
107. In order to facilitate the exchange of information and cooperation, some of the Level 1 legal acts require that Member States communicate to the Commission and to the other Member States

³¹ Commission Delegated Regulation (EU) 2017/2055 of 23 June 2017 supplementing Directive (EU) 2015/2366 of the European Parliament and of the Council with regard to regulatory technical standards for the cooperation and exchange of information between competent authorities relating to the exercise of the right of establishment and the freedom to provide services of payment institutions, OJ L 294, 11.11.2017, p. 1-25, at the following website: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32017R2055>

the names of the authorities that are designated to receive requests for exchange of information or cooperation.

108. Some directives, such as MiFID2 or PSD2, explicitly confer mandates on the respective ESAs to develop technical standards to establish standard forms, templates and procedures for the exchange of information and for specific ways of cooperation, including notifying on-site inspections or delegating the task of carrying out an inspection to another CA.
109. Other notifications that are common practice in the legislation reviewed are related to the withdrawal of the authorisation of a financial institution by the CA of the home MS. In this case, the latter has to notify the CA of the host MS of such a withdrawal as soon as possible.
110. In a similar way, where a CA has good reason to suspect that there are activities being carried out that are contrary to the provisions of a particular directive/regulation, and that they are being carried out by entities that are not subject to that CA's supervision in the territory of another MS, it is required to notify the CA of the other MS. In addition, in the event that the host CA takes any precautionary measures, it is required to inform the home CA.
111. One special case is the CPR, which establishes a specific mechanism for the exchange of information among authorities in the event of a suspected breach of the provisions of the applicable EU legislation falling within its scope of application. The PAD and the MCD are the only directives in scope of the CPR that fall within the ESAs' remit. However, only those infringements defined as 'widespread infringements' and/or 'widespread infringements with a Union dimension' (more than two MSs), are subject to the mechanisms of coordinated investigation and enforcement set out under Article 15 and following ones of the CPR.
112. In addition, as the PAD does not identify a specific regulated entity and does not contain a proper distribution of responsibilities between home and host authorities, the provisions in the Regulation could not be applied in practice for the case of the PAD.

Responsibilities of the competent authority in the home MS

113. As a general principle, the CAs of the home MS are responsible for the prudential supervision of a financial institution. They are also responsible for granting authorisation to the entities for setting up the organisational requirements and for the enforcement of obligations. The home CA is often, but not always, the one that has the power to take action against an entity if it infringes any provisions.
114. The CAs of the home MS are responsible for certain activities that can be very difficult to supervise from a distance, including but not limited to i) the provision of payment services under the FPS, and in particular, the supervision of the compliance with the provisions related to information requirements and transparency of conditions and the rights of payment service users; and ii) the supervision of the established minimum knowledge and competence requirements for creditors', credit intermediaries' and appointed representatives' staff under the MCD providing services in the host MS under the freedom to provide services. Home CAs may face difficulties when supervising compliance with rules by those financial institutions for

which they are responsible and that provide services in the host MS, mainly due to the distance from the host MS and the use of a different language.

Responsibilities of the competent authority in the host MS

115. The responsibilities of the CAs of the host MSs differ from one piece of legislation to another. However, there is one common principle in various directives/regulations. Where the host CA ascertains that an entity operating in its territory, the head office of which is in another territory, does not comply with some provisions, it has to notify the CA of the home MS. And if the actions of the home CA do not put an end to the irregular situation or, in emergency situations, where immediate action is necessary to address a threat to the interests of consumers, the host CA can take temporary precautionary measures. These precautionary measures must be appropriate and proportionate to their purpose of protecting against the threat and must be terminated when the threat has been addressed.
116. In what follows below, different responsibilities allocated to host CAs under the IDD, the SII Directive, the PRIIPs Regulation, MiFID2, the MCD, PSD2, UCITS4, the AIFMD and CRD4 are explained.
117. Under the IDD, the host CA is responsible for ensuring that the services provided by the establishment within its territory comply with the obligations related to information requirements and conduct of business rules (Chapter V) and the additional requirements in relation to insurance-based investment products (Chapter VI). Additionally, where an insurance, reinsurance or ancillary insurance intermediary's primary place of business is located in a Member State other than the home MS, the CA of that other MS may agree with the home CA to act as if it were the home CA with regard to the provisions of Chapters IV (organisational requirements), V, VI and VII (sanctions and other measures).
118. Moreover, the IDD does not affect the power of the host MS to take appropriate measures to prevent an insurance distributor established in another MS from carrying out an activity within its territory under the FPS (Article 5) or, where applicable, the ROE, where the relevant activity is entirely or principally directed towards the territory of the host MS, with the sole purpose of avoiding the legal provisions that would be applicable if that insurance distributor had its residence or registered office in the host Member State and, in addition, where its activity seriously endangers the proper functioning of insurance and reinsurance markets in the host Member State with respect to the protection of consumers (Article 8).
119. Under the SII Directive (Article 155), where the host CA establishes that an insurance undertaking with a branch or pursuing business under the FPS in its territory is not complying with the legal provisions applicable to it in that MS, it will require the insurance undertaking concerned to remedy such irregularity. Where the insurance undertaking concerned fails to take the necessary action, the host CA will inform the home CA accordingly. Where, despite the measures taken by the home MS or because those measures prove to be inadequate or are lacking in that MS, the insurance undertaking persists in violating the legal provisions in force in the host MS, the host CA may, after informing the home CA, take appropriate measures to prevent or penalise further irregularities, including, in so far as is strictly necessary, preventing

that undertaking from continuing to conclude new insurance contracts within the territory of the host MS. Insurance undertakings should submit to the host CAs all documents requested of them, to the same extent that insurance undertakings with a head office in that MS are also obliged to submit.

120. Under the PRIIPs Regulation, in turn, Article 17 stipulates that the CA of the MS where the product is marketed is responsible for the supervision of the marketing of that PRIIP, but not the key investor information document itself, and has the right to suspend the marketing of a PRIIP within its territory in cases of non-compliance with the Regulation. The CA may prohibit or restrict the marketing, distribution or sale of insurance-based investment products or insurance-based investment products with certain specified features, or a type of financial activity or practice of an insurance or reinsurance undertaking, on the grounds that they give rise to significant investor protection concerns or pose a threat to the orderly functioning and integrity of financial markets or the stability of the financial system in one MS.
121. Furthermore, under MiFID2, and in accordance with Articles 85 and 35, host CAs are responsible for the monitoring of the conduct of business standards set by the host MS that apply to investment firms, and in particular to i) general principles and information to clients; ii) assessment of suitability and appropriateness and reporting to clients; iii) obligation to execute orders on terms most favourable to the client; and iv) client order handling rules.
122. MiFID2 also sets out precautionary measures to be taken by the host CA. Article 86 provides that where the host CA ascertains that an investment firm that has a branch within its territory infringes the legal or regulatory provisions adopted in that MS pursuant to those provisions of MiFID2 that confer powers on the host Member State's CA, the host CA will require the investment firm concerned to put an end to its irregular situation. If the investment firm concerned fails to take the necessary steps, the CAs of the host Member State will take all appropriate measures to ensure that the investment firm concerned puts an end to its irregular situation.
123. Under the MCD, Article 9 sets out that the host MS is responsible for establishing the minimum knowledge and competence requirements applicable to the staff of a branch through which a creditor or credit intermediary provides its services within the territory of another MS. The host MS, in accordance with Article 32, is also responsible for indicating to the credit intermediary the conditions under which, in areas where the EU law is not harmonised, those activities are to be carried out in the host MS.
124. PSD2, in its Article 100 provides that the host CA is responsible for monitoring compliance with the provisions of the national law transposing Title III (transparency of conditions and information requirements) and Title IV (rights and obligations in relation to the provision and use of payment services). Moreover, in accordance with Article 29, the host CA can also require that payment institutions having agents or branches within their territories report to them periodically on the activities carried out in their territories for information or statistical purposes, and when they operate via branches or agents under the ROE, for monitoring compliance with the provisions of the national law transposing Titles III and IV of PSD2. The

details of these requirements were mandated to be developed by the EBA in the form of regulatory technical standards (RTS).

