

## *Position paper: Strengthening conduct supervision in cross-border retail financial services to create a more efficient EU capital market*

### **Executive Summary**

Digitalization of financial services and engagement with such services has been accelerated by the Covid-19 pandemic. European harmonization of rules has further enhanced the ability of European consumers to engage with financial products and services beyond national borders. Thus, providing more investment options for European consumers.

To ensure further consumer engagement on European capital markets, it is important that consumers feel sufficiently protected. Effective consumer protection is vital for the success of the Capital Markets Union (CMU).

Supervision of financial services provision is currently performed exclusively by national competent authorities (NCAs). The division of responsibilities between home and host NCAs, the abilities of host NCAs, and the current level of information sharing between relevant NCAs can and should be improved to ensure higher and more harmonized consumer protection.

This paper focuses on improvements with respect to the cross-border provision of retail investment products and services with a corresponding focus on MiFID 2. The AMF and AFM view the area of retail investment as warranting priority. Nevertheless, the issues outlined in this paper are relevant beyond investment products and services. As such, some suggested solutions would be relevant to consider with respect to other product/services groups for which there is a cross-border market within Europe. The insurance market and payment market would be the most established examples of these.

#### **Risks of current situation**

##### *Regulatory and supervisory arbitrage*

The competent authority, of the Member State where the financial firm is authorized, holds the sole supervisory responsibility when a financial firm operates without a branch office in a host Member State. This causes difficulty in organizing effective cross-border supervision and creates an opportunity for supervisory and regulatory arbitrage.

The AFM and AMF increasingly observe practices of financial firms obtaining a license and European passport in other EU member states than that of their target audience. The AFM and AMF note that such firms are overrepresented in offering high-risk products (such as CFDs) as well as in terms of the complaints received from consumers on their practices.

##### *Practical limitations for home NCAs to effectively supervise conduct of firms in host Member States*

Home NCAs tend to lack expertise with respect to knowledge of language or marketing and sales behaviour in other jurisdictions. This makes it difficult for home supervisors to adequately monitor

cross-border activity of financial firms in host member states. In addition, finite supervisory capacity and the inclination to prioritize resources where they are most effective, i.e. on issues affecting domestic consumers, can result in limited capacity being available to address cross-border issues.

#### *Lack of effective information sharing on cross-border activity*

Competent authorities currently lack up-to-date insight in the services that are being provided in their respective markets on a cross-border basis. Passport notifications lack relevant information and, at times, quality. Passport notifications are not subject to regular updates and as such do not reliably reflect actual practices of passport holders, including the products and services offered and the specific jurisdictions in which this is taking place. Once a passport has been obtained, there is no obligation to report on a significant increase in activity. Competent authorities can thus be left unaware of the scale of activities performed on a cross-border basis.

#### **Proposed solutions**

The AMF and AFM propose to strengthen the internal market for financial services by empowering host state supervision for cross-border activities and reducing the risk of supervisory and regulatory arbitrage, through the solutions listed below.

#### *Minimum due diligence requirements in passporting system*

Minimum due diligence by home NCAs before passports are granted enhances consistent and high-quality gatekeeping. Home NCAs should exercise due diligence on the services and products a financial firm intends to offer in host member states and identify potential risks as result of cross-border activities at an early stage. We propose the introduction of a requirement for NCAs to withhold, or withdraw, authorisation where a firm has clearly chosen to place its seat in a particular Member State in order to avoid stricter standards of the Member States where it will carry out most of its activity.

#### *A centralised and up-to-date database on cross-border activities at the ESA level*

The availability of data on actual and up-to-date cross-border activity would empower NCAs and ESAs to better identify and (re)act in cases where cooperation and coordination is needed. ESAs could perform a key role in this regard. EIOPA's approach, collecting and disseminating relevant data on cross-border services on a continuous (annual) basis and establishing cooperation platforms, may serve as a good example.

#### *Extension of host NCA abilities under MiFID 2 article 86*

Establishing a limited timeframe within which home NCAs must act once solicited by the host NCA and allowing host NCAs to use temporary measures against firms which can be lifted once home NCAs take appropriate action would greatly improve effective cross-border supervision and reduce cross-border investor protection risks. Furthermore, host NCAs should be able to join forces with respect to firms that pose serious risks to investors in their jurisdictions. This could be achieved by enabling host NCAs to opt-in to an Article 86 MiFID cease and desist measure by another host member state on a specific firm without referring to the home NCA.

#### *A more effective division between home and host NCAs responsibilities with respect to conduct supervision, as well as more powers for host NCAs on matters of conduct*

Currently, the presence of a branch office in a host Member State is key in determining the division of home/host responsibilities with respect to conduct supervision. Increased digitalisation makes this determinant outdated. This warrants reconsideration. Host NCAs should have enhanced abilities in

order to leverage their better expertise and understanding of the local situation. Home NCAs should be informed and consulted to avoid sanctioning the same situation twice (non bis in idem). Where difficulties in cooperation between home and host arise ESMA should be involved.

For firms that operate in many different Member State, joint action through supervisory working groups at centralised ESA level may be envisioned. This would require determining a threshold of what meaningful cross-border activity entails to avoid situations where too high a burden is placed on financial firms engaging in minor cross-border activity.

## **Introduction**

**The AFM and AMF fully support the objectives of the European Commission in the Capital Markets Union (CMU) and the Retail Investment Strategy (RIS) to strengthen the internal financial markets.**

To enable a more competitive European market, the European Commission has repeatedly emphasised the importance of facilitating a stronger internal market for financial services. It has done so through its plans for a Capital Markets Union<sup>1</sup>, its Retail Financial Services Action Plan<sup>2</sup>, and more recently, the announcement of the upcoming Retail Investment Strategy (RIS)<sup>3</sup>.

The AFM and AMF recognize that a more integrated European retail investment market serves to, amongst others, create a more inclusive and resilient economy, provide businesses with a greater choice of financing, SMEs in particular, and offer more opportunities for savers and investors. The AFM and AMF emphatically endorse the drive towards a more integrated internal market<sup>4</sup>. We believe it is important to recognize that such a market creates a situation where national conduct authorities become more interdependent to ensure adequate consumer protection across borders. An enhanced and more integrated retail investment market thus needs to be accompanied by a strengthened system of cross-border conduct supervision. One that ensures consumers remain sufficiently protected and regulatory and supervisory arbitrage is avoided. Providing a well-regulated and actively supervised environment is vital in ensuring retail investors' confidence in and engagement with European capital markets.

**In recent years the AFM and AMF have witnessed an increasing trend of cross-border financial services provision within the EU.** Digitalisation of financial services has greatly contributed to this; consumers and providers are only one-click away. The ongoing harmonisation of financial market legislation has further enabled easy access for consumers to a variety of providers, and vice versa, across borders<sup>5</sup>. This ease of cross-border access is generally a welcome development because it provides European consumers with more options. However, it does create a more urgent need for highly effective cross-border supervision.

This position paper aims to highlight the supervisory challenges that arise when the cross-border provision of financial services further accelerates, and it proposes several ways to strengthen the supervisory framework of home/host conduct supervision to address these challenges. In the first section we highlight risks concerning regulatory and supervisory arbitrage. The following section provides proposals to mitigate the identified risks. The third section highlights risks and shortcomings in the realm of information sharing on cross-border financial service provision with the subsequent section providing proposed solutions. The paper concludes with a brief summary of the issues addressed.

---

<sup>1</sup> [Capital markets union 2020 action plan: A capital markets union for people and businesses | European Commission \(europa.eu\)](https://ec.europa.eu/commission/presscorner/detail/en/ip19_1911)

<sup>2</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52017DC0139&from=EN>

<sup>3</sup> [EU strategy for retail investors \(europa.eu\)](https://ec.europa.eu/commission/presscorner/detail/en/ip21_1111)

<sup>4</sup> As evidenced by our respective position papers: AMF <https://www.amf-france.org/en/news-publications/news-releases/amf-news-releases/amf-position-encourage-retail-participation-eu-capital-markets> and AFM <https://www.afm.nl/en/nieuws/2021/december/goede-beleggersbescherming-ris>

<sup>5</sup> Fu, J. and M. Mishra (2020), "The Global Impact of COVID-19 on Fintech Adoption", *SSRN Electronic Journal*, <http://dx.doi.org/10.2139/ssrn.3588453>

## **1. Risks of Regulatory and Supervisory Arbitrage**

**Digitalization has made it considerably easier to provide retail financial services across borders. However, combined with the current difficulty of organizing effective cross-border conduct supervision, this creates an opportunity for financial organizations engaging in harmful behaviour to subvert effective conduct supervision.**

In today's financial market, financial firms no longer need a physical presence (i.e. branch office) in the host Member State since they can reach consumers, situated in the host Member State, through digital channels. This is especially the case in investment and payments markets, where digitalization of services has become the norm. In such cases, when firms exercise their Freedom to Provide Services (FPS) without any physical presence (i.e. without a branch) in the host Member State, the host competent authority remains dependent on the home NCA to effectively supervise the activities with regard to consumers based in the host Member State's jurisdiction.

When a financial services provider engages in cross-border activity through a branch in the host Member State (i.e. based on its Right of Establishment – RoE), the primary supervisory responsibility on these service providers generally lies with the host NCA<sup>6</sup>. Examples of such conduct requirements are, requirements on disclosure and marketing, investment advice, suitability and appropriateness, and reporting to clients. The host NCA is thus given the powers to exercise its duties with regard to conduct supervision and empowered to uphold a level-playing field with regard to consumer protection within its jurisdiction, even if the provider's seat is located elsewhere in the EU.

Conversely, when cross-border activities are provided through digital means, on the basis of the Freedom to Provide Services (FPS) passport, without the establishment of a branch or any physical presence in the host Member State, the host NCA is not provided with direct supervision or enforcement powers with regard to the conduct of that particular financial services provider. The host NCA is thus unable to uphold a similar level playing field with regard to consumer protection in its jurisdiction.

This gives rise to situations where the home NCA is primarily responsible for the conduct supervision of a financial firm, even when that firm primarily targets consumers in another Member State, using the language of that host State. A lack of familiarity with relevant local regulations and the local language of that host Member State, as well as the distance to targeted consumers, impedes the ability of the home NCA to (timely) and effectively identify risks and react to transgressions. As a result, the level playing field the host NCA can uphold with regard to conduct and investor protection in the case of passporting through the RoE, risks becoming an uneven playing field in the event of passporting on the basis of FPS.

While the current division of responsibilities between the home NCA and host NCA as described above is often clearly articulated in legislation, it is not always practical. In practice, it creates incentives for regulatory and supervisory arbitrage. Such arbitrage greatly endangers adequate consumer protection across the European Union and urgently needs to be addressed. We have seen several examples of such arbitrage on which we will expand below.

### *Firms which do not offer marketing materials in their home state language*

As host competent authority, the AFM has observed firms that seem to exclusively target customers outside their home Member State, based on the language of their marketing materials. This begs the

---

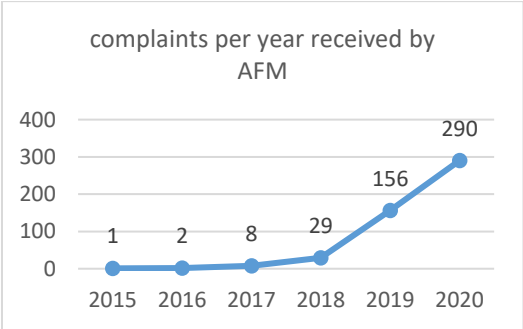
<sup>6</sup> See for example article 35 (8) of MiFID 2

question why a firm would settle outside the jurisdiction of their target market(s). While we recognize that there are factors beyond proximity to target consumers which influence where a company settles, we are concerned that (perceived) differences in supervisory and regulatory intensity might play a role in this. On its side, the AMF has noticed an extensive use of passports from certain EU countries to provide services to French investors, through the FPS passport. Research shows a very significant use of the passport by ISPs authorised in Cyprus and operating on an FPS basis in France. Of 228 authorised ISPs in Cyprus, 197 (i.e. 86%) carried out a passport notification with France pursuant to Article 34 of MiFID 2.

*Offering high risk products such as CFDs*

The AFM and AMF identify a trend where firms offering financial products associated with a high risk level, such as contracts for difference (CFDs), frequently establish themselves outside of jurisdictions where the bulk of their clients are based. The relatively strict supervisory approach of countries with large markets might be part of the reason why firms offering CFDs chose to establish themselves outside these markets. Many countries have put into place consumer protection measures against CFDs.

The AFM has observed a yearly increase of complaints on investment firms offering CFDs in the Netherlands operating on cross-border basis. We have observed a tenfold increase in the number of complaints between 2018 and 2020 (290 in the latter year). In the first half of 2021, the AFM already received 209 complaints.<sup>7</sup> In a similar vein, the AMF noticed that ISPs authorised in certain Member states appear to be over-represented among the investor complaints received by the AMF. The analysis of these alerts and complaints also highlights the substantial marketing of complex, high risk financial products such as CFDs. Of the underlying assets most frequently proposed, Forex CFDs are the most heavily represented. In 2021, the AMF has already received 130 complaints and alerts on Forex and CFDs.



Given the high risk of losses, the AFM has taken a strict approach in its supervision of firms offering CFDs. As a result, the number of firms based in the Netherlands offering this product is very limited. Research conducted in 2019 showed that nearly all firms offering CFDs to Dutch consumers were based in other member states. The AFM thus had to work with relevant home NCAs to stop firms offering CFDs to consumers in the Netherlands from conducting harmful practices affecting these consumers. The AMF has reinforced its supervision activities over the years regarding the marketing of extremely complex and very risky investment products, such as CFDs and binary options.

<sup>7</sup> Based on the hundreds of complaints the AFM received since 2018 that loss varies between € 250 to over € 1.000.000 per investor. The risk warning which CFD brokers are required to show on their website, suggests that between 74% and 89% of their clients ultimately end up with a loss. In 2018 the AFM estimated between 55,000 and 65,000 retail investors traded using CFDs resulting in an estimated total loss of €78,000,000.

## Risks due to practical limitations for home NCAs to effectively supervise conduct of firms in host State

**An important cause of the (potentially) harmful situation outlined above is the disadvantageous position of the home NCA to effectively supervise large scale cross-border provision of products/services in other Member States.**

### *Firms operate out of direct sight of relevant home NCAs creating practical difficulties*

Firms often conduct their activities in the language of the targeted consumer, in that consumer's jurisdiction. In other words, firms that operate on a cross-border basis actively reach out to consumers outside their jurisdictions, out of the direct sight of the relevant home NCAs. In some cases, we observe practices in which a tied agent in another European country operates as intermediary, further confounding the home/host responsibilities and increasing difficulty for home and host NCA to intervene in a timely manner.

### *Home NCA capacity constraints and putting resources where they are most effective*

In situations where a financial institution does not actively target consumers in its home market, the home NCA may lack the incentive to act to protect consumers outside its own jurisdiction. While there is generally a willingness to cooperate with other NCAs, finite supervisory capacity and the inclination to prioritize supervision of activities affecting domestic consumers can result in limited capacity being expended in addressing cross-border issues. NCAs put their resources where they are most effective and where they see the most (acute) risks.

### *Overall disadvantageous position of home NCA*

Home competent authorities may be restricted in terms of expertise, such as knowledge of language or marketing and sales behaviour in other jurisdictions. This makes it difficult for home supervisors to adequately monitor these activities. The lack of expertise combined with a lack of capacity and corresponding prioritization means that the home NCA is in a disadvantageous position to deal with an entity within its jurisdiction performing cross-border activities causing harm to consumers in a host Member State. Even in cases where there is close coordination between home and host NCAs, it is inevitable that some delays will occur as a result of the administrative burden of having to work through the decision-making process and subsequent coordination of two separate supervisory entities.

Based on local language knowledge, familiarity with marketing and sales behaviour, accessibility for affected consumers, and capacity available, and priority given to issues affecting consumers within its jurisdiction, the host competent authority is best placed to detect and then act on infringements occurring in their own jurisdiction. In the current home/host set up of supervisory responsibilities, host NCAs lack the necessary instruments, mandