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EBA Report

on potential impediments to the cross-border provision of banking
and payment services

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Executive summary

The cross-border provision of services is a crucial part of the EU Single Market, allowing consumers' access to services across Member States in accordance with EU treaty provisions.

A body of EU and national law exists with the aim of enabling the provision of financial services cross-border in a manner that ensures that risks to financial stability and market integrity are mitigated and that consumers are adequately protected. In some cases, EU law is highly prescriptive, not only in its aim but also in the means by which outcomes are to be achieved. In other cases, EU law is less prescriptive or may not yet occupy a policy field. In these circumstances, Member States and competent authorities have discretion to bring forward such measures as they consider proportionate, for example to protect local consumers from the mis-selling of financial products or to ensure appropriate redress schemes should things go wrong.

In this context, it is inevitable that some divergences may emerge between jurisdictions in response to national specificities. However, in some cases, issues may emerge that, alone or in combination, may have negative unintended effects, potentially creating complexities that impede consumer choice and the cross-border provision of services, in turn hampering the functioning of the EU Single Market.

The report focuses on the areas of authorisations and licensing, consumer protection and conduct of business requirements, and anti-money laundering (AML) and countering the financing of terrorism (CFT), building on the matters highlighted in both the European Commission's Consumer Financial Services Action Plan¹ and the EBA's FinTech Roadmap.² The report identifies potential issues in these areas and proposes ways to overcome them whilst maintaining adequate protection for consumers and the integrity and stability of the financial system. The report highlights possible actions for the European Commission and the EBA.

As a starting point it is necessary to identify when an activity is considered to be a cross-border service and, if it is, whether it is carried out under the 'freedom to provide services' or 'right of establishment'. This is of particular relevance at a time when financial services are being provided increasingly using digital means (internet, apps etc.). However, this categorisation of activities is a complex matter that requires analysis on a case-by-case basis.

Current interpretative communications issued by the European Commission with the aim of helping to define the extent of the freedom to provide services would benefit from update, in line with the recent case law of the Court of Justice of the European Union (CJEU) interpreting the EU treaty provisions, to reflect the digitalisation of the financial services sector.

¹ https://ec.europa.eu/info/publications/consumer-financial-services-action-plan_en.

² <https://eba.europa.eu/-/eba-publishes-its-roadmap-on-fintech>.

In particular, digital solutions provide new ways for institutions, including new entrant FinTech firms, to reach consumers in multiple jurisdictions but competent authorities and consumers face difficulties in determining when such activities constitute cross-border business under the freedom to provide services. Although this issue is not limited to financial services, the EBA highlights the need for the European Commission to update its 1997 Communication³ in order to promote greater convergence of practices in determining when business is to be regarded as being provided cross-border under the freedom to provide services, taking particular account of technological developments.

In the area of authorisations and licensing, to promote supervisors' visibility of institutions' cross-border activities, changes to Level 1 legislation would be desirable to strengthen requirements for institutions to report on a more uniform and timely basis their cross-border activities. This more accurate and timely information would better equip home and host competent authorities to respond, for instance through enhanced supervision or the exercise of supervisory powers, to address any additional risks identified.

Additionally, to promote institutions' awareness of applicable regulatory requirements imposed in host jurisdictions, Level 1 changes could be contemplated to confer on the EBA a mandate to issue guidelines under Article 16 of the EBA Regulation to promote convergence and transparency in the communication by competent authorities of requirements imposed in relation to business with establishment or business provided cross-border without establishment. Such guidelines could support institutions in their navigation and understanding of the applicable requirements thereby easing compliance challenges.

In the context of consumer protection and conduct of business requirements, greater harmonisation at Level 1, particularly related to imposed in host jurisdictions disclosure requirements and the allocation of imposed in host jurisdictions responsibilities for the supervision of complaints handling, would be required to mitigate challenges faced by firms when seeking to provide financial services cross-border whilst maintaining high standards of consumer protection.

In the area of AML/CFT, as a result of differing national transposition of the Fourth Anti-Money Laundering Directive (AMLD4), cross-border businesses are potentially exposed to different AML/CFT obligations in each Member State. In addition, institutions operating on a cross-border basis may be subjected to different supervisory approaches in different Member States on a basis of the money laundering (ML)/ terrorist financing (TF) risks presented by them creating complexity and possibly hindering the provision of services. To help counteract these issues and to achieve some level of convergence, the EBA has published the Risk Factors Guidelines⁴ to support competent authorities' understanding of the ML/TF risks associated with different types of

³ Commission interpretative communication: Freedom to provide services and the interests of the general good in the Second Banking Directive (97/C 209/04).

⁴ Joint guidelines by the European Supervisory Authorities (JC 2017 37) under Articles 17 and 18(4) of Directive (EU) 2015/849 on simplified and enhanced customer due diligence and the factors credit and financial institutions should consider when assessing the money laundering and terrorist financing risk associated with individual business relationships and occasional transactions, published on 26 June 2017; available at: <https://eba.europa.eu/regulation-and-policy/anti-money-laundering-and-e-money/guidelines-on-risk-factors-and-simplified-and-enhanced-customer-due-diligence>.

businesses. These guidelines are currently being amended also to address risks associated with remote on-boarding and innovative technologies. Furthermore, the European Supervisory Authorities (ESAs) have recognised that a certain level of convergence could potentially be achieved through cooperation between competent authorities in home and host Member States. To enhance cooperation, the ESAs have drafted Guidelines on supervisory cooperation, which will be published shortly, and are organising and continuously facilitating various knowledge sharing activities. However, there is a limit to how much convergence can be achieved through such actions and Level 1 changes would be required to further harmonise the legal framework with a view to minimising the potential for regulatory divergence in the AML/CFT space.

More generally, the issues identified in this report provide some useful indications for paving the way to a better integration of the EU Single Market. The EBA has developed the report relying on available resources and tools (e.g. surveys, legal mapping etc.). However, further analysis could be useful on the causes and the materiality of the issues identified; this would also allow a better understanding of whether the current challenges to the provision of cross-border services are more demand-driven (lack of interests by or difficulties for customers to enter into business with foreign providers, language barriers, differences in financial literacy, consumer preferences etc.) or supply-driven (lack of interests by or difficulties for financial firms to address their offer to other EU markets).

Background

As identified in the EBA's March 2018 FinTech Roadmap,⁵ digital solutions enable providers of financial services to reach a wider population of customers, including cross-border. However, the full potential of these solutions has not yet been achieved, in part due to divergences in regulatory requirements.⁶ Identifying and resolving these issues is a necessary step in addressing barriers to market entry, supporting the scaling-up of financial services across the EU, and improving the competitiveness of the EU Single Market. These are important objectives of the European Commission, which, as part of its digital single market strategy,⁷ aims to open up digital opportunities for individuals and businesses and enhance the EU's position as a world leader in the digital economy.

Indeed, this is an urgent problem. The European Commission's Consumer Financial Services Action Plan⁸ highlights that, in 2016, only 7% of consumers used financial services from another EU Member State. As acknowledged by the EBA in its response to the EU Commission Green Paper on Retail Financial Services (COM 2016 (630)), there may be several reasons for the limited number of cross-border transactions, such as differences in language and degree of financial literacy, consumer preferences and national legislation.⁹ However, facilitating access to cross-border services by addressing issues that potentially deter firms from offering financial services in this manner can help enhance choice for consumers.

In this report the EBA identifies issues deriving from the body of EU financial services law, including areas that are not fully harmonised or are not yet covered by EU law, which may limit the ability of institutions and other FinTech firms¹⁰ to provide cross-border services, and proposes remedial actions in order to facilitate greater cross-border provision of services.

In particular, the EBA focuses on issues arising in the context of authorisations and licensing, consumer protection and AML/CFT. The EBA does not reflect on issues arising in other potentially relevant areas, such as fiscal policies and language requirements, as these fall outside the scope of its remit.

⁵ The EBA'S FinTech Roadmap: Conclusions from the consultation on the EBA's approach to financial technology (FinTech): <https://eba.europa.eu/documents/10180/1919160/EBA+FinTech+Roadmap.pdf>.

⁶ As announced in the European Commission's March 2018 FinTech Action Plan, the Commission has established an expert group to assess whether there are any unjustified regulatory obstacles to financial innovation in the financial services regulatory framework: https://eur-lex.europa.eu/resource.html?uri=cellar:6793c578-22e6-11e8-ac73-01aa75ed71a1.0001.02/DOC_1&format=PDF.

⁷ <https://ec.europa.eu/digital-single-market/en/news/digital-single-market-strategy-europe-com2015-192-final>.

⁸ https://ec.europa.eu/info/publications/consumer-financial-services-action-plan_en.

⁹ <https://eba.europa.eu/-/eba-responds-to-the-european-commission-s-green-paper-on-retail-financial-services>.

¹⁰ 'FinTech firm' means a firm using FinTech for the purposes of the provision of one or more financial services. Credit institutions, payment institutions, electronic money institutions and other types of firm fall within the scope of this term where they apply FinTech for this purpose.

The analysis contained in the report is based on a review of available resources in the form of European Commission interpretative communications, case law of the CJEU, EU law and survey responses from both competent authorities and a sample of industry participants (credit institutions, payment institutions and electronic money institutions), which provided valuable input.

1. Methodological approach

1. To inform this report, the EBA adopted a three-stage approach.
2. First, the EBA carried out an in-depth assessment of relevant information. To that effect, the EBA:
 - a. reviewed relevant case law of the CJEU and European Commission interpretative communications, including on the freedom to provide services and the interests of the general good in the Second Banking Directive (97/C/209/04) and on the freedom to provide services and the general good in the insurance sector (2000/C/43/03), and other relevant information, and summarised the criteria and indicators set out in those documents in order both to understand when the digital provision of financial services may qualify as cross-border provision and to help mark the boundaries between the ‘right of establishment’ and the ‘freedom to provide services’;
 - b. conducted a research exercise using the responses to several papers, which include the responses to the European Commission consultation on FinTech,¹¹ the EBA discussion paper on FinTech,¹² the EU Commission Green Paper on retail financial services,¹³ and other sources, such as the FinTech-related work of both the European Supervisory Authorities (ESAs) and the ESA Joint Committee (JC);
 - c. developed a mapping of EU disclosure and complaints handling requirements across a large number of EU directives and regulations;
 - d. assessed responses to a number of surveys to FIN-NET (the EU’s financial dispute resolution network) from consumer associations, competent authorities and industry;
 - e. performed a series of interviews with a sample of payment institutions and electronic institutions.
3. Second, based on the information gathered, the EBA has identified a number of potential issues relating to the cross-border provision of financial services arising from regulatory requirements and supervisory practices in the areas of authorisations and licensing, consumer protection and conduct of business requirements, and AML/CFT.

¹¹ Public consultation on FinTech: a more competitive and innovative European financial sector – 23 March 2017: https://ec.europa.eu/info/consultations/finance-2017-fintech_en.

¹² EBA/DP/2017/02 Discussion Paper on the EBA’s approach to financial technology (FinTech): <https://eba.europa.eu/documents/10180/1919160/EBA+Discussion+Paper+on+Fintech+%28EBA-DP-2017-02%29.pdf>.

¹³ Green Paper on retail financial services: better products, more choice, and greater opportunities for consumers and businesses – COM(2015) 630 final: http://ec.europa.eu/finance/consultations/2015/retail-financial-services/docs/green-paper_en.pdf.

4. Finally, where appropriate, the EBA has identified potential policy actions in each of the specific areas to address or mitigate these issues.

2. Categorisation of a digital activity as cross-border

5. As the purpose of this report is to identify potential issues that institutions, including new entrant FinTech firms, may experience when seeking to provide financial services cross-border, the first question that arises is: *when is a digital activity considered to be a cross-border provision of services?*
6. When a digital activity is identified as being a cross-border provision of services, it then needs to be determined whether it falls under the category of ‘freedom to provide services’ or that of ‘right of establishment’, according to the case law of the CJEU and the EU treaties. This categorisation is important for determining the applicable regulation and relevant supervisory authority. The exercise of an activity under the ‘right of establishment’ in a host Member State triggers some additional legal obligations for the principal institutions, compared with the freedom to provide services. It also has consequences for the allocation of competencies between the competent authorities of the host and home Member States for the supervision of activities in the relevant jurisdictions.
7. The categorisation of an activity as described above is a complex matter. The Joint Committee report on cross-border supervision of retail financial services¹⁴ highlights the lack of a common and clear set of criteria for determining the location of the services provided, in particular when the provision of services is done through digital means. The location of services is key for ascertaining whether there is cross-border provision of services and whether it falls under the category of ‘freedom to provide services’ or ‘right of establishment’.
8. In addition, in 2019, the EBA published its opinion on the nature of passport notifications regarding agents and distributors,¹⁵ which also presents detailed analysis of when a cross-border activity of a payment institution or electronic money institution through agents and/or distributors is designated as ‘freedom to provide services’ or ‘right of establishment’. The EBA opinion, recognising the lack of transparency on this matter, aims to provide clarity regarding the criteria that, in the EBA’s view, competent authorities should take into account when assessing whether or not an activity carried out by a payment institution or electronic money institution using agents or distributors in a host Member State amounts to an establishment in the host Member State.
9. In the context of this report and with the aim of providing some clarity on the specific treatment regarding the digital provision of financial services, the EBA further analysed CJEU case law and

¹⁴ <https://eba.europa.eu/documents/10180/2551996/Final+Report+on+cross-border+supervision+of+retail+financial+services.pdf>.

¹⁵ Opinion of the European Banking Authority on the nature of passport notifications regarding agents and distributors under Directive (EU) 2015/2366 (PSD2), Directive 2009/110/EC (EMD2) and Directive (EU) 2015/849 (AMLD) – EBA-Op-2019-03.

other relevant information, including European Commission interpretative communications relating to (i) when a digital activity should be considered as a cross-border provision of services and (ii) where it is cross-border, whether it should be regarded as being carried out under the ‘right of establishment’ or ‘freedom to provide services’.

10. Some of the key aspects that should be considered in the context of identifying when a digital activity is a cross-border provision of services include the following:

- **Location of the place of provision of the ‘characteristic performance’ of the services:** this is increasingly difficult especially in view of the growth of long-distance services, particularly those using electronic means (internet, mobile banking, etc.).
- **Confirmation that the digital provision of services is directed to the host Member State:** to establish this, it must be ascertained that, before the conclusion of any contract with the consumer, the provider is envisaging doing business with consumers that are domiciled in one or more Member States, including the Member State of that consumer’s domicile, in the sense that it intends to conclude a contract with them. This is relevant specifically for identifying whether or not the activity would trigger a passporting communication. This is also relevant to ensure that, where applicable, the levels of consumer protection are identical, through the application of the local mandatory consumer contract law rules and other general interest provisions, when the service is supplied in the host Member State under the freedom to provide services and when the service is supplied by way of establishment.

11. Except for the Distance Marketing of Financial Services Directive (2002/65/EC) (DMFSD), Level 1 texts that are applicable to the provision of financial services do not provide specific rules with regard to internet-based services. In these cases, in principle, the general rules regarding e-commerce activities apply.

12. In conclusion, this is a complex issue and the lack of a common EU regulation on whether an activity done via the Internet is a cross-border provision of services and whether it should be regarded as ‘right of establishment’ or ‘freedom to provide services’ requires that each situation is assessed by the competent authorities on a case-by-case basis. The EBA considers that there is a need for further guidance from the European Commission and in particular for an update to the 1997 communication¹⁶ to support the identification of cross-border services in view of the digitisation of financial services.

¹⁶ Commission interpretative communication: freedom to provide services and the interests of the general good in the Second Banking Directive (97/C 209/04).

3. Authorisations and licensing

13. To carry out financial services activities in the EU, typically authorisation is required pursuant to EU law, for instance in relation to banking activities, such as the Capital Requirement Directive (Directive 2013/36/EU; CRD); payment services activities, such as the Second Payment Services Directive (Directive 2015/2366; PSD2), and electronic money activities, such as the Second E-money Directive (Directive 2009/110; EMD2). EU law typically specifies the role of home and host competent authorities and attributes responsibilities for the transmission of information from institutions to the home and host authorities and between these authorities. This chapter identifies issues relating to the cross-border provision of banking services for the purpose of illustrating wider issues relating to the challenge that competent authorities face in identifying cross-border activity and the challenge that credit institutions face in navigating the applicable requirements. The findings set out in this chapter can be applied, by analogy, to payment institutions and electronic money institutions.¹⁷

3.1 Background: European framework for the authorisation of credit institutions

14. The CRD sets out the framework for the authorisation and prudential regulation of the activities of credit institutions.

3.1.1 Authorisation as a credit institution

15. Articles 10 to 14 of the CRD set out the requirements for authorisation as a credit institution.¹⁸ In particular, applicants must satisfy the requirements of having an appropriate programme of operations and structural organisation, arrangements for the effective direction of the business, initial capital, and suitable shareholders and members.

16. The CRD also sets out the procedures to be followed by competent authorities when considering an application for authorisation, including the timeframe for the assessment (Article 15 of the CRD), and the arrangements for consulting with competent authorities in other Member States in relevant cases (Article 16 of the CRD). In order to facilitate a common approach, the EBA has adopted draft regulatory technical standards (RTS) and implementing technical standards (ITS) on the information to be presented in an application for authorisation as a credit institution.¹⁹ Pursuant to CRDV²⁰ the EBA has a new mandate to produce guidelines addressed

¹⁷ For equivalent legislative references, see in particular Articles 5, 11 and 28 and 29 of PSD2.

¹⁸ Further requirements can be specified in national law, in which case they must be notified to the EBA. (See Article 8 of the CRD.)

¹⁹ <https://eba.europa.eu/regulation-and-policy/other-topics/rts-and-its-on-the-authorisation-of-credit-institutions>. The RTS and ITS are subject to adoption by the European Commission.

²⁰ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L0878&from=EN>.

to the competent authorities to specify a common assessment methodology for granting authorisations in accordance with the CRD (Article 8(5)), which will foster further harmonisation of practices.

17. Entities authorised as credit institutions may carry out the activities referred to in Annex I to the CRD in accordance with the licence granted by the competent authority.²¹ These activities include taking deposits and other repayable funds from the public, lending activities and payment services. Credit institutions have the right to carry out their activities in the Member State in which they are authorised and can provide services in other Member States by exercising:

- the freedom of establishment within the territory of another Member State (Article 35 of the CRD);
- the freedom to provide services (Article 39 of the CRD).

3.1.2 Arrangements concerning the freedom of establishment or the freedom to provide services

18. Where a credit institution intends to establish a branch within the territory of another Member State it is required to notify the competent authorities of its home Member State (the jurisdiction in which the entity has been authorised as a credit institution) in accordance with Regulations (EU) No 1151/2014 and No 926/2014²² (Article 35(1) of the CRD).²³

19. Unless the home competent authority has reason to doubt the adequacy of the administrative structure or the financial situation of the credit institution,²⁴ taking account of all relevant EU requirements (e.g. on internal governance), the authority is required to notify the host competent authority within three months of receiving the notification from the credit institution (Article 36(1) of the CRD). Such notifications must be made in accordance with the requirements of Article 35(2) of the CRD and Regulations (EU) No 524/2014 and (EU) No 620/2014 on passport notifications.

20. Article 36 of the CRD sets out the arrangements for the preparation for supervision of the branch, and confers on the host competent authority the right to specify conditions under which, in the interests of the general good, the activities may be carried out in the host

²¹ For instance, in the United Kingdom, in the context of the application for authorisation, firms have to specify the activities listed in the Annex to the CRD that they intend to carry out.

²² <https://eba.europa.eu/regulation-and-policy/passporting-and-supervision-of-branches/draft-technical-standards-on-passport-notifications>.

²³ In relation to Member States participating in the Single Supervisory Mechanism (SSM) (as home or host jurisdiction) further procedural arrangements are specified in Articles 11 to 17 of Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (SSM Framework Regulation) (ECB/2014/17). Specifically, the notification of the exercising of the right of establishment or freedom to provide services follows different paths of communication and has different competent authorities depending on (i) whether the home and the host Member States are or are not participating in the SSM, and (ii) the significance of the credit institution (when established in a participating Member State) or of the branch.

²⁴ Where the home competent authority has such doubts, procedures apply for informing the credit institution concerned (Article 35(4) of the CRD).

jurisdiction (Article 36(1) of the CRD). Any such conditions must be communicated to the credit institution concerned in accordance with the procedures specified in Article 36(2) of the CRD.

21. Any variations in the programme of operations of, and activities carried out by, branches of credit institutions (e.g. to run off existing business or to transfer business to an existing branch of another credit institution in the group) are required to be notified to the competent authorities of the home and host Member States (Article 36(3) of the CRD). Based on the information received, the competent authorities of the home and host Member States must take a decision and may impose conditions relating to the change of business (Articles 35(3) and 36(3) of the CRD).
22. In relation to the provision of cross-border services, prior to carrying out such activities for the first time, a credit institution must notify the competent authorities of its home Member State (Article 39 of the CRD). The competent authority of the home Member State is obliged to send that notification to the competent authority of the jurisdiction in which the activities are to be carried out within one month of receiving the notification. Regulations (EU) No 524/2014 and (EU) No 620/2014 set out how competent authorities should collaborate and exchange information for this purpose and on the template for the sharing of the relevant information.²⁵
23. Ongoing supervision and cooperation between the competent authorities must be carried out in accordance with Articles 40 to 45 and 50 to 52 of the CRD. A well-elaborated set of regulations and EBA guidelines²⁶ are in place that set out the modalities for:
 - a. the functioning of supervisory colleges (including home competent authorities and competent authorities in host Member States in which significant branches identified in accordance with Article 51 of the CRD²⁷ are located; competent authorities in host Member States where other branches are located may also be invited to participate as observers);
 - b. the coordination of supervisory activities, including those to facilitate the examination of the conditions for the establishment of branches and ongoing supervision;
 - c. the taking of joint decisions in relation to prudential requirements;
 - d. the circumstances in which home and host authorities shall share information.²⁸

²⁵ <https://eba.europa.eu/regulation-and-policy/passporting-and-supervision-of-branches/draft-technical-standards-on-information-exchange-between-home-and-host-competent-authorities>.

²⁶ <https://eba.europa.eu/regulation-and-policy/colleges-of-supervisors>.

²⁷ See also the EBA's guidelines on the supervision of significant branches: <https://eba.europa.eu/documents/10180/1699755/EBA-GL-2017-14++%28Final+Report+on+Guidelines+on+supervision+of+significant+branches%29.pdf/924c0b19-0229-47f2-ad64-2b145bfd7c69>.

²⁸ In relation to the SSM, specific arrangements are also in place pursuant to the SSM Framework Regulation. See footnote 19.

3.2 Methodological approach: identification of issues affecting the establishment of a branch or the provision of cross-border services

24. As part of the information-gathering exercise to inform this report, competent authorities and the industry were invited to provide views on whether the processes pursuant to the CRD (Articles 35, 36 and 39) pose issues for the establishment of a branch or for the cross-border provision of services, or whether issues emerge from supervisory practices. In particular, competent authorities were requested to describe the framework:

- a. against which a notification under Article 35(1) of the CRD regarding the intention of a credit institution to establish a branch in another Member State is considered by the *home* competent authority;
- b. for imposing on credit institutions additional requirements with regard to the establishment of a branch in another jurisdiction as the *home* competent authority (i.e. outgoing branches);
- c. for imposing on credit institutions conditions regarding the establishment of a branch (i.e. incoming branches) as a *host* competent authority in accordance with Article 36(1) of the CRD;
- d. against which a notification under Article 39(1) of the CRD regarding a credit institution's intention to provide services cross-border is considered by a *home* competent authority;
- e. for imposing on credit institutions additional requirements with regard to the provision of services cross-border as a *home* competent authority;
- f. for imposing any obligations as regards activities carried out by credit institutions in the *host* jurisdiction in exercise of the freedom to provide services cross-border as a host competent authority.

25. Follow-up questions were also posed to the competent authorities asking them to indicate whether or not they, as *host* competent authorities, impose on incoming branches of credit institutions conduct of business requirements such as:

- a. advertising/marketing rules (consumer-facing);
- b. solicitation rules (consumer-facing);
- c. disclosure rules (consumer-facing);
- d. charges and fees rules (consumer-facing);
- e. complaints-handling rules.

26. Competent authorities were asked to indicate the format by which these requirements are communicated to firms and the home (or host) competent authority concerned.

27. The purpose of these information-gathering exercises was to identify whether there are variations in the practices of the competent authorities that could be regarded as impeding the

capacity of credit institutions to access markets in other Member States through the establishment of a branch or through the freedom to provide services.

3.3 General observations

28. Twenty competent authorities provided responses to the questions described in Section 3.2. Representatives of the industry also responded to the questions referring to authorisation themes.

3.3.1 Establishment of a branch (role of home/host competent authorities)

Home competent authorities

29. The competent authorities observed that Article 35(3) of the CRD is very clear as to the (limited) circumstances in which a home competent authority may object to the establishment by a credit institution of a branch in another Member State. Specifically, the home authority may object only where it has 'reason to doubt the administrative structure or the financial situation of the credit institution, taking into account the activities envisaged'. Indeed, competent authorities did not report any cases of having objected to the establishment of a branch on this basis over the last five years. In view of the clarity of the Level 1 text, none of the competent authorities reported having a published or internal framework that further particularises the basis on which a notification under Article 35(1) of the CRD will be assessed. However one competent authority has a dedicated circular presenting the provisions relating to branch activities and exercising the freedom to provide services and another has issued public information.²⁹

30. Pursuant to Article 91 of the CRD, competent authorities are required to carry out a review of the arrangements, strategies, processes and mechanisms implemented by credit institutions to comply with the CRD and the Capital Requirement Regulation (CRR) and evaluate the risks to which the institution is or might be exposed, the risks that the institution poses to the financial system and the risks revealed by stress testing (the supervisory review and evaluation process (SREP)). The technical criteria for the SREP are further specified in Article 98 of the CRD and the EBA's guidelines for common procedures and methodologies for the supervisory review and evaluation process (SREP) and supervisory stress testing,³⁰ which make clear that the business model analysis must include a consideration of the materiality of the business and geographical dispersion (e.g. business lines, branches).

31. On the basis of the outcome of the review, competent authorities can determine whether the arrangements, strategies, processes and mechanisms in place, and own funds and liquidity, are sufficient to ensure a sound management and coverage of risks. Where deficiencies are identified, competent authorities can exercise their supervisory powers (Article 104 of the CRD), for instance to require the institution concerned to hold additional own funds or, for example,

²⁹ https://www.cnb.cz/export/sites/cnb/en/legislation/.galleries/official_information/v_2015_01_20115560_en.pdf.

³⁰ EBA/GL/2018/03 – EBA's guidelines for common procedures and methodologies for the supervisory review and evaluation process (SREP) and supervisory stress testing.

to restrict or limit the business, operations or network of institutions or to request the divestment of activities that pose excessive risks to the soundness of the institution.

32. Moreover, where credit institutions report a change in the branch activities, home (and host) competent authorities can react and impose conditions relating to the change of activities where appropriate (Article 36(3) of the CRD).

Host competent authorities

33. In cases where the competent authorities receive notification of a credit institution's intention to establish a branch in their jurisdiction, the vast majority of competent authorities indicated that they would typically expect (as *host* competent authority) to impose some form of requirement in relation to the branch operations in exercise of the power conferred by Article 36(1) of the CRD (the power to impose conditions in national law under which, in the interests of the general good, activities may be carried out in the host jurisdiction). For example, in one Member State, the published information (see footnote 29) makes clear the applicable obligations in relation to branch business.

34. In terms of the requirements imposed, the table sets out the number of competent authorities that reported the requirements of the kind enlisted.

Requirement imposed by the host competent authority	Number of competent authorities
Advertising/marketing rules (consumer-facing)	12
Solicitation rules (consumer-facing)	11
Disclosure rules (consumer-facing)	11
Charges and fees rules (consumer-facing)	10
Complaints rules (consumer-facing)	12
Alternative dispute resolution mechanism (for dealing with consumer complaints)	11
Confidentiality/secretcy requirements	8
Reporting requirements (to host competent authority)	12
Other	6

35. Finally, regarding the communication of the relevant conditions to credit institutions, the majority of competent authorities use the format of a standardised letter issued on a bilateral

(and non-public) basis.³¹ However, two use bespoke letters. One competent authority has set out on its website a list of applicable requirements.³²

Industry feedback

36. Industry representatives observed the following:

- a. Significant variations exist between competent authorities regarding the type and nature of requirements imposed in relation to branch operations (e.g. consumer protection, AML/CFT, on-boarding and reporting requirements; differential tax systems in the Member States were also cited but are outside the scope of this report). These variations can deter or hamper firms from establishing branches in other jurisdictions owing to the cost of compliance with varying conduct of business requirements.
- b. There is very little information publicly available that helps firms understand the requirements to which they may be subject should they choose to establish a branch in another jurisdiction. This lack of transparency, and challenges in navigating the applicable frameworks, can be sufficient to deter firms, particularly for smaller firms, from taking steps to establish a branch.

3.3.2 Freedom to provide services (role of home/host competent authorities)

a. Home competent authorities

37. The competent authorities observed that Article 39 of the CRD provides an automatic obligation for *home* competent authorities to transmit to the relevant *host* competent authority any notification received from a credit institution regarding its intention to carry out, for the first time, services on a cross-border basis. Under Article 39 of the CRD – in contrast to the establishment of branches and without any prejudice to the general power to restrict or limit the operations of institutions that pose excessive risks to their soundness (see Article 104(1)(e) of the CRD) – the *home* competent authority has no specific assessment role or any right to refuse to transmit the notification.³³

38. As an aside, competent authorities noted that many credit institutions will submit notifications on a ‘just-in-case’ basis without necessarily having immediate plans to carry out cross-border business (e.g. by submitting a single notification to the *home* competent authority indicating an intention to provide services in all other Member States). Typically credit institutions cite cost and efficiency savings as reasons for submitting notifications in this way and as a fail-safe way to avoid the risk of non-compliance with the notification obligation.

³¹ Indeed, some competent authorities are subject to an obligation to notify the institution concerned.

³² See: <https://www.nbb.be/doc/cp/eng/ki/bep/pdf/ab1.pdf>.

³³ Article 39 of the CRD.

39. Competent authorities also observed that there is no requirement under EU law for institutions to notify the *home* (or *host*) competent authorities in the event that they choose to discontinue carrying out cross-border business or change the nature of that business. However, some *home* competent authorities (as a matter of national supervisory practice) require the cessation of business on a cross-border basis or material changes in business (of which this may be one) to be notified as a matter of ongoing supervision. *Host* competent authorities may also indicate to incoming firms an expectation that material changes in business activities in that jurisdiction should be reported to the *host* authority (in the interests of the general good).

40. In terms of what constitutes cross-border business, competent authorities drew attention to the case law of the CJEU and the European Commission's 1997 communication,³⁴ which interpret and clarify the terms on which credit institutions may provide services in the single market in the light of the case law of the CJEU. Specifically, with respect to the freedom to provide services, the European Commission has clarified the following:

- a. Only those activities exercised by means of the freedom to provide services on the territory of another Member State must be notified in advance. In order to determine whether or not the activity is exercised on a given territory, the place where the 'characteristic performance' (i.e. the essential service for which payment is due) is supplied must be determined.
- b. Any form of advertising, whether targeted at a particular audience or not, and any offer of services from a distance by any means whatsoever is exempt from prior notification.
- c. The notification procedure laid down by the Second Banking Directive pursues an objective of mutual information of supervisory authorities. Any failure to carry out the notification or any incomplete or erroneous notification should not affect the validity of a banking contract.

41. In practice, in this text the European Commission has interpreted when cross-border business is relevant for the purpose of the freedom to provide services and, therefore, for the purposes of the notification under Article 39 of the CRD. Despite this interpretative communication, however, the evolution of market practices often makes it unclear when, under the CRD (and other sectoral directives such as PSD2), activities fall either within the remit of the freedom to provide services or of the right of establishment (especially when activities are carried out through digital means).

42. Additionally, some competent authorities have developed guidance on the criteria for what constitutes cross-border inbound business. However, such criteria are not convergent and may vary depending on the business activity/service concerned, even though these generally relate to marketing activities carried out in the territory, the characteristic performance of the

³⁴ Commission interpretative communication: Freedom to provide services and the interests of the general good in the Second Banking Directive (97/C 209/04).

service/activity and/or the existence of a contract or contractual proposal. Furthermore, guidance is generally not published on the websites of the competent authorities and there seems to be legal uncertainty as to its implementation, which may impact on the correct fulfilment of notification obligations and the ensuing application of local general interest provisions. Likewise, the criteria for defining as temporary the presence in the territory typical of the conduct of activities under the free provision of services (as opposed to regulatory permanent establishment) do not seem to be convergent and are [generally] not published on competent authorities' websites.

b. Host competent authorities

43. Competent authorities observed that, except for the transmission of the initial notification regarding the intention of a credit institution to provide cross-border services, as *host* authorities they have no real visibility of the scope of the activities of credit institutions that are actually carried out in their jurisdictions in exercise of the right to carry on activities cross-border, and of changes regarding these activities (including the cessation of business). This stems from the fact that, although there are reporting requirements for cross-border activities, there is no specific Level 1 obligation for credit institutions to notify their *home* authority of such changes and for such information to be transmitted from the *home* authority to the *host* authority. However, where, as a matter of domestic law, competent authorities require credit institutions to notify them of such changes, transmission of that information from *home* to *host* competent authority occurs in accordance with EU requirements in the spirit of sound cooperation between the authorities.³⁵

Industry feedback

44. In terms of the role of the *host* competent authority, no competent authorities reported communicating to the *home* competent authority or the credit institutions concerned the regulatory or supervisory expectations regarding the carrying out of business cross-border in the host jurisdiction, except in two cases where attention was drawn to AML/CFT rules that are applicable to all financial professionals active in the local market, in another where the competent authority specified the requirement for the credit institution to be subject to market conduct (and other relevant obligations) and in another where the authority was under a general obligation to inform the credit institution about the applicable obligations.

45. Industry respondents did not identify any specific concerns stemming from the notification process. However, again, industry representatives observed that a lack of consistency in local requirements, for instance for remote customer on-boarding (see Section 5 of this report), can deter firms from seeking to exercise their right to carry out cross-border activities owing to the complexities in navigating different types of AML/CFT requirements.

³⁵ See the technical standards on information exchange between home and host competent authorities: <https://eba.europa.eu/regulation-and-policy/passporting-and-supervision-of-branches/draft-technical-standards-on-information-exchange-between-home-and-host-competent-authorities>, in particular Article 16 of the RTS (information regarding cross-border service providers) and Part 3 of Annex I to the ITS, which refers to information such as volume of deposits and loans and form of cross-border activity (free text).

3.4 Cooperation between home and host authorities

46. EU law is highly prescriptive as to the role of, and communication and cooperation between, *home* and *host* competent authorities as regards the establishment of branches, and these arrangements have been demonstrated to be working well in practice.³⁶ As a result, no issues have been identified in this regard. However, issues have been identified with regard to the reporting by institutions of information about their *actual* cross-border activities.

47. In particular, owing to weaknesses in current reporting requirements, competent authorities (in both *home* and *host* jurisdictions) lack visibility on institutions' cross-border activities, specifically with regard to:

- a. the activities actually carried out in the *host* jurisdiction;
- b. changes to the activities carried out in the *host* jurisdiction;
- c. the cessation of activities in the *host* jurisdiction.

48. In view of changes to business models driven by FinTech (for instance digital platform solutions) that help enhance the capacity of institutions to provide services to customers in other jurisdictions, it is vital that competent authorities have better visibility on these activities.

49. Accordingly, this issue could be addressed by changes to strengthen the Level 1 in order to ensure that circumstances of a kind described above are reported by credit institutions to *home* competent authorities on a uniform and more timely basis throughout the EU, for example quarterly. Consequential changes can also be considered to templates for regulatory reporting and additional actions to promote further convergence in supervisory practices concerning the sharing of information (see paragraph 54).

3.5 Supervisory practices

50. EU law provides flexibility for:

- a. *home* competent authorities to determine whether arrangements, strategies, processes and mechanisms implemented by credit institutions and the own funds and liquidity held by them ensure a sound management and coverage of their risks (as part of the SREP process pursuant to Article 97 of the CRD), including as regards branch and cross-border business;
- b. *host* competent authorities to impose requirements in the interests of the general good.

51. In the context of the information-gathering exercises for the purposes of this report, no information has come to light that suggests that *home* competent authorities are imposing

³⁶ Ibid.

supervisory requirements that could constitute an obstacle to the carrying out by credit institutions of business in jurisdictions other than the home Member State. However, variations in the practices of *host* competent authorities in relation to the imposition of requirements on incoming branches of credit institutions, for example conduct of business and consumer protection rules,³⁷ against a background in which few competent authorities publish information on their supervisory expectations and the nature of the requirements they would impose on branch business, may be perceived as deterring the establishment of branches.

52. In this light, a Level 1 change should be considered that mandates the EBA to develop guidelines under Article 16 of the EBA's Founding Regulation to promote greater and more consistent levels of communication to the industry about the requirements that are likely to be imposed by host jurisdictions in the interests of the general good.

3.6 Conclusions

53. In order to address the issues stemming from the absence of transparency of requirements imposed in host jurisdictions in relation to business provided via the right of establishment or through the cross-border provision of services without establishment, Level 1 changes could be considered to mandate the EBA to issue guidelines under Article 16 of the EBA Regulation to promote more consistent communication by competent authorities to industry about the requirements that are likely to be imposed by host jurisdictions in the interests of the general good. It is emphasised that such guidelines would relate only to competent authorities' practices in communicating any requirements that may be applied in exercise of the power to impose requirements in this context and would not relate to the exercise of their supervisory discretion in this field. Competent authorities' compliance with such guidelines should be without prejudice of the fact that it is the institutions' ultimate responsibility to comply with the legal framework applicable in the host Member State.

54. In view of the trend towards the increasing provision of services cross-border, it is vital to promote supervisors' visibility on such activities. Although some recent changes have improved visibility (for instance the PSD2 supports increased transparency with the creation of the EBA register that provides a consolidated view on cross-border services), further Level 1 changes would be desirable in order to strengthen the requirements for institutions to notify *home* and *host* authorities of cross-border activities, particularly as regards the frequency and form of such notifications. The EBA also stands ready to complement any such changes with additional actions, such as guidance and through the EBA's question and answer (Q&A) tool, to promote further convergence of practices.

³⁷ The specificities of the requirements imposed are considered more generally in the context of Sections 4 and 5 of this report.

4. Consumer protection and conduct of business

55. Consumer protection and conduct of business requirements are critical for the purposes of ensuring that consumers are fairly treated when purchasing and using financial products and services. However, divergences in these requirements at the national level can complicate compliance processes and elevate related costs, and may pose a potential impediment to institutions' seeking to provide cross-border financial services. This chapter identifies areas in which there are consumer protection or conduct of business-related challenges for institutions seeking to provide their services across borders, taking account of the existing regulatory framework and its application.

4.1 Background: European framework for consumer protection and conduct of business

56. Consumer protection and conduct of business requirements are laid out across numerous EU directives that are within the EBA's scope of action.³⁸ These include Directive 2014/17/EU (the Mortgage Credit Directive (MCD)), Directive 2014/92/EU (the Payment Accounts Directive (PAD)), PSD2, EMD2, Directive 2008/48/EC (the Consumer Credit Directive (CCD)),³⁹ the DMFSD and Directive 2009/22/EC (the Alternative Dispute Resolution Directive (ADR)). At the time of publication of this report, both the CCD and the DMFSD are being reviewed by the European Commission. In addition to these there might be additional national provisions that are outside the scope of European legislation, or there might be stricter provision of minimum harmonisation directives.

4.2 Methodological approach

57. The EBA FinTech Roadmap sets out as a priority in the area of consumer protection the identification of potential barriers to FinTech firms when providing services across borders, including in respect of the allocation of home–host responsibilities for the supervision of complaints-handling requirements, the purchase and use of services via the internet and/or through mobile solutions (e.g. apps), and EU and/or national disclosure requirements.

58. Taking account of these themes, for the purpose of this report, the EBA conducted a mapping of the EU directives referred to in paragraph 56, and competent authorities were requested to describe their frameworks for:

³⁸ For the purposes of this work, Regulation (EU) No 1286/2014 (Packaged Retail and Insurance-based Investment Products), Regulation (EU) No 600/2014 (Markets in Financial Instruments Regulation) and Directive 2004/39/EC (Markets in Financial Instruments Directive) have not been assessed, given the very limited scope of the EBA under these texts, which is limited to structured deposits.

³⁹ Following the recent amendment of Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority), the CCD will come under the EBA's scope of action.

- a. national complaints-handling and redress mechanisms;
- b. national disclosure requirements.

59. The EBA followed the responses of the competent authorities with a series of bilateral questions and interviews and carried out an additional targeted survey to elicit information about the allocation of supervisory powers.

4.3 General observations

60. Consumer protection and conduct of business requirements for products and services marketed face to face and for those marketed through digital means are typically the same, and they also typically apply irrespective of whether they are provided by FinTech firms or by financial services providers with more traditional business models. This is because competent authorities typically follow the ‘same service, same risks, same rules’ principle. However, some variations exist between Member States as regards the nature of some of the requirements.

61. Industry respondents indicated that, when providing financial services across borders, requirements applied by host Member States were in several cases stricter than those applied by the relevant home Member State, in particular with regard to mortgages, payment services, personal credit payment accounts, e-money services and deposits/savings accounts.

62. In the area of payments, industry respondents alluded to different interpretations of different articles of PSD2 at the national level, which in the area of consumer protection includes the non-acceptance of the International Bank Account Number (IBAN)⁴⁰ in some jurisdictions and differences in fees regulation.

63. As explained in Section 4.5 of this report, because the existing legal framework is based to a large extent in areas where EU law is not yet fully harmonised, some conduct of business and consumer protection requirements together mean that the levels of protection consumers enjoy may differ depending on whether they buy financial services from firms operating across borders in the host territory under the freedom to provide services or from other providers.

4.4 Degree of EU harmonisation of consumer protection requirements

64. Two particular areas identified already in the EBA FinTech Roadmap have been further explored in this report:

- Complaints-handling procedures and redress mechanisms;
- consumer-facing disclosure requirements.

4.4.1 Complaints-handling procedures and redress mechanisms across EU jurisdictions

⁴⁰ This led to the need to establish branches in the other jurisdiction.

65. Rules and procedures for customer complaints handling are currently not fully harmonised in EU legislation. Only some EU directives (PSD2 and ADRD) include specific requirements for complaints-handling and redress mechanisms to leave scope for divergence at the national level.

66. The following two areas are further explored in this section of the report:

- firms' internal complaints-handling procedures;
- complaints addressed to competent authorities.

(i) Requirements for firms to set up internal complaints-handling procedures

67. Based on the mapping of existing rules for complaints handling, it has been identified that EU Level 1 legislation is not prescriptive as regards complaints-handling procedures or policies and, as a result, there are divergences at the national level.

68. In order to strengthen consumer protection and to ensure a consistent approach to complaints handling, the EBA and the European Securities and Markets Authority (ESMA) initially, in 2014, issued joint guidelines on complaints handling by financial institutions (JC 2014 43). The scope of these guidelines has since been extended,⁴¹ and the revised guidelines on complaints handling for the securities and banking sectors (JC 2018 35) were published in 2018.

(ii) Complaints addressed to competent authorities

69. Consumers tend to file complaints of alleged infringements of the applicable rules with their own local competent authority. This may be due, in part, to a lack of visibility regarding the cross-border nature of the activity and a lack of clarity as regards the applicable complaints scheme, but also to insufficient understanding on the part of consumers of the allocation of responsibilities between competent authorities in the supervision of cross-border activities.

4.4.2 Consumer disclosure and transparency of information requirements across EU jurisdictions

70. Industry respondents commonly identified the limited degree of regulatory harmonisation in consumer-facing disclosure requirements as an area that could potentially negatively impact firms that are willing to provide financial services across borders. The EBA has observed several potential issues, mainly stemming from limited harmonisation.

71. The following areas related to disclosure have been analysed in more detail:

- a. the scope and level of harmonisation of the EU legal framework for consumer disclosure;
- b. national specific disclosure requirements;
- c. potentially outdated provisions in the EU legal framework.

⁴¹ Guidelines have been extended to the providers of the new account information and payment initiation services under PSD2 and to mortgage credit intermediaries under the MCD.

72. As a result of the analysis, the EBA arrived at the view that the disclosure rules in the EU, most notably those set out in the DMFSD, need to be updated. In parallel with the report, the EBA is therefore also publishing an opinion addressed to the EU Commission on the disclosure to consumers via digital means, with concrete proposals on how the DMFSD should be modified so as to make its disclosure provisions more suitable for the digital age, which would then also reduce national divergences.

i. Scope and harmonisation of the existing legal framework for consumer disclosure

73. Despite the fact that EU product-specific financial legislation usually contains disclosure requirements (for example in the CCD, the MCD, PSD2 and the PAD), and that there are also horizontal directives partially covering these aspects, such as the DMFSD, the E-Commerce Directive (ECD) and the Unfair Commercial Practices Directive (UCPD), a lack of harmonisation of requirements has been identified in the following two areas:

- advertising, for which only the CCD, the MCD and the DMFSD have specific requirements;
- adequate explanations to consumers, for which only the CCD and the MCD have introduced specific requirements.

74. This limited level of harmonisation presents issues for both institutions and consumers. In the case of the former, institutions may need to adjust disclosures depending on the jurisdictional location of their potential consumers. In the case of the latter, consumers may receive different information/presentations of information depending on the home Member State of the institution concerned, creating challenges in comparing products and services from different providers.

ii. National specific disclosure requirements

75. Regarding the requirements on (i) pre-contractual information; (ii) contractual information; and (iii) communications to customers, although most competent authorities indicated that they apply specific national requirements in these areas, responses in the survey suggest that there are some jurisdictions that do not apply national requirements.

76. Regarding the requirements for specific products (residential mortgages, personal credit, deposits, payment accounts, payments services and e-money services), based on the responses received, there seem to be differences to the extent to which national requirements apply. However, further analysis of materiality would be needed to conclude whether these differences actively hamper the provision of cross-border services. By way of example:

- In the area of personal credit, most respondents refer to applicable requirements stemming from the CCD. Rules on advertising appear to be the most commonly implemented, and rules on communication to customers are implemented to a lesser extent.

- In the area of payment accounts, while most respondents seem to have requirements for pre-contractual/contractual information in place, there appears to be greater heterogeneity regarding requirements for advertising and adequate explanations.
- In the area of payment services and electronic money, adequate explanations and rules on advertising seem to be the least harmonised.

iii. The potentially outdated EU legal framework

77. Three main areas in which the EU legal framework might be outdated for the digital provision of financial services have been identified:

- pre-contractual and/or contractual information requiring hard copies;
- the definition of ‘durable medium’;
- the definition of ‘consumers’.

78. On pre-contractual information, the CCD and most EU directives provide that pre-contractual information has to be provided on paper or on another durable medium. Only the EMD stays silent on the way of providing the contract and the pre-contractual information. The issue that arises is the outdated meaning of the term ‘durable medium’. Despite the fact that definitions of ‘durable medium’ exist in several directives, including the DMFSD and PSD2, the definitions therein may not keep up with the speed of innovation in the technology that is available to store information.

79. Finally, the definition of ‘consumer’ appears to differ between the various directives in the banking sector and also between Member States. This requires firms to adapt to national requirements on pre-contractual information and procedures.

80. More generally, in the area of consumer-facing disclosure, most industry respondents considered that it would be helpful if the disclosure requirements in existing regulations (such as on costs, fees, risks, etc.) were to be complemented by requirements that set out how the disclosure should be presented when services are provided via digital means (mobile, internet, etc.).

4.5 Allocation of supervisory powers

81. The issues identified in this section that derive from different approaches adopted by national legal frameworks in the allocation of supervisory powers refer mainly to the area of complaints handling. However, the conclusions reached also appear relevant to other consumer protection requirements.

4.5.1 Inconsistent supervisory approaches

82. The JC guidelines on complaints handling for the securities (ESMA) and banking (EBA) sectors,⁴² which have recently been extended by the EBA to the providers of the new account information and payment initiation services under PSD2 and to mortgage credit intermediaries under the MCD, apply to authorities that are competent for supervising complaints handling by firms in their jurisdiction. According to the content of the guidelines, this includes circumstances where the competent authority supervises complaints handling under EU and national law by firms doing business in their jurisdiction under the freedom of services or the freedom of establishment.
83. The information gathered through engagement with a limited number of national competent authorities suggests that some Member States might not apply national requirements on complaints-handling procedures consistently. This could lead to different scenarios such that, depending on whether the home and host legislation consider complaints-handling procedures as part of the firm's internal control mechanisms under the home competent authority's prudential remit, or as part of its conduct of business regulation, it might be the case that both or neither of the two competent authorities in question would end up supervising the firm's internal complaints handling procedures. This could result in potential conflicts where those requirements are not fully harmonised.
84. A difficult situation may also occur if the legal framework in the host Member State does not apply the requirement to set up complaints-handling procedures to foreign firms operating in its territory, and the home legal framework includes this requirement not under the competent authority's prudential remit, but under its conduct of business rules. In those cases, the home competent authority may not have supervisory powers regarding complaints-handling procedures over its domestic firms operating abroad.
85. The approach taken by Member States to establish the obligation for firms operating across borders in their jurisdiction to set up complaints-handling procedures in accordance with their national legal framework seems not to depend too heavily on whether such requirements are part of prudential or conduct of business regulations. This approach is unlike that envisaged in the JC guidelines, which seem to adopt an 'incoming' services approach (as they apply to competent authorities that are supervising complaints handling by firms in their jurisdiction). This includes circumstances where the competent authority supervises complaints handling under EU and national law by firms doing business in its jurisdiction under the freedom to provide services or the freedom of establishment. There are examples of Member States requiring both firms passporting out and firms passporting in their services to set up complaints-handling procedures in accordance with their national requirements, irrespective of whether such requirements are considered as part of prudential or conduct of business regulations.
86. This is particularly the case where firms authorised in the jurisdiction operate in other EU Member States under the freedom of services (i.e. 'outgoing services without establishment') or where firms operate through branches, either outgoing or incoming. However, this is less common in the case of firms authorised or registered in other EU Member States operating in the host jurisdiction under the freedom of services (i.e. 'incoming services without establishment'); only a few Member States have established national requirements on

⁴² <https://eba.europa.eu/regulation-and-policy/consumer-protection-and-financial-innovation/guidelines-for-complaints-handling-for-the-securities-esma-and-banking-eba-sectors>

complaints-handling procedures in this circumstance, and in some cases these are less detailed and comprehensive than for establishments. Some differences have also been observed in the approach towards regulating credit institutions and payment and e-money institutions, with the first being more stringent.

87. Similarly, some discrepancies have been detected with regard to competent authorities' supervisory duties. For example, one competent authority seems to supervise complaints-handling procedures under all scenarios, whereas most competent authorities seem to supervise mostly firms operating through outgoing branches and outgoing services without establishment, irrespective of whether such requirements are part of prudential or conduct of business regulations, and whether they act under a prudential or a conduct of business and consumer protection mandate (or both).
88. Furthermore, only a few competent authorities seem to supervise firms operating under the 'incoming services without establishment' scenario, and in one jurisdiction only a limited set of requirements are applicable to firms operating across borders under the freedom to provide services, which are much lighter than those requirements under the freedom of establishment. These divergences are even greater in the case of credit intermediaries and non-credit institution creditors under the MCD, as in some Member States these providers are outside the remit of the financial competent authorities, whereas in other Member States they are subject to the supervision of the financial competent authorities only where they have been granted an authorisation as a credit institution or where they operate nationwide in the relevant jurisdiction (i.e. not only at regional level).
89. Indeed, inconsistencies across jurisdictions exist regarding whether the complaints proceedings are also open to institutions passporting into another country. Some Member States limit this access to institutions that have an establishment whereas other countries apply these proceedings to both the right of establishment and the freedom to provide services.
90. Most of the host national frameworks reported in the limited sample examined do not grant supervisory powers to the home Member States but require intermediaries operating in their territory to apply their own national requirements for complaints handling in accordance with a territory-specific principle.
91. Some Member States apply the national framework in accordance with a territorial principle to all institutions operating within their boundaries, regardless of the fact that they operate pursuant to an EU passport having been authorised by the authority of another Member State.
92. The above-mentioned findings suggest divergent, and sometimes overlapping, regulatory and supervisory approach across Member States, which, together with a lack of a clear allocation of home–host responsibilities, may lead in practice to either overlaps or gaps in the cross-border supervision of complaints-handling procedures.
93. It is to be noted that this issue appears to be extended to other consumer protection requirements as highlighted by the responses to the questionnaire. In particular, in what concerns disclosure requirements, some competent authorities indicated that the legal requirements for disclosure apply to institutions providing cross-border banking services in their jurisdiction under both the freedom to provide services and the right of establishment, as and

when applicable, whereas others indicated that the requirements on disclosure apply to institutions providing cross-border banking services in their jurisdiction only under the right of establishment, as and when applicable. A few competent authorities did not provide any answers.

94. In summary, the assessment suggests that (i) less than half of the limited number of competent authorities participating in the exercise apply similar requirements to foreign institutions operating in their territory, regardless of whether they operate under the freedom to provide services or the right of establishment; (ii) a similar number of competent authorities apply requirements to (and perform supervision over) only institutions operating under the right of establishment, thus not imposing any legal requirement on institutions operating under the freedom to provide services and leaving the responsibility of their oversight to the home competent authorities.
95. The phenomenon outlined above will be further analysed in the course of the follow-up work on the JC complaints-handling guidelines by the Joint Committee of the three ESAs, which also cover issues stemming from cross-border services and related complaints.

4.5.2 Lack of a clear allocation of responsibilities between home and host competent authorities

96. The distribution of responsibilities between home and host competent authorities is not always clear. While some legislation states that supervisory competence falls under the exclusive remit of the home Member States, other legislation splits the responsibilities between home and host Member States. More specifically, it seems that the majority of this legislation confers on the host competent authorities some responsibilities for ensuring compliance with conduct rules, especially those related to the requirements for information to be provided to customers and transparency of conditions. Importantly, it seems that some of the more recent directives that have replaced former ones, such as MiFID2 or PSD2, have somehow given more powers and/or access to information to host competent authorities, suggesting a slight change in the approach of the EU legislators in recent years. In addition to the responsibilities allocated to host competent authorities under the different EU legislation, host Member States might have conferred on the host competent authorities additional powers under national law.
97. **Supervision of the overall cross-border activities.** As already highlighted in the JC report on cross-border supervision of retail financial services (JC/2019-22),⁴³ supervision and enforcement issues appear to be linked to the bias that home competent authorities may have of prioritising the supervision of financial institutions providing services in their Member State. In the case of the simultaneous exercise of the freedom to provide services and the right of establishment by an institution, it is very difficult for competent authorities to determine under which passporting regime (the freedom to provide services or the right of establishment) the service is being provided, as financial institutions are not always able to clearly allocate their activities in this regard. Similar problems emerge when the service is

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<https://eba.europa.eu/documents/10180/2551996/Final+Report+on+cross-border+supervision+of+retail+financial+services.pdf>

provided under the freedom to provide services by a branch located in another Member State, and not by the parent company.

98. In these cases, there are difficulties in supervising the overall activities in a Member State, which may ultimately lead to regulatory gaps and arbitrage. This may also lead to a lower level of protection for consumers.

4.6 Cooperation between home and host authorities

99. As already highlighted in the JC report on cross-border supervision of retail financial services,⁴⁴ unlike the insurance and investment sectors, there are very few provisions in EU Level 1 texts in the banking, payments and e-money sectors that regulate the cooperation between home and host authorities in the area of consumer protection and conduct of business requirements. This gap has also been outlined by the industry and competent authorities throughout the information-gathering exercises that constitute the basis of this report.

4.7 Conclusions

100. Based on the EBA's assessment of the input provided by industry and competent authority respondents, it can be concluded that, in order to facilitate and possibly enable the scaling up of services provision across the EU Single Market and ensure an adequate and uniform level of consumer protection across the EU, further harmonisation in the area of the conduct of business and consumer protection requirements would be required, while still respecting national competencies and local market specificities.

101. Areas where further harmonisation of the legislative framework should be considered include:

- a. consumer-facing disclosure requirements;
- b. the allocation of home–host responsibilities for the supervision of complaints handling in the case of cross-borders services;
- c. supervisory practices and powers regarding the right of establishment and the freedom to provide services.

102. Additionally, clarifications of, or guidance on, the interpretation of the term 'durable medium' would also be desirable, to promote convergence.

103. In the absence of a more harmonised EU-wide legal framework, there is a limit to how much convergence can be achieved through the EBA's own initiative guidelines or activities promoting supervisory convergence and consumer awareness.

104. Thus, further harmonisation of consumer protection rules at the EU level could be accompanied by specific mandates for technical standards and guidelines to support

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<https://eba.europa.eu/documents/10180/2551996/Final+Report+on+cross-border+supervision+of+retail+financial+services.pdf>

harmonisation and convergence of supervisory practices or further actions, for example through the Q&A tool to promote further convergence of practices.

5. Anti-money laundering and countering the financing of terrorism

105. This section examines the AML/CFT obligations of credit institutions and financial institutions⁴⁵ ('institutions') set out in AMLD4 and identifies areas in which divergences in national implementation pose potential impediments to the cross-border provision of financial services.

5.1 Background: EU framework for anti-money laundering and countering the financing of terrorism

106. The AML/CFT obligations of institutions and competent authorities in the EU are set out in AMLD4, which came into force on 26 June 2015. AMLD4 has been amended by Directive (EU) 2018/843 (AMLD5),⁴⁶ which was published in May 2018. Depending on their activities, FinTech firms that fall within the scope of AMLD4⁴⁷ are required to comply with the same AML/CFT obligations as traditional financial institutions.

107. AMLD4 puts a risk-based approach at the centre of the AML/CFT regime. It recognises that the ML/TF risks can vary across Member States, competent authorities and institutions, and that those within its scope have to take steps to identify and assess that risk with a view to deciding how best to manage it through effective AML/CFT policies and procedures. For institutions, these policies and procedures form part of their internal control systems and, in addition to the suspicious transaction reporting obligations, include customer due diligence (CDD) measures, which consist of a duty to:

- identify the customer (and, where applicable, the beneficial owner and beneficiary) and verify the customer's (and beneficial owner's and beneficiary's) identity on the basis of documents, data or information obtained from 'reliable and independent sources';
- assess and, as appropriate, obtain information on the purpose and intended nature of the business relationship;
- carry out on-going monitoring of business relationships and transactions.

108. The AMLD4 is a minimum harmonisation directive. This means that Member States, when transposing AMLD4 into their national legislation, can go beyond the standards set by the directive and can include additional measures where this is necessary to mitigate ML/TF risks.

⁴⁵ Credit institutions and financial institutions as defined in Article 3(1) and (2) of Directive (EU) 2015/849.

⁴⁶ Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU.

⁴⁷ Article 2 and Article 3 of Directive (EU) 2015/849.

As a result, national approaches to AML/CFT may diverge between competent authorities and institutions in different Member States.

5.2 Methodological approach

109. As part of the methodological approach referred to in Section 1 of this report, competent authorities were requested to describe their national AML/CFT legal framework that is applicable to FinTech firms and to highlight any provisions that may have a negative impact on businesses operating on a cross-border basis. Competent authorities were asked a series of questions including those regarding:

- (i) whether there are any provisions in competent authorities' national AML/CFT legislation that could:
 - prevent or impose limitations on FinTech firms operating on a cross-border basis;
 - discourage innovative digital solutions from being used by FinTech firms in their customer on-boarding processes;
 - limit non-face-to-face customer on-boarding via online channels.
- (ii) whether competent authorities are aware of any remote or electronic identification processes that are regulated, recognised, approved or accepted in their Member State;
- (iii) whether competent authorities are aware of any instances where the national AML/CFT legislation requires that customer identification and verification is carried out face to face only;
- (iv) the application of AML/CFT legislation to FinTech firms operating in a Member State on a cross-border basis;
- (v) competent authorities' approaches to AML/CFT supervision of FinTech firms that are operating in their Member State on a cross-border basis.

110. In addition, industry representatives were requested to provide their feedback on AML/CFT-related obstacles that prevent or limit institutions' cross-border services. The industry representatives were asked to share their views on the following:

- i. different Member States' approaches to remote customer on-boarding, particularly where services are provided on a cross-border basis;
- ii. apart from remote customer on-boarding, if there any other obstacles for the cross-border provision of products and services created by Member States' AML/CFT regimes;
- iii. if there any provisions in Member States' AML/CFT frameworks that impede or prevent cross-border services with or without the right of establishment (an 'establishment');

- iv. examples of institutions withdrawing their services from Member States because of AML/CFT requirements in that Member State;
- v. obstacles relating to differing views by Member States, of what constitutes an ‘establishment’ for AML/CFT purposes;
- vi. examples of Member States that have extended the scope of their AML/CFT regime to institutions that provide cross-border services without an establishment, for example by requiring firms to apply that Member State’s CDD regime, or to report suspicious transactions to that Member State’s financial intelligence unit;
- vii. any EU requirements that may be impeding or preventing institutions from providing services across borders.

5.3 General observations

111. The majority of competent authorities confirmed that the same AML/CFT regime applies to FinTech firms as for incumbent institutions and therefore the differences described in this section of the report are not specific to FinTech. They also confirmed that in most Member States the AML/CFT legislation is technologically neutral and institutions can determine the appropriate means of on-boarding their customers and apply CDD measures commensurate with the ML/TF risk. However, some Member States have adopted a more prescriptive approach that sets out specific requirements or conditions that should be met by institutions when using innovative solutions or on-boarding customers remotely.
112. The survey responses from both industry and competent authorities confirm that most issues that can potentially constitute obstacles to the smooth provision of services across borders arise from the divergence of the national transpositions of AMLD4, which is a direct consequence of the minimum harmonisation framework. In addition, respondents from the industry have highlighted certain challenges experienced by institutions operating across borders that arise from varying supervisory practices in different Member States.
113. The divergent practices and issues discussed in this section are not exclusively FinTech-specific and are often relevant more generally for all financial institutions.

5.4 Divergent regulatory approaches

114. In a framework based on a minimum harmonisation directive such as AMLD4, divergent regulatory approaches are common and anticipated. This means that each Member State may impose different AML/CFT requirements when transposing AMLD4 into their national legislation. For institutions operating on a cross-border basis, it means that their policies and procedures may need to be adjusted to ensure compliance with the specific Member States’ AML/CF requirements, where they operate.
115. Most respondents highlighted this as the main factor having an impact on cross-border operations. Nevertheless, even if the underlying minimum harmonisation approach were

maintained, respondents suggested a number of areas that are the most affected by regulatory divergence and which would benefit from greater harmonisation. These areas include the following:

- **CDD measures:** AMLD4 does not set out in detail how institutions should apply CDD measures, but some Member States, when transposing AMLD4, have introduced very specific CDD requirements in their national law. Respondents suggest that this may potentially have a negative impact on cross-border businesses, as the CDD measures that an institution has put in place to comply with the requirements in one Member State may not be sufficient to comply with the CDD requirements of another Member State. Examples provided by the respondents include:
 - a requirement for institutions to obtain signed hard copies of specific declarations from customers or to have them signed by a qualified electronic signature;
 - a requirement to complete a complex declaration on beneficial ownership;
 - a refusal to accept alternative forms of evidence of identity, such as a driver's licence;
 - a requirement that only the identification documents that contain biometric data and specific security signs can be accepted as a proof of a customer's identity, thereby preventing customers from Member States or third countries where the documents do not contain such data or security measures from obtaining institutions' services on a cross-border basis;
 - national legislation contains specific thresholds that trigger the application of CDD measures for occasional transactions;
 - a requirement to collect physical copies of documents used as part of the identification and verification procedures;
 - certain limitations are placed on the outsourcing of AML/CFT obligations, for example by prohibiting the outsourcing of ongoing monitoring of customers and sanctions screening.
- **Digital identification:** AMLD4 is technologically neutral. This means that institutions are given flexibility, to the extent that national legislation implementing AMLD4 permits this, when it comes to choosing the most suitable means of identifying and verifying their customers. In line with the opinion published by the ESAs in January 2018,⁴⁸ the institutions are allowed to use innovative solutions as part of their AML/CFT processes if those solutions are commensurate with the ML/TF risk that they are exposed to. Furthermore, AMLD5 confirms that digital identification means can be considered as reliable and independent sources, where they are regulated, recognised, approved or accepted by the relevant national authorities,⁴⁹ but leaves it to Member States to decide what types of

⁴⁸ Joint opinion of the European Supervisory Authorities (JC 2017 81) on the use of innovative solutions by credit and financial institutions in the customer due diligence process, published on 23 January 2018. Available at: [https://esas-joint-committee.europa.eu/Publications/Opinions/Opinion%20on%20the%20use%20of%20innovative%20solutions%20by%20credit%20and%20financial%20institutions%20\(JC-2017-81\).pdf](https://esas-joint-committee.europa.eu/Publications/Opinions/Opinion%20on%20the%20use%20of%20innovative%20solutions%20by%20credit%20and%20financial%20institutions%20(JC-2017-81).pdf).

⁴⁹ Article 13(1)(a) of Directive (EU) 2018/843.

electronic identification are acceptable in their territories. Respondents to the EBA survey suggested that there was no consistent approach among Member States to accepting digital identification and verifying customers' identity, with some Member States fostering the use of new technologies and some Member States being more reluctant.

- **Third party reliance:** AMLD4 allows institutions to rely on third parties⁵⁰ to fulfil certain CDD obligations. However, some Member States have limited the reliance on third parties through their national legislation, by, for example, requiring that the third parties comply with the same requirements as those that are applicable domestically, or that the initial identification of a customer carried out by a third party dates back no more than 24 months. AMLD4 is clear that this arrangement should not be confused with outsourcing, which is governed by a contractual relationship between the parties.⁵¹
- **Extension of host state AML/CFT requirements to institutions making use of the free provision of services:** AMLD4 provides that, where an institution is operating an establishment in another Member State, that establishment is required to comply with the national provisions of that Member State and is supervised by the competent authority of that Member State.⁵² AMLD4 does not envisage that institutions that provide services in another Member State under the free provision of services, without an establishment, should comply with that Member State's national AML/CFT provisions, although Member States can decide to extend the scope of their AML/CFT regime to those providers where this is justified by the level of the ML/TF risk. This means that, in some Member States, those institutions have to comply with local AML/CFT requirements.

5.5 Remote on-boarding of customers

116. The key difference between FinTech firms and more traditional business models for credit institutions and financial institutions as defined in Article 2(1) of AMLD4 is that they often operate online, without any physical establishment in a particular territory. This means that in the FinTech sector the remote on-boarding of customers is the norm and the on-boarding of customers while they are physically present is no longer an option for them. So prior to offering their services on a cross-border basis, FinTech firms must first establish the host Member State's approach towards remote on-boarding of customers. Responses to the EBA's survey suggest that the approach varies significantly between Member States. While some Member States remain cautious about the use of remote on-boarding and electronic identification solutions, particularly where they do not present safeguards as required by AMLD5,⁵³ and associate them

⁵⁰ Article 26 of Directive (EU) 2015/849 provides that 'third parties' means obliged entities listed in Article 2 of Directive (EU) 2015/849, the member organisations or federations of those obliged entities, or other institutions or persons situated in a Member State or third country that:

- a) apply customer due diligence requirements and record keeping requirements that are consistent with those laid down in this directive;
- b) have their compliance with the requirements of this Directive supervised in a manner consistent with Section 2 of Chapter VI.

⁵¹ Article 29 of Directive (EU) 2015/849.

⁵² Article 48 of Directive (EU) 2015/849.

⁵³ Point c of Section 2 of Annex III of Directive 2015/849.

with heightened ML/TF vulnerabilities, in spite of recent changes introduced by AMLD5, others are more liberal in their approach.⁵⁴ On the basis of responses received, the EBA has identified three different legal approaches across the EU:

- **prohibitive**, where Member States' legislation does not allow remote on-boarding of customers under any circumstances and a customer's physical presence is required by law;
- **restrictive**, where Member States allow remote on-boarding but have made the use of such on-boarding conditional on the use of a particular technology, such as video identification, or define all customers that are on-boarded remotely as high risk and require the application of enhanced CDD measures to these customers; another example of this is where a Member State has limited the use of remote on-boarding to individual accounts only;
- **risk-based**, where Member States' legislation places no restrictions on remote on-boarding but requires institutions to apply a risk-based approach to non-face-to-face on-boarding of customers.

117. Furthermore, the responses to the EBA's survey confirm that a small number of Member States have adopted provisions in their national AML/CFT legislation, such as requiring the customer to be physically present at on-boarding, that limit or prevent the use of remote on-boarding solutions. However, most Member States have transposed AMLD4 in ways that do not prevent the use of innovative solutions, although, in some instances, certain conditions may need to be satisfied when using these solutions. This is often justified by the ML/TF risk associated with innovations and new technologies in general. Some examples of these conditions include:

- a prerequisite that an approval should be sought from the supervisory body in a Member State prior to commencing the use of a particular innovative solution or technology;
- a provision to ensure that secure and protected electronic communications equipment is operated by the service provider;
- a requirement to carry out an enhanced assessment of distribution channel risks;
- a requirement to apply enhanced CDD measures in all cases where innovative solutions are used to on-board customers.

5.6 Supervisory practices

118. Differences in the national transposition of AMLD4 have naturally led to differences in the way institutions are supervised in each Member State by the competent authorities. In order to supervise institutions effectively, competent authorities must develop a good understanding of the ML/TF risks to which institutions are exposed in their jurisdiction and adjust their supervisory practices commensurate with the ML/TF risk presented by the institutions. This means that the

⁵⁴ Directive (EU) 2018/843 explicitly refers to technological solutions governed by the 'eIDAS Regulation'.

ML/TF risk assessment of an institution operating on a cross-border basis by its home competent authority may differ from that carried out by the host competent authority on the basis of customers served by this institution, the jurisdictions that this institution is exposed to, the delivery channels used to provide services and the products offered by the institution. As a result, the intensity and frequency of the competent authority's engagement with the institution may differ between Member States. This means that, if an institution is rated as high risk by a competent authority in a home Member State but as low risk in a host Member State, it is likely that it will receive more AML/CFT supervisory engagement from the home competent authority.

119. In addition, each competent authority carries out its own assessment of systems and controls put in place by institutions operating in their jurisdiction and determines whether they are robust enough to mitigate those ML/TF risks to which the institutions are exposed. As a result of these assessments, the competent authorities in different Member States may come to different conclusions about the effectiveness of various controls. This is particularly evident in respect of FinTech. Some competent authorities have developed a good understanding of the ML/TF risks associated with FinTech and are more receptive to various innovative solutions than others who have adopted a more conservative approach.

120. To achieve some level of convergence and help competent authorities enhance their understanding of risks, the ESAs have published risk factors guidelines and risk-based supervision guidelines,⁵⁵ which provide some clarity on the type of ML/TF risk factors that should be considered by competent authorities when carrying out their risk assessments, and the European Commission has published the supranational risk assessment⁵⁶ (SNRA), in which it has highlighted ML/TF risks associated with particular products. However, as the technologies are continuously developing and improving, the competent authorities continuously need to keep abreast of these developments and, in line with the ESAs' guidelines, continuously review and update their risk assessments to reflect the latest developments.

121. In general, the scope and intensity of supervisory measures that are applicable to each institution in a particular Member State should be determined by national competent authorities on the basis of their own ML/TF risk assessment. This means that those institutions rated as high risk may be inspected by competent authorities more frequently and more intrusively than those rated as lower risk. Therefore, an institution that is rated as high risk by a competent authority in a home Member State but as low risk in a host Member State is likely to receive more AML/CFT supervisory attention from the home competent authority.

⁵⁵ Joint guidelines by the European Supervisory Authorities (JC 2017 37) under Articles 17 and 18(4) of Directive (EU) 2015/849 on simplified and enhanced customer due diligence and the factors credit and financial institutions should consider when assessing the money laundering and terrorist financing risk associated with individual business relationships and occasional transactions, published on 26 June 2017. Available at: <https://eba.europa.eu/regulation-and-policy/anti-money-laundering-and-e-money/guidelines-on-risk-factors-and-simplified-and-enhanced-customer-due-diligence>

⁵⁶ Commission staff working document accompanying the report from the Commission to the European Parliament and the Council (COM 2019 650 final) on the assessment of the risk of money laundering and terrorist financing affecting the internal market and relating to cross-border activities, published on 27 July 2019. Available at: https://ec.europa.eu/info/sites/info/files/supranational_risk_assessment_of_the_money_laundering_and_terrorist_financing_risks_affecting_the_union_-_annex.pdf

5.7 Cooperation between home and host competent authorities

122. ML and TF is almost never bound by the borders of one Member State; therefore, cooperation between competent authorities in different Member States is key to a robust AML/CFT supervisory framework within the EU. For a competent authority to have a holistic view of all ML/TF risks to which a particular institution is exposed, it should have access to the relevant information in respect of that institution's operations in other Member States. In practice, the competent authorities can obtain this information in two ways: (i) by requesting it directly from the institution, or (ii) by requesting it from the competent authority that is responsible for the AML/CFT supervision of that institution in another Member State. The EBA's experience shows that where, for various reasons, the necessary information cannot be obtained from other competent authorities, it is gathered more intensively directly from the institutions through increased reporting requirements. This may potentially add an administrative burden and associated costs on these institutions and could result in a withdrawal of that institution's services from that jurisdiction.

123. Some provisions requiring the cooperation between home and host competent authorities in circumstances where the institution operates an establishment in the host Member State were already contained in AMLD4;⁵⁷ however, these provisions have now been enhanced by AMLD5, which contains an explicit requirement for all competent authorities to cooperate and exchange information where they are responsible for the supervision of institutions that operate on a cross-border basis.⁵⁸ These cooperation requirements will be further enhanced by the ESAs' supervisory cooperation guidelines,⁵⁹ which, when published, will provide a framework and clarify practical modalities for such cooperation.

5.8 Conclusions

124. From all the issues discussed in this section of the report, it is evident that divergent regulatory approaches and the application of the risk-based approach by competent authorities when supervising institutions' compliance with AML/CFT requirements are key factors that impact cross-border services across the EU. While the respondents to the EBA survey have provided numerous examples of diverging regulatory practices, which have been summarised by the EBA in Section 5.4 of this report, it is important to remember that the root cause of these differences lies in the fact that the AML/CFT framework in the EU is based on the minimum harmonisation directive, that is AMLD4, which gives flexibility to Member States to impose different AML/CFT requirements when transposing the directive into their national legislation. In addition, AMLD4 recognises that institutions operating on a cross-border basis are exposed to different levels of ML/TF risks in different Member States. It requires competent authorities

⁵⁷ Article 48(5) of Directive (EU) 2015/849.

⁵⁸ Article 57a of Directive (EU) 2018/843.

⁵⁹ Consultation Paper on the draft joint guidelines by the European Supervisory Authorities (JC/CP/2018/59) on cooperation and information exchange for AML/CFT supervision purposes, published for consultation on 8 November 2018. Available at: <https://eba.europa.eu/documents/10180/2440050/Consultation+Paper+on+JC+GLs+on+cooperation+and+information+exchange+for+AML+CFT+supervisory+purposes+.pdf>

to assess the risks associated with institutions operating in their jurisdiction and to adjust the intensity and frequency of their supervision, to ensure that it is commensurate with the ML/TF risks associated with these institutions.

125. The EBA, together with ESMA and the European Insurance and Occupational Pensions Authority (EIOPA), actively contributes to the work on fostering a common approach to AML/CFT across the EU to the extent possible under the current legal setting. In particular by:

- amending the risk factors guidelines (see footnote 55);
- publishing final guidelines on supervisory cooperation (see footnote 59);
- organising and facilitating continuous knowledge sharing between AML/CFT competent authorities and technology providers through meetings and round tables;
- working closely with the European Commission, including in the context of the Commission's expert group on electronic identification. Outcomes of the work of this expert group will determine the EBA's future work in this field.

126. However, in the absence of a more harmonised EU-wide legal framework, there is a limit to how much convergence can be achieved through the ESAs' guidelines and other work on supervisory convergence. Therefore, in the EBA's view, changes to Level 1 text would be required to achieve greater regulatory convergence across the EU. Respondents to the EBA's survey have suggested a number of areas that would benefit from greater convergence, including the EU-wide CDD standards and customer identifications processes and documentation. Other respondents suggested the creation of a repository of national legislative requirements from all Member States and an EU-wide database for the verification of the validity of the identity documents.

127. Differences in supervisory practices, while challenging for cross-border businesses, are inevitable when implementing a risk-based approach in their AML/CFT supervision, as the supervisory practices and measures are developed in line with the ML/TF risk that a particular institution is exposed to. The key to developing a robust risk-based approach by competent authorities is to have a good understanding of the ML/TF risks associated with certain sectors and institutions. This can be achieved through the continuous engagement with these sectors, which is particularly important when dealing with the rapidly changing FinTech sector. Certain differences in supervisory practices can also be attributed to the divergent national legislation, which may impose limitations on the supervisory measures or, in contrast, extend supervisory powers that can be applied to cross-border services provided in some Member States.

6. Overall conclusions

128. In this report the EBA has identified a number of areas in which Level 1 changes, enhancements to European Commission communications, EBA guidance and further supervisory convergence would be desirable, to overcome issues that, in isolation or in combination, may currently diminish the appetite for institutions, including new-entrant FinTech firms, to provide financial services across borders. Should these issues be addressed, the attractiveness of the provision of services in this way could be enhanced, supporting the scaling up of services, particularly in the digital space. This in turn could contribute to improving market efficiency, promoting more choice for consumers and enhancing the competitiveness of the EU Single Market.

129. As identified in this report, it is challenging for competent authorities and institutions to identify when services are being provided across borders and, if so, when this is done through the freedom to provide services or the right of establishment. This is a complicated question that is exacerbated by the trend towards the provision of services using digital means. In this context, current European Commission interpretative communications do not reflect technological developments or accurately specify criteria for digital activity to be classified as cross-border; therefore, further European Commission guidance is sought. Such guidance would also be useful more generally in terms of identifying when a cross-border service is provided under the provisions relating to the freedom to provide services or those relating to the right of establishment.

130. Additionally, the body of EU law currently prescribes requirements in areas such as authorisations and licensing, consumer protection, conduct of business and AML/CFT. However, scope for divergence between Member States still exists, for example as a result of the minimum harmonisation nature of some of the requirements (e.g. consumer protection, conduct of business and AML/CFT). Some variations in national law, although justified by reference to local market conditions or ML/TF risks, may result in unintended obstacles to the cross-border provision of financial services and should be addressed in order to facilitate the scaling up of financial services across borders.

131. From an authorisations and licensing perspective, competent authorities (in both home and host jurisdictions) lack visibility on institutions' cross-border activities. Level 1 changes could strengthen the reporting requirements by institutions to home and host authorities of cross-border activities (including the commencement of actual activity, material changes in that activity and cessation of business provided across borders without an establishment). In this regard, enhancements, particularly as regards the frequency and form of reporting, are considered desirable. Additionally, Level 1 changes mandating the EBA to prepare guidelines under Article 16 of its Founding Regulation could be considered to promote greater consistency and transparency in the communication of national requirements that are applicable to the provision of cross-border financial services. Finally, the EBA stands ready to enhance supervisory convergence efforts by the use of the Q&A tool where appropriate, further encouraging home–

host dialogues on the provision of services cross-border, including initiatives such as holding EBA workshops and training.

132. In order to facilitate and possibly enable the scaling up of services provision across the EU Single Market and to ensure an adequate and uniform level of consumer protection across the EU, further harmonisation in the area of conduct of business and consumer protection requirements would be required. Areas where further harmonisation of the legislative framework should be considered include (i) disclosure requirements, (ii) the allocation of responsibilities for complaints handling regarding cross-border financial services and (iii) supervisory practices in the context of the provision of financial services via the right of establishment and/or the freedom to provide services. The definition of ‘durable medium’ could also benefit from clarification, to promote convergence.

133. Finally, in the area of AML/CFT, the analysis conducted identifies regulatory divergence, arising from the minimum harmonisation directive, as one of the main factors impacting on cross-border operations. In addition, the risk-based approach to the supervision of AML/CFT, which means that the level of supervisory activities is adjusted by each competent authority commensurate with the ML/TF risks presented by each institution under their supervision, may also have an impact on institutions when they are operating on a cross-border basis in different Member States. While they are not mutually exclusive, a number of other areas that are associated with potential challenges for cross-border businesses have been identified by the EBA, such as remote on-boarding, divergent supervisory practices and cooperation between home and host competent authorities. To counteract at least some of the regulatory divergences, the EBA considers that potential changes to the Level 1 text could be necessary, including potential new mandates for the EBA to produce technical standards or guidelines to promote further convergence in the application of supervisory measures.