125. Under UCITS4, Article 17 provides that the CA of a management company's host MS is responsible for supervising compliance of a management company that pursues activities through a branch in the host MS using the rules drawn up by the host MS. These are rules of conduct related to the following principles: i) a management company acts honestly and fairly in conducting its business activities in the best interests of the UCITS it manages; ii) it acts with due skill, care and diligence, in the best interests of the UCITS; iii) it employs effectively the resources and procedures that are necessary; and iv) it tries to avoid conflicts of interest.
126. Additionally, in accordance with Article 97, where UCITS are marketed in its territory, the host CA is competent to supervise that the UCITS take the necessary measures to ensure that facilities are available in that MS for making payments to unit-holders, repurchasing or redeeming units and making available the information that UCITS are required to provide. The host CA is also responsible for supervising that UCITS provide to investors within its territory all the information and documents that it is required to provide in its home MS.
127. The AIFMD, in its Article 45, provides that the host CA is responsible for supervising compliance of the AIFM with similar conduct of business rules where the AIFM manages and/or markets AIFs through a branch in the host MS. In these cases, the host CA supervises that an AIFM i) acts honestly and fairly with due skill, care and diligence in conducting its business activities; ii) acts in the best interests of the AIF or the investors of the AIFs that it manages; iii) employs effectively the resources and procedures that are necessary; and iv) tries to avoid conflicts of interest.
128. In the banking sector, CRD4, in its Title V, allocates responsibilities between the home and host CAs for the supervision of credit institutions that operate across borders, only in relation to the prudential aspects of their business. In accordance with Article 52, the host CAs have the power to carry out, on a case-by-case basis, on-the-spot checks and inspections of the activities carried out by branches of institutions on their territory and to require information from a branch about its activities and for supervisory purposes, where they consider it relevant for reasons of stability of the financial system in the host MS.
129. Additionally, in accordance with Article 50, where an institution authorised under the CDR4 operates in one or more Member States other than that in which its head office is situated, the CAs of the Member States concerned will scollaborate closely in order to supervise the activities. They will supply one another with all the information concerning the management and ownership of such institutions that is likely to facilitate their supervision and the examination of the conditions for their authorisation. They will also supply all the information that is likely to facilitate the monitoring of institutions, in particular with regard to liquidity, solvency, deposit guarantee, the limiting of large exposures, other factors that may influence the systemic risk posed by the institution, administrative and accounting procedures and internal control mechanisms. However, it should be noted that, with the establishment of the SSM, these provisions are partially altered, as the activities are streamlined through the interaction between the ECB and the national CAs.

130. Finally, in the CRR, Article 101 provides that, where an institution has a branch in another MS, the host CAs will receive reports on a semi-annual basis for each property market within the EU to which the institutions are exposed.
131. To sum up, the responsibilities allocated to CAs in the host MS differ across the different Level 1 texts reviewed. However, the majority of these texts confer on the host CAs, at least where a branch is involved, some responsibilities for compliance with conduct rules, especially those related to the information to be provided to customers and to the transparency of conditions. Importantly, some of the more recent directives that have replaced former ones, such as MiFID2 or PSD2, have given additional powers and/or enhanced access to information to host CAs, suggesting a slight change in the approach of the EU co-legislators in recent years. In addition to the responsibilities allocated to host CAs under the different EU legislation bodies, some host MSs might have conferred on the host CAs additional powers in some sectors under national law.

Simultaneous exercise of the FPS and the ROE

132. The EU legislation which has been reviewed by the ESAs does not restrict the simultaneous exercise of the FPS and the ROE in any of the texts. The European Commission interpretative Communication on the freedom to provide services and the interest of the general good in the Second Banking Directive,³² published in 1997, and the Commission interpretative Communication on the freedom to provide services and the general good in the insurance sector,³³ published in 2000, aim to provide some interpretative guidance on these matters.
133. Both communications, still valid, reflect the principles laid down by the European Court of Justice (ECJ) at the time of drafting and set out the Commission's position regarding the application of those principles to the Second Banking Directive and the Third Insurance Directive. Pursuant to these communications, the Commission considers that there is nothing that prevents a credit institution or an insurance undertaking from carrying out its activities under the FPS and, at the same time, under the ROE, even if the same activities are involved. However, the credit institution or insurance undertaking has to be able to clearly relate the activity concerned to one of the methods of carrying out business, either the FPS or the ROE.
134. However, there seems to be a change in the approach by the EU co-legislators, which is corroborated by the recent Commission proposals on the taxation of significant digital presence,³⁴ including the presumption of establishment if certain quantitative criteria relating to the online services are met. This new approach is intended to address the issue of online

³² Commission interpretative Communication — Freedom to provide services and the interest of the general good in the Second Banking Directive, OJ 97/C 2019/02 10.07.1997, at the following link:

<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=OJ%3AC%3A1997%3A209%3ATOC>

³³ Commission Interpretative Communication — Freedom to provide services and the general good in the insurance sector, OJ C 43, 16.2.2000, p. 5-27, at the following link:

[http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32000Y0216\(01\)](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32000Y0216(01))

³⁴ Proposal for a Council Directive laying down rules relating to the corporate taxation of a significant digital presence, COM(2018) 147 final, at the following link:

https://ec.europa.eu/taxation_customs/sites/taxation/files/proposal_significant_digital_presence_21032018_en.pdf

Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services, COM(2018) 148 final, at the following link:
https://ec.europa.eu/taxation_customs/sites/taxation/files/proposal_common_system_digital_services_tax_21032018_en.pdf

services whose importance warrants their service being regarded as part of the host MS's economy. Although it would be premature to conjecture about future developments, this approach could have implications for the division of supervisory tasks between the home and host CAs if the presumed establishment were to be regarded as amounting to a branch.

Exercise of the FPS by a branch or another establishment in a host MS for providing services in a third MS

135. The EU legislation that has been reviewed by the ESAs does not contain any provisions in relation to those cases where a financial institution has established a branch in a MS and the branch provides services under the FPS in another MS of the EU that is different from the home MS of the institution and from the host MS where the branch is located. All the provisions identified in the reviewed rules set out the conditions for the passporting of services and/or products under either the FPS or the ROE.
136. However, in the Commission Interpretative Communication³⁵ on the freedom to provide services and the interest of the general good in the Second Banking Directive from 1997, the Commission considered that the FPS may be exercised by a branch for providing services in a third MS, provided that the branch's home MS, that is, the home MS of the parent institution, sends a notification to the CA of that third MS.

Information reporting requirements for statistical/supervisory purposes for host CAs

137. In the IDD, there are no specific provisions on reporting requirements for statistical or supervisory purposes for host CAs. However, as the host CA is responsible for monitoring compliance with the obligations specified in Chapter V (information requirements and conduct of business rules) and Chapter VI (additional requirements in relation to insurance-based investment products) of the IDD for branches, the host CA may be able to require branches to provide information on obligations under those chapters.
138. In the SII Directive, Article 159 lists the reporting requirements for statistical purposes that insurance undertakings will communicate to the home CA, which then submits such information to the host CAs. There are also concrete communications required to take place between the home and host CAs in cases of non-compliance with certain prudential requirements. Additionally, in accordance with Article 155 and in order to investigate compliance with the legal provisions of the host MS also applicable to cross-border activities, any insurance or reinsurance undertaking operating through a branch or the FPS can be requested to communicate to the host CA any documents the provision of which would have been compulsory if requested from an undertaking with its head office in that host MS.
139. PSD2, in Article 29, stipulates that host CAs may require payment institutions, the head office of which is located in another MS, that have agents or branches within the host MS to report to

³⁵ Commission interpretative Communication — Freedom to provide services and the interest of the general good in the Second Banking Directive, OJ 97/C 2019/02 10.07.1997, at the following link: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=OJ%3AC%3A1997%3A209%3ATOC>

them periodically on the activities carried out in the host MS. These reports can be required for information or statistical purposes and, to the extent that the branches and agents conduct their business under the ROE, to monitor compliance with the provisions of the national law transposing Title III (Transparency of conditions and information requirements for payment services) and Title IV (Rights and obligations in relation to the provision and use of payment services) of PSD2.

140. MiFID2, in Article 85, sets out that host CAs may, for statistical purposes, require all investment firms with branches within their territories to report to them periodically on the activities of those branches. MiFID2 also allows host CAs to require branches of investment firms to provide the information necessary for the monitoring of their compliance with the standards set by the host MS that apply to them under Article 35(8) of MiFID2, mainly on i) general principles and information to clients; ii) assessment of suitability and appropriateness and reporting to clients; iii) obligation to execute orders on terms most favourable to the client; and iv) client order handling rules.
141. Under the UCITS Directive, Article 21 provides that the CA of a management company's host MS may, for statistical purposes, require all management companies with branches within its territory to report periodically on their activities in the host MS. In addition, a management company's host MS may require management companies pursuing business within the host MS, through a branch or under the FPS, to provide the information necessary for the monitoring of their compliance with the rules under the responsibility of the CA of the management company's host MS that apply to them.
142. The AIFMD does not contain any specific provision on reporting requirements for statistical or supervisory purposes for host CAs. The reporting obligations set out in Article 24 refer to the home CA. However, in accordance with Article 45 of the Directive, the host CA may require an AIFM managing or marketing AIFs in its territory, whether or not through a branch, to provide the information necessary for the supervision of the AIFM's compliance with the applicable rules.
143. CRD4, in accordance with Article 40, allows the host CA to require all credit institutions having branches within its territory to report to it periodically on their activities in the host MS. These reports can be required only for information or statistical purposes, for assessing whether a branch is significant in accordance with Article 51(1) of CRD4, or for supervisory purposes in accordance with the powers of the host CA, which in this Directive are limited to certain prudential matters.
144. In addition, Article 89 of CRD4 specifies that Member States shall require each institution to disclose annually, by MS and by third country in which it has an establishment, information on a consolidated basis for the financial year on i) name, nature of activities and geographical location; ii) turnover; iii) number of employees on a full-time-equivalent basis; iv) profit or loss before tax; v) tax on profit or loss; and vi) public subsidies received.
145. The CRR also contains prudential reporting obligations. Article 101 specifies that institutions have to report on a semi-annual basis some specific data on exposures for which an institution has recognised immovable residential property as collateral for each national property market.

These data have to be reported to the home CA of the relevant institution, but where an institution has a branch in another MS, the data relating to the branch must also be reported to the host CA.

146. In the PRIIPs Regulation, there is no periodical reporting requirement for information, statistical or supervisory purposes for the host CA. The closest provision to such periodical reporting is a MS option that can be found in Article 5 that allows a MS to require the ex ante notification of the key information document by the PRIIP manufacturer, or the person selling a PRIIP, to the CA for the PRIIPs marketed in that MS.

147. Finally, the MCD, the PAD, and the EuVECA, EuSEF, and ELTILF Regulations do not contain any provisions for any periodical reporting for statistical or supervisory purposes for the host CA.

Use of third parties

148. The IDD, in Article 3, sets out that insurance, reinsurance and ancillary insurance intermediaries have to register with the home CA. The IDD, in accordance with Article 16, also provides that insurance and reinsurance undertakings can only use the insurance and reinsurance distribution services of registered intermediaries. In addition, the IDD, in Chapter III, allows insurance intermediaries to exercise the FPS and the ROE when they intend to carry out business in another MS. Where the intermediary establishes a permanent presence in another MS it is treated in the same way as a branch, even where the presence does not take the form of a branch, but consists merely of an office managed by the intermediary's own staff or by a person who is independent but has permanent authority to act for the intermediary as an agency would.

149. The SII Directive sets strict requirements on outsourcing (Articles 38, 42 and 49), representatives (Article 152) and claims representatives appointed pursuant to Article 4 of Directive 2000/26/EC. Outsourcing requirements shall apply to people with the given authority to underwrite business or settle claims in the name and on account of the insurance undertaking.

150. Article 19 of PSD2 provides that a payment institution can carry out business through agents, who act on behalf of the payment institution in providing payment services. PSD2 specifies, in Article 14, that payments institutions have to register the agents through which they carry out business. In addition, in accordance with Article 19, payment institutions are allowed to provide payment services via agents exercising the FPS and the ROE.

151. The EMD lays down, in Article 3, that an e-money institution can distribute and redeem electronic money through natural or legal persons, the so-called distributors, which act on their behalf. The EMD stipulates that, where an e-money institution wishes to distribute e-money in another MS by making use of distributors, it has to follow the procedure set out in PSD2. Additionally, in accordance with the same Article, e-money institutions provide payment services via agents, in the same way as is set out for payment institutions in PSD2. In any case, neither agents nor distributors are allowed to issue e-money.

152. In addition to outsourcing arrangements, MiFID2 specifically provides in Article 29 that an investment firm is allowed to appoint tied agents for promoting its services, soliciting business or receiving orders from clients and transmitting them, placing financial instruments and

providing advice in respect of financial instruments and services offered by the investment firm. In accordance with the same Article, tied agents have to register in the public register of the MS where they are established. Article 29 also stipulates that Member States have the option to adopt provisions for tied agents that are more stringent than those set out in the Directive or to add further requirements for tied agents registered within their jurisdiction. Finally, MiFID2 allows an investment firm to carry out business in another MS by making use of tied agents, including those registered in the home MS, when notified, under the FPS (in accordance with Article 34) and the ROE (in accordance with Article 35).

153. The UCITS Directive, in Article 13, sets out the conditions under which a management company can delegate one or more of its functions to third parties, if the law of the management company's home MS allows this delegation. The liability of the management company is not affected by the delegation of any functions to third parties. In accordance with Article 30, similar conditions apply to investment companies that delegate functions to a third party.
154. The AIFMD, in Article 20, lays down the conditions under which an AIFM can delegate to third parties the task of carrying out functions on its behalf. In accordance with Article 21, depositories are also allowed, if certain conditions are met, to delegate the safe-keeping of assets of the AIF.
155. CRD4 and the CRR have few references to agents or third parties. Article 65 of CRD4 lays down that CAs have the power to require information from third parties to whom some entities have outsourced operational functions or activities. The CRR refers only to i) reviews of the risk management processes that can be conducted by an internal independent unit or by an independent external third party (Article 187); and ii) institutions that outsource some tasks related to credit risk control, such as producing reports from the institution's rating system, that must have access to all relevant information from the third party that is necessary for examining compliance with the requirements. The CAs may perform on-site examinations to the same extent as within the institution (Article 190).
156. The MCD regulates the activity of credit intermediaries, which are therefore regulated entities themselves. However, tied credit intermediaries could be regarded as third parties, similar to tied agents in MiFID2. In accordance with Article 29, credit intermediaries have to be admitted by the home CA to carry out all or part of the credit intermediation activities or to provide advisory services as set out in the MCD. All admitted credit intermediaries have to be registered with the home CA. In addition, Article 31 lays down that Member States can allow a credit intermediary to appoint representatives. In those Member States where appointed representatives are allowed, they have to be registered in the public register in the MS where they are established.
157. In accordance with Article 32, a credit intermediary admitted by its home CA can carry out its activities and provide services covered by the admission in any other MS, provided that the activities the credit intermediary intends to carry out in the host MS are covered by the admission. However, credit intermediaries are not allowed to provide their services in relation to credit agreements offered by non-credit institutions to consumers in those MSs where such non-credit institutions are not allowed to operate. Appointed representatives cannot provide

advisory services in Member States where such appointed representatives are not allowed to operate.

158. The only reference to third parties in the EuVECA and EuSEF Regulations can be found in Article 8 of both regulations. In accordance with these Articles, where a manager of a qualifying venture capital fund or qualifying social entrepreneurship fund delegates functions to third parties, the manager's liability towards the qualifying venture capital fund, social entrepreneurship or investors therein remains unaffected.

159. Finally, the PRIIPs Regulation, the PAD and the ELTIF Regulation do not contain references to third parties or agents.

Jurisdiction shopping

160. During the analysis of the different pieces of legislation that are part of the legal mapping exercise, the ESAs came across several recitals and provisions in PSD2, the MCD and MiFID2 that should be highlighted in this report, considering the issue of divergent implementations of EU law into national law, which weakens the single market, and considering the issues of risk of prioritising the supervision of national markets referred to above, which diminishes the effectiveness of EU law.

161. Firstly, Recital 36 of PSD2 reads:

'In order to avoid abuses of the right of establishment, it is necessary to require that the payment institution requesting authorisation in the Member State provide at least part of its payment services business in that Member State.'

Pursuant to Article 11(3) of PSD2:

'A payment institution which, under the national law of its home Member State is required to have a registered office, shall have its head office in the same Member State as its registered office and shall carry out at least part of its payment service business there',

and pursuant to Article 29(3) of PSD2:

'The competent authorities shall provide each other with all essential and/or relevant information, in particular in the case of infringements or suspected infringements by an agent or a branch, and where such infringements occurred in the context of the exercise of the freedom to provide services. In that regard, the competent authorities shall communicate, upon request, all relevant information and, on their own initiative, all essential information, including on the compliance of the payment institution with the conditions under Article 11(3).'

162. Secondly, Recital 77 of the MCD reads:

'In order to ensure the effective supervision of credit intermediaries by competent authorities, a credit intermediary which is a legal person should be admitted in the Member State in which it has its registered office. A credit intermediary which is not a legal person

should be admitted in the Member State in which it has its head office. In addition, Member States should require that a credit intermediary's head office always be situated in its home Member State and that it actually operates there.'

Pursuant to Article 29(5) of the MCD:

'Member States shall ensure that:

(a) any credit intermediary which is a legal person has its head office in the same Member State as its registered office if under its national law it has a registered office;

(b) any credit intermediary which is not a legal person or any credit intermediary which is a legal person but under its national law has no registered office has its head office in the Member State in which it actually carries on its main business.'

163. Thirdly, pursuant to Recital 46 of MiFID2:

'The principles of mutual recognition and of home Member State supervision require that the Member States' competent authorities should not grant or should withdraw authorisation where factors such as the content of programmes of operations, the geographical distribution or the activities actually carried on indicate clearly that an investment firm has opted for the legal system of one Member State for the purpose of evading the stricter standards in force in another Member State within the territory of which it intends to carry out or does carry out the greater part of its activities. An investment firm which is a legal person should be authorised in the Member State in which it has its registered office. An investment firm which is not a legal person should be authorised in the Member State in which it has its head office. In addition, Member States should require that an investment firm's head office is always situated in its home Member State and that it actually operates there.'

164. Against this background it seems that the EU co-legislators are moving increasingly in a direction that requires that a financial institution locates in a MS where it carries out at least part of its business. While in MiFID2 this principle was only introduced in a recital, the EU co-legislators have moved to legally binding provisions as the more recently amended PSD2 shows in Article 11(3).

Annex 3: Summary of the main requirements on cooperation and exchange of information between CAs

Summary of the main requirements on cooperation and exchange of information between CAs

Directive or Regulation	Level 1	Level 2	Level 3 or other agreement
MiFID2	<p>Article 79: Obligation to cooperate</p> <p>Article 80: Cooperation between competent authorities in supervisory activities, for on-site verifications or investigations</p> <p>Article 81: Exchange of information</p> <p>Article 82: Binding mediation</p> <p>Article 83: Refusal to cooperate</p>	<p>Commission Delegated Regulation (EU) 2017/586 of 14 July 2016 with regard to RTS for the exchange of information between competent authorities when cooperating in supervisory activities, on-the-spot verifications and investigations</p> <p>Commission Implementing Regulation (EU) 2017/980 of 7 June 2017 laying down ITS with regard to standard forms, templates and procedures for cooperation in supervisory activities, for on-site verifications, and investigations and exchange of information between competent authorities</p>	
PSD2	<p>Article 26: Exchange of information</p> <p>Article 27: Settlement of disagreements between competent authorities of different Member States</p> <p>Article 29: Supervision of payment institutions exercising the right of establishment and freedom to provide services</p> <p>Article 30: Measures in case of non-compliance, including precautionary measures</p>	<p>RTS on the framework for the cooperation and exchange information between competent authorities in the home and host Member States</p>	
EMD	Same as PSD2	<p>RTS on the framework for the cooperation and exchange information between competent authorities in the home and host Member States</p>	
IDD	<p>Article 5: Breach of obligations when exercising the freedom to provide services</p> <p>Article 7: Division of competence between home and host Member States</p> <p>Article 8: Breach of obligations when exercising the freedom of establishment</p> <p>Article 13: Cooperation and exchange of information between the competent authorities of Member States</p>		Luxembourg Protocol
SII	<p>Article 30: Supervisory authorities and scope of supervision</p> <p>Article 33: Supervision of branches established in another Member State</p> <p>Article 137: Non-compliance with technical provisions</p> <p>Article 138: Non-compliance with the Solvency Capital Requirement</p> <p>Article 139: Non-compliance with the Minimum Capital Requirement</p> <p>Article 146: Communication of information</p>	<p>Commission Delegated Regulation (EU) 2015/35 of 10 October 2014 supplementing Directive 2009/138/EC of the European Parliament and of the Council on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) – Recital 139, Article 354</p>	Decision on the collaboration of the insurance supervisory authorities

Directive or Regulation	Level 1	Level 2	Level 3 or other agreement
	<p>Article 148: Notification by the home Member State</p> <p>Article 155: Insurance undertakings not complying with the legal provisions</p> <p>Article 158: Reinsurance undertakings not complying with the legal provisions</p> <p>Article 159: Statistical information on cross-border activities</p> <p>Article 160: Winding-up of insurance undertakings</p> <p>Article 161: Winding-up of reinsurance undertakings</p>		Decision on the collaboration of the competent authorities with regard to the application of the IORP II Directive
CRD4	<p>Article 6: Cooperation within the European System of Financial Supervision</p> <p>Article 24: Cooperation between competent authorities</p> <p>Article 50: Collaboration concerning supervision</p> <p>Article 51: Significant branches</p> <p>Article 52: On-the-spot checking and inspection of branches established in another Member State</p> <p>Article 56: Exchange of information between authorities</p> <p>Set of articles on consolidated supervision: Articles 111-127</p> <p>Article 153: Measures taken by the competent authorities of the home Member State in relation to activities carried out in the host Member State</p> <p>Article 154: Precautionary measures</p> <p>Article 155: Responsibility</p> <p>Article 156: Liquidity supervision</p> <p>Article 157: Collaboration concerning supervision</p> <p>Article 158: Significant branches</p> <p>Article 159: On-the-spot check</p>	<p>Commission Delegated Regulation (EU) No 524/2014 of 12 March 2014 with regard to RTS specifying the information that competent authorities of home and host Member States supply to one another</p> <p>Commission Implementing Regulation (EU) No 620/2014 of 4 June 2014 laying down ITS with regard to information exchange between competent authorities of home and host Member States</p>	
CRR	Article 21: Joint decisions on the level of application of liquidity requirements		
UCITS4	<p><u>Regulated by Chapter XII, mainly Articles 101 and 108-110.</u></p> <p>Article 101</p> <p>Article 105</p> <p>Article 108</p> <p>Article 109</p> <p>Article 110</p>	Commission Regulation (EU) No 584/2010 as regards the form and content of the standard notification letter and UCITS attestation, the use of electronic communication between competent authorities for the purpose of notification, and procedures for on-the-spot verifications and investigations and the exchange of information between competent authorities	
AIFM	<p>Article 50: Obligation to cooperate</p> <p>Article 53: Exchange of information relating to the potential systemic consequences of AIFM activity</p> <p>Article 54: Cooperation in supervisory activities</p> <p>Article 55: Dispute settlement</p>		ESMA Guidelines on cooperation
MCD	<p>Article 9: Knowledge and competence requirements for staff</p> <p>Article 36: Obligation to cooperate</p> <p>Article 37: Settlement of disagreement between competent authorities of different Member States</p>		

Directive or Regulation	Level 1	Level 2	Level 3 or other agreement
PAD	Article 22: Obligation to cooperate Article 23: Settlement of disagreements between competent authorities of different Member States		
PRIPs	Article 20 Article 22		ESMA Guidelines on cooperation
EuVECA	Article 22: Cooperation and exchange of information between CAs and ESMA Article 24: Settlement in case of disagreements between CAs		ESMA Guidelines on cooperation
EuSEF	Article 23: Cooperation and exchange of information between CAs and ESMA Article 25: Settlement in case of disagreements between CAs		ESMA Guidelines on cooperation
ELTIF	Article 35: Cooperation between competent authorities		ESMA Guidelines on cooperation

Annex 4: Analysis of the identified requirements on cooperation and exchange of information between CAs

MiFID2

165. MiFID2 has several articles related to cooperation: i) Article 79 on the obligation to cooperate; ii) Article 80 on cooperation between CAs in supervisory activities, for on-site verifications or investigations; iii) Article 81 on the exchange of information; iv) Article 82 on binding mediation; and v) Article 83 on refusal to cooperate.
166. Article 80 is specific to the cooperation in supervisory activities and confers two mandates on ESMA under paragraphs 3 and 4 respectively: i) to develop RTS for the exchange of information between CAs when cooperating in supervisory activities, on-the-spot verifications and investigations; and ii) to develop implementing technical standards (ITS) to establish standard forms, templates and procedures for CAs to cooperate in supervisory activities, on-site verifications and investigations. In addition, Article 81(4) confers a mandate on ESMA to develop ITS to establish standard forms, templates and procedures for the exchange of information.
167. These RTS were published in the Official Journal of the European Union as Commission Delegated Regulation (EU) 2017/586 of 14 July 2016, and have applied since 3 January 2018. These RTS specify the information to be exchanged in relation to i) investment firms, market operators or data reporting service providers; and ii) credit institutions. Among the different pieces of information that a CA may request, the following are of particular relevance to the present report:
- a. general information in relation to the constitution of the entities;
 - b. information relating to the authorisation process of an entity;
 - c. information relating to members of the management body or persons effectively directing the business;
 - d. information necessary to assess the suitability of members of the management body or persons effectively directing the business of the entities;
 - e. information on shareholders and members with qualifying holdings;
 - f. information on the organisational structure
 - g. information on waivers granted or refused in relation to clients who may be treated as professionals on requests;
 - h. information on sanctions and enforcement action imposed against the entities;
 - i. information related to the operational activities and relevant conduct and compliance history related to the subject of the request;
 - j. any other information necessary for cooperating in supervisory activities, on-the-spot verifications or investigations.

168. With regard to the mandates on the ITS, ESMA developed them by drafting the ITS with regard to standard forms, templates and procedures for cooperation in supervisory activities, for on-site verifications and for investigations and exchange of information between CAs. These ITS were published in the Official Journal of the European Union as Commission Implementing Regulation (EU) 2017/980 of 14 July 2016, and have applied since 3 January 2018.
169. These ITS lay down procedures as well as templates and forms to be used by CAs for the cooperation and exchange of information. In particular, the ITS define the forms that CAs will use to make a request for cooperation or exchange of information, for acknowledgement of receipt and for the reply to a request. They also describe the procedure for sending and processing a request for cooperation or exchange of information, which always have to be made via the designated contact points that CAs must communicate to ESMA.
170. In addition, these ITS specify two more specific procedures for i) requests for taking a statement from a person; and ii) requests for an on-site verification or investigation.
171. Finally, these ITS describe how a CA shall inform another CA when the former has information that it considers would be of interest to the latter, that is, the case where there is an unsolicited exchange of information.

PSD2

172. PSD2 has a few articles related to cooperation: i) Article 26 on the exchange of information; ii) Article 27 on the settlement of disagreements between CAs of different Member States; and iii) Article 29 on supervision of payment institutions exercising the right of establishment and freedom to provide services. The last Article is the most relevant, as it states that:
- a. home and host CAs shall cooperate;
 - b. the home CA may delegate the task of carrying out an on-site inspection of an agent or a branch in the host MS of a payment institution, headquartered in the home MS;
 - c. the CAs shall provide each other with all essential and/or relevant information, in particular in the case of infringements or suspected infringements by an agent or a branch, and where such infringements occurred in the context of the exercise of the FPS.
173. In addition, Article 29(6) confers on the EBA the mandate to develop RTS on the framework for the cooperation and exchange of information between CAs in the home and host Member States. The EBA submitted the Final report on these RTS to the European Commission on 31 July 2018, and subsequently published it on its website on the same day. The final adoption by the European Commission is still pending at the time of writing this report.
174. The Final report on these RTS submitted to the European Commission specify the procedure for the requests and replies for cooperation and exchange of information between CAs, including specific features that they shall have: the designation of single contact points for the communication; the language in which the information will be exchanged (English or a EU language accepted by both MSs); and the use of standardised forms for i) requests for

cooperation or exchange of information; ii) replies to requests; iii) notifications by the home CA of the intention to carry out an on-site inspection in the host MS; and iv) notifications in the case of an infringement or suspected infringements.

175. The Final report on the RTS submitted to the European Commission set out a procedure for cooperation that is flexible enough to allow different scenarios:

- some of them explicitly mentioned in PSD2 such as:
 - the home CAs notifies the host CA when it intends to carry out an on-site inspection in the territory of the host MS;
 - the home CA delegates to the host CA the task of carrying out an on-site inspection of an institution that operates in the host MS;
- others not explicitly mentioned in PSD2 such as:
 - the host CA wishing to request the home CA to carry out an inspection of an institution that operates in the host territory;
 - the host CA wishing to request that this inspection is delegated to the host CA or carried out jointly by both the home and host CAs.

176. To that end, the RTS propose a procedure that allows any CA, home or host, to request another CA to carry out an on-site investigation but, at the same time, this procedure does not imply any obligation on the home CA to carry out a joint inspection or to delegate the task to the host CA or for the host CA to be able to be compliant with the competences and obligations set out in PSD2.

EMD

177. There are no articles on cooperation in the EMD. However, Article 111 of PSD2 amended the EMD so that Articles 5, Articles 11 to 17, Article 19(5) and (6), and Articles 20 to 31 of PSD2 will apply mutatis mutandis to e-money institutions. Therefore, the most relevant article on cooperation between CAs under PSD2, Article 29 of PSD2, including the RTS on home-host cooperation under PSD2, also applies to e-money institutions.

CRD4

178. CRD4 contains many provisions in relation to cooperation between CAs: i) Article 6 on cooperation within the European System of Financial Supervision; ii) Article 24 on cooperation between CAs; iii) Article 50 on collaboration concerning supervision; iv) Article 51 on significant branches; v) Article 52 on on-the-spot checking and inspection of branches established in another MS; vi) Article 56 on the exchange of information between authorities. Additionally, there are more articles regarding the consolidated supervision of credit institutions and investment firms, of which Articles 111-127 are related to cooperation.

179. Moreover, CRD4 has additional provisions in Chapter 1 of Title XI (Transitional and final provisions) on transitional provisions on the supervision of institutions exercising the freedom of establishment and the freedom to provide services. Under this chapter, Articles 153-159 are related to cooperation and apply instead of Articles 40, 41, 43, 49, 50 and 51 until the date on which the liquidity coverage requirement becomes applicable in accordance with a delegated

act adopted pursuant to Article 460 of the CRR. The mentioned liquidity coverage requirement became fully applicable from the beginning of 2018 in accordance with Commission Delegated Regulation³⁶ (EU) 2015/61 of 10 October 2013, which supplements the CRR with regard to the liquidity coverage requirement for credit institutions.

180. All these articles are very focused on the cooperation between CAs of the home and host MS for financial stability and prudential matters, with the exception of Article 50, which can also be relevant for conduct and consumer protection matters. Article 50 confers on the EBA a mandate to develop RTS and ITS related to how CAs collaborate and exchange information regarding institutions operating through branches and regarding the freedom of provision of services in one or more EU Member States other than that in which head offices are situated.
181. The RTS specify the information that CAs shall exchange with each other in accordance with Article 50 of CRD4, which covers the following areas: management and ownership; liquidity and supervisory findings; solvency; deposit guarantee schemes; limitation of large exposures; and internal control mechanisms. Furthermore, the RTS introduce some additional areas where CAs shall exchange information, such as leverage, general non-compliance, supervisory measures and sanctions, and preparation for emergency situations. The RTS focus on the exchange of supervisory information between supervisory authorities, with the aim of ensuring a structured and consistent process in the provision of and access to key supervisory information across Member States.
182. The ITS outline operational procedures and set out standard forms and templates for information sharing requirements, which are likely to facilitate the monitoring of institutions that operate through a branch or through the exercise of the FPS. The ITS set out the procedures for information exchange during (i) going concern and (ii) liquidity stress situations and are supplemented by two annexes containing templates for information exchange. The quantity and frequency of information to be provided is based on the proportionality principle, depending on whether a branch is deemed significant.
183. The RTS are focused on the exchange of information relevant for the prudential supervision of credit institutions. However, Article 12(1) of the RTS regarding information concerning general non-compliance states that:

‘the competent authorities of the home Member State shall provide information to competent authorities of a host Member State regarding any situations in respect of which the competent authorities of the home Member State have determined that an institution has not complied with national or Union law or with requirements, in relation to the prudential supervision or market conduct supervision of institutions, including the requirements laid down in Regulation (EU) No 575/2013 and Directive 2013/36/EU, other than the requirements referred to in Articles 3 to 11 of this Regulation. The information to be provided shall explain the situation and the supervisory measures taken or planned to be taken.’ (underlined emphasis added).

³⁶ Commission Delegated Regulation (EU) 2015/61 of 10 October 2013, at the following link: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32015R0061>

184. It is therefore plausible and possible for CAs to also rely on these provisions for home-host issues that are not of a direct prudential nature.

185. The ITS, too, are very much focused on the prudential supervision of credit institutions, as they establish the standard forms, templates and procedures for the information sharing requirements that are likely to facilitate the monitoring of institutions that operate, through a branch or in the exercise of the FPS, in one or more Member States other than that in which their head offices are situated, and in relation to the information provided in the RTS. However, Article 5 states that CAs shall make a request for information that is not required to be exchanged pursuant to the RTS.

186. Article 5 of the ITS is not very detailed and can be summarised as follows:

- a. It requires that any request for information that is not required to be exchanged pursuant to the RTS is transmitted in written or electronic form to the relevant contact persons identified in the contact list of Article 3 of the ITS.
- b. The CA making a request has to explain how the information requested will facilitate the supervision of an institution and has to specify a reasonable time by which the response must be provided.
- c. The CA receiving a request has to provide information without undue delay and has to make every effort to respond by the time indicated in the request. If the information is not available, the CA has to inform the requesting authority accordingly.

CRR

187. In the CRR, only Article 21 on the joint decisions on the level of application of liquidity requirements is somehow related to cooperation between home and host CAs. However, this Article is about liquidity requirements and is therefore related to prudential supervision.

IDD

188. There are four articles in relation to cooperation between CAs in the IDD: i) Article 5 on breach of obligations when exercising the FPS; ii) Article 7 on the division of competence between home and host Member States; iii) Article 8 on breach of obligations when exercising the freedom of establishment; and iv) Article 13 on cooperation and exchange of information between CAs of Member States.

189. Article 7 specifies that if an insurance, reinsurance or ancillary insurance intermediary's primary place of business is located in a MS other than the home MS, the CA of that other MS may agree with the home CA to act as if it were the home CA with regard to provisions of Chapters IV, V, VI and VII. These chapters are related to organisation requirements (IV), information requirements and conduct of business rules (V), additional requirements in relation to insurance-based investment products (VI) and sanctions and other measures (VII).

190. Article 13 provides that CAs have to cooperate among themselves and exchange any relevant information on insurance and reinsurance distributors in order to ensure the proper application of the Directive. And, in particular, CAs have to share relevant information concerning the good

repute, the professional knowledge and the competence of insurance and reinsurance distributors. In addition, CAs must exchange information on insurance and reinsurance distributors who have been subject to a sanction or other measure referred to in Chapter VII.

191. Article 5 lays down that when the host CA considers that an insurance, reinsurance or ancillary insurance intermediary acting within its territory under the FPS is in breach of any obligations, the host CA has to inform the home CA, and it describes the actions that both CAs can take. Article 8 is similar to Article 5 but for the case when the institution operates under the ROE.

192. In view of the provisions in the IDD on the notification procedures and cooperation of CAs in cross-border cases, EIOPA reviewed what is known as the Luxembourg Protocol agreed between CAs under the Insurance Mediation Directive of 2002. The Luxembourg Protocol covers:

- the general aims and principles for the cooperation between CAs regarding the administrative procedure, the supervision of professional requirements and professional secrecy;
- the registration and notification procedures, including the minimum information to be contained in the public registers and to be given in a notification for cross-border mediation services;
- the procedures of exchange of information and ongoing supervision of intermediaries;
- general matters regarding out of court settlement of complaints.

193. The Luxembourg Protocol contains several annexes, including some standard forms that CAs should follow in order for an intermediary to operate under the FPS or the ROE.

Solvency II Directive and EIOPA's BoS Decision on the collaboration of the insurance supervisory authorities

194. The SII Directive has several provisions related to the exchange of information and the cooperation between supervisory authorities. In particular, for ROE and FPS there is required to be exchanged on an ongoing basis quantitative information as defined in Article 159 as well as qualitative information on non-compliances (Articles 137, 138 and 139). Requirements on verifications foster the participation of both home and host supervisory authorities (Articles 30, 33 and 155).

195. Additionally, in the Decision on the collaboration of the insurance supervisory authorities adopted on 30 January 2017 that builds on the Solvency II Directive provisions and on a lessons learned exercise conducted on recent cross-border problems, the following are considered to be of particular relevance, among the different requirements:

- Authorisations: exchange of information on the suitability of the shareholders, members with qualifying holdings and persons who effectively run the undertaking or have other key functions, deteriorating financial conditions and instances of non-compliance, concerns over the system of governance, supervisory measures, authorisations sought in other Member States and increased exchange of information on applicants that intend to operate exclusively (or almost exclusively) in another MS. Timelines for the exchange of information are defined.

- **Notifications:** exchange of information on the scheme of operations, nature of risks and commitments, solvency, person(s) who effectively run(s) the branch/undertaking or are responsible for key functions for the branch/undertaking, planned distribution channel(s), relevant outsourcing contracts and partners that will be used in the host MS and any local third or related parties involved in the underwriting activities in the host MS, and policyholder guarantee funds. The host CA shall communicate irregularities known about the planned outsourcing activities, distribution partners, claims representatives, key persons as well as any relevant information following the analysis of the notification received from the home CA, as well as if the insurance undertaking or its parent undertaking tried to establish an insurance undertaking in the host MS and any cases of authorisation revoked or withdrawn and the reasons supporting such decisions. Specific exchanges are foreseen in the event of closure of branches and cessation of FPS activities.
- **Supervision on a continuous basis:** the home CA shall inform in a timely manner the host CA about the outcomes from its supervisory review process that relate to risks arising from or impacting the cross-border activity, such as changes to assessments of the suitability of shareholders and members with qualifying holdings, as well as persons who effectively run the undertaking or hold other key functions, details of deteriorating financial conditions and instances of non-compliance, supervisory measures and follow-up investigations. On the other hand, the host CA shall inform the home CA if it has reason to consider that the activities of an insurance or reinsurance undertaking might affect its financial soundness, such as situations that can influence the home CA's assessment of suitability, vulnerabilities discovered during the monitoring of compliance with the legal provisions of the host MS and following conduct of business supervision, supervisory measures and other adverse developments. Specific guidance is provided to foster proper cooperation in the case of on-site verifications.
- **Participation of the FPS host CAs in specific sessions of colleges of supervisors** where activity carried out by way of the FPS is discussed.
- **Creation of cooperation platforms** where no college of supervisors is established.

196. The Decision defines the operational framework for exchanging relevant quantitative information that is automatically extracted from the Solvency II quantitative reporting templates and made available to each concerned host CA through the EIOPA Hub.

UCITS Directive

197. The articles of the UCITS Directive related to cooperation are within Chapter XII on provisions concerning the authorities responsible for authorisation and supervision. The main articles are: i) Article 101 on cooperation and exchange of information; ii) Article 105, which confers on ESMA the option to develop ITS with regard to the procedures for exchange of information between CAs and between CAs and ESMA; iii) Article 108 on the notifications of infringements by UCITS and actions taken by CAs; iv) Article 109 on the cooperation, exchange of information between home and host CAs of management companies of UCITS; and v) Article 110 on the possibility for the home CA to carry out on-the-spot verification of the information referred to in Article 110 in relation to a branch of a management company in the host MS.

198. Article 101 is the most relevant provision of the above-mentioned articles. Article 101 states that the CA of one MS may request the cooperation of the CA of another MS in a supervisory activity or for an on-the-spot verification or in an investigation on the territory of the latter. Where a CA receives a request with respect to an on-the-spot verification or investigation, it shall:

- a. carry out the verification or investigation itself;
- b. allow the requesting authority to carry out the verification or investigation;
- c. allow auditors or experts to carry out the verification or investigation.

199. The CA that has requested cooperation can also request that its own officials accompany the officials of the other CA when the latter decides to carry out the verification or investigation itself. In the same way, where the CA that has received the requests decides to allow the requesting authority to carry out the verification or investigation it can also request that its own officials accompany the officials carrying out the verification or investigation.

200. Article 101 also specifies that a CA may refuse to exchange information following a request for cooperation in carrying out an investigation or on-the-spot verification. The CA must notify the requesting CA of any decision and the notification must contain information about the reasons for its decision. The only reasons that can be specified for refusing to exchange information or cooperation are the following:

- a. such an investigation, on-the-spot verification or exchange of information might adversely affect the sovereignty, security or public policy of that MS;
- b. judicial proceedings have already been initiated in respect of the same persons and the same actions before the authorities of that MS;
- c. final judgement in respect of the same persons and the same actions has already been delivered in that MS.

201. Additionally, Article 101 sets out that a CA may refer to ESMA situations where requests to exchange information, or to carry out an investigation or on-the-spot verification, or for authorisation for its officials to accompany those of the CA of the other MS has been rejected or has not been acted upon within a reasonable time.

202. Finally, Article 101 confers on ESMA the option to develop draft ITS to establish common procedures for CAs to cooperate in on-the-spot verifications and investigations.

203. Additionally, there are still in place technical standards that were developed by the European Commission, prior to the establishment of ESMA, and that were published in the Official Journal of the European Union in the form of Commission Regulation (EU) No 584/2010³⁷ as regards the form and content of the standard notification letter and UCITS attestation, the use of electronic communication between CAs for the purpose of notification, and procedures for on-the-spot verifications and investigations and the exchange of information between CAs.

AIFMD

³⁷ Commission Regulation (EU) No 584/2010, of 1 July 2010, at the following website:
<https://eur-lex.europa.eu/legal-content/GA/ALL/?uri=celex%3A32010R0584>

204. The AIFMD contains the following articles on cooperation between CAs: i) Article 50 on obligation to cooperate; ii) Article 53 on exchange of information relating to the potential systemic consequences of AIFM activity; iii) Article 54 on cooperation in supervisory activities; and iv) Article 55 on dispute settlement.
205. Article 50 is a general provision on cooperation and exchange of information between CAs. This Article requires that the CAs supply one another and ESMA with the information required for the purposes of carrying out their duties under the Directive. It also requires that CAs share the cooperation arrangements entered into by them in accordance with Articles 35, 37 and/or 40 of the Directive. The last articles are related to the conditions for marketing with a passport of a non-EU AIF managed by a EU AIFM (Article 37) and managed by a non-EU AIFM (Article 40) and the authorisation of non-EU AIFMs intending to manage EU AIFs and/or market AIFs managed by them in the EU.
206. Article 53 is about the information that CAs should exchange with one another where this is relevant for monitoring and responding to the potential implications of the activities of individual AIFMs or AIFMs collectively for the stability of systemically relevant financial institutions and the orderly functioning of markets on which AIFMs are active.
207. Finally, Article 54 is the most relevant article as it relates to the cooperation in supervisory activities. In a similar way to Article 101 of the UCITS Directive, Article 54 of the AIFMD sets out that a CA can request the cooperation of the CA of another MS in a supervisory activity or for an on-the-spot verification or in an investigation in the territory of the latter. Where a CA receives a request with respect to an on-the-spot verification or investigation, it shall:
- a. carry out the verification or investigation itself;
 - b. allow the requesting authority to carry out the verification or investigation;
 - c. allow auditors or experts to carry out the verification or investigation.
208. The CA that has requested cooperation can also request that its own officials accompany the officials of the other CA when the latter decides to carry out the verification or investigation itself. In the same way, where the CA that has received the requests decides to allow the requesting authority to carry out the verification or investigation, it can also request that its own officials accompany the officials carrying out the verification or investigation.
209. Article 54 also specifies that a CA may refuse to exchange information to act on a request for cooperation in carrying out an investigation or on-the-spot verification. The CA must notify the requesting CA of any decision and the notification must contain information about the reasons for its decision. The only reasons that can be specified for refusing to exchange information or cooperation are the following:
- a. such an investigation, on-the-spot verification or exchange of information might adversely affect the sovereignty, security or public policy of that MS;
 - b. judicial proceedings have already been initiated in respect of the same persons and the same actions before the authorities of that MS;
 - c. final judgement in respect of the same persons and the same actions has already been delivered in that MS.

210. Additionally, Article 54 confers on ESMA the option to develop draft ITS to establish common procedures for CAs to cooperate in on-the-spot verifications and investigations.
211. Finally, Article 55 refers to the possibility for CAs to refer to ESMA any disagreement they might have on an assessment, action or omission of another CA in areas where the AIFMD requires cooperation or coordination between CAs.

EuVECA Regulation

212. There are only two articles related to cooperation in the EuVECA Regulation: i) Article 22 on cooperation and exchange of information between CAs and ESMA; and ii) Article 24 on the settlement of disagreements between CAs.
213. Article 22 is very short and generic, stating that CAs have to cooperate with each other and exchange information for the purpose of carrying out their respective duties under the Regulation. And Article 24 describes the possibility for CAs to refer to ESMA any disagreement they might have on an assessment, action or omission of another CA in areas where the Regulation requires cooperation or coordination between CAs.

EuSEF Regulation

214. There are only two articles related to cooperation in the EuSEF Regulation: i) Article 23 on cooperation and exchange of information between CAs and ESMA; and ii) Article 25 on the settlement of disagreements between CAs.
215. Article 23 is very short and generic, stating that CAs have to cooperate with each other and exchange information for the purpose of carrying out their respective duties under the Regulation. Article 25 describes the possibility for CAs to refer to ESMA any disagreement they might have on an assessment, action or omission of another CA in areas where the Regulation requires cooperation or coordination between CAs.

ELTIF Regulation

216. The ELTIF Regulation contains only one short article on cooperation, which is Article 35. This Article provides that the CA of the ELTIF Regulation and the CA of the manager of the ELTIF Regulation, if different, have to cooperate with each other and exchange information for the purpose of carrying out their duties under the Regulation. It also establishes that CAs shall cooperate with each other in accordance with the AIFMD.

MCD

217. The MCD has three articles on cooperation: i) Article 9 on knowledge and competence requirements for staff of financial institutions; ii) Article 36 on the obligation to cooperate; and iii) Article 37 on the settlement of disagreements between CAs.
218. Article 9(5) states that for the effective supervision of creditors and credit intermediaries providing their services within the territory of other Member States under the FPS, the CAs of the host and the home Member States should cooperate closely for the effective supervision

and enforcement of the minimum knowledge and competence requirements of the host MS. For that purpose they may delegate tasks and responsibilities to each other.

219. Article 36 requires that CAs cooperate with each other whenever necessary for the purpose of carrying out their duties under the Directive. CAs have to render assistance to the CAs of other MSs and must exchange information and cooperate in any investigation or supervisory activities. Article 36 specifies that a CA may refuse to act on a request for cooperation in carrying out an investigation or supervisory activity or to exchange information. The CA has to notify the requesting CA of any decision and the notification must contain information about the reasons for its decision. The only reasons that can be specified for refusing to exchange information or cooperation are the following:

- a. such an investigation, on-the-spot verification, supervisory activity or exchange of information might adversely affect the sovereignty, security or public policy of that MS;
- b. judicial proceedings have already been initiated in respect of the same persons and the same actions before the authorities of that MS;
- c. final judgement in respect of the same persons and the same actions has already been delivered in that MS.

220. Finally, Article 37 sets out that a CA can refer the situation to the EBA where a request for cooperation, and in particular the exchange of information, has been rejected or has not been acted upon in a reasonable time.

PAD

221. The PAD contains two articles on cooperation: i) Article 22 on the obligation to cooperate; and ii) Article 23 on the settlement of disagreements between CAs.

222. Article 22 of the PAD is very similar to Article 36 of the MCD. It requires that CAs cooperate with each other whenever necessary for carrying out their duties under the Directive. CAs have to render assistance to CAs of other MSs and exchange information and cooperate in any investigation or supervisory activities. It specifies that a CA may refuse to act on a request for cooperation in carrying out an investigation or supervisory activity or to exchange information. The CA has to notify the requesting CA of any decision and the notification must contain information about the reasons for its decision. The only reasons that can be specified for refusing to exchange information or cooperation are the following:

- a. such an investigation, on-the-spot verification, supervisory activity or exchange of information might adversely affect the sovereignty, security or public policy of that MS;
- b. judicial proceedings have already been initiated in respect of the same persons and the same actions before the authorities of that MS;
- c. final judgement in respect of the same persons and the same actions has already been delivered in that MS.

223. Article 23 provides that a CA can refer the situation to the EBA where a request for cooperation, and in particular the exchange of information, has been rejected or has not been acted upon in a reasonable time.

CPCR

224. The CPCR establishes a specific mechanism for the exchange of information among authorities in the case of a suspected breach of the provisions of the applicable EU legislation falling within its scope of application. In particular, at the request of an applicant authority, a requested authority shall, without delay, and in any event within 30 days unless otherwise agreed, provide to the applicant authority any relevant information necessary to establish whether an intra-EU infringement has occurred or is occurring, and to bring about the cessation of that infringement. The requested authority shall regularly inform the applicant authority about the steps and measures taken and the steps and measures that it intends to take.

225. With regard to the banking sector, Recital 49 of the new Consumer Protection Cooperation Regulation³⁸, which will be applicable from 17 January 2020, establishes that the Regulation is without prejudice to the role and the powers of the CAs and of the EBA in relation to the protection of the collective economic interests of consumers in matters concerning payment accounts services and credit agreements relating to residential immovable property. Furthermore, Recital 50 states that in view of the existing cooperation mechanisms under the MCD and the PAD, the mutual assistance mechanism should not apply to intra-EU infringements of those Directives. As a result of these two recitals it could be noted that i) cross-border violations of consumer protection directives falling under the scope of the CPCR with the exception of the MCD and the PAD are always subject to the rules of the CPCR for the cooperation among home and host authorities (e.g. the Distance Marketing of Consumer Financial Services Directive³⁹ and the Consumer Credit Directive⁴⁰); and ii) those violations of the MCD and the PAD that are not intra-EU infringements, and which are defined, under the CPCR as ‘widespread infringements’ and/or ‘widespread infringements with a Union dimension’, are subject to coordinated investigation and enforcement mechanisms set out under Article 15 and the following ones of the CPCR.

PRIIPs Regulation

226. The PRIIPs Regulation contains two articles regarding cooperation between CAs. The first one, Article 20, is a short provision that only states that CAs have to cooperate with each other and,

³⁸ Regulation (EU) 2017/2394 of the European Parliament and of the Council, of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No 2006/2004, OJ L 345, 27.12.2017, p. 1-26, at the following website:
<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32017R2394>

³⁹ Directive 2002/65/EC of the European Parliament and of the Council, of 23 September 2002, concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC, OJ L 271, 9.10.2002, p. 16-24, at the following website:
<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32002L0065>

⁴⁰ Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC, OJ L 133, 22.5.2008, p. 66-92, at the following website:
<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:32008L0048>

without undue delay, provide each other with information that is relevant for the purposes of carrying out their duties under the PRIIPs Regulation. The second one, Article 22, specifies that CAs have to cooperate to ensure that administrative sanctions and measures produce the results pursued by the PRIIPs Regulation and that they must coordinate their action to avoid possible duplication and overlaps when applying administrative sanctions and measures to cross-border cases.

ESMA Guidelines on cooperation arrangements and information exchange⁴¹ (applicable to the AIFMD and the EuVECA, EuSEF and ELTIF Regulations and partially to the PRIIPs Regulation)

227. In 2014, ESMA published guidelines aimed at facilitating cooperation arrangements and the exchange of information between individual national CAs and between those authorities and ESMA (ESMA Guidelines on cooperation arrangements and information exchange), in the application of their responsibilities under EU law relating to the securities and markets area. The guidelines incorporate cooperation procedures agreed between the authorities and ESMA in the form of a new multilateral memorandum of understanding (MMoU). The new MMoU entered into force on 29 May 2014 and updated the existing MMoU on the Exchange of Information and Surveillance of Securities Activities which was agreed by the members of the Committee of European Securities Regulators (CESR), formerly the Forum of European Securities Commissions, on 26 January 1999.
228. These guidelines and the new MMoU are not specifically focused on the conduct of business, as they also cover other areas in the remit of ESMA such as prudential requirements or market infrastructure. The guidelines set out parameters for the day-to-day cooperation between CAs, although to the extent that EU law requires different cooperation arrangements or information exchange, in particular by technical standards laying down standard forms, templates and procedures for cooperation, the applicable EU legislation prevails.
229. The ESMA Guidelines on cooperation arrangements and information exchange have, inter alia, provisions on:
- a. scope of assistance;
 - b. how to send and process requests for assistance;
 - c. requests for an authority to take a statement from a person;
 - d. requests for an authority to open an investigation or carry out an on-site inspection;
 - e. confidentiality and permissible uses of information;
 - f. designated contact points;
 - g. resolution of disputes.
230. The guidelines also contain two annexes: one with a standard format for a request of assistance and one with a standard format for a response to a request for assistance.

⁴¹ ESMA Guidelines on cooperation arrangements and information exchange between competent authorities and between competent authorities and ESMA (ESMA/2017/298), at the following website: <https://www.esma.europa.eu/document/guidelines-cooperation-arrangements-and-information-exchange-between-competent-authorities>



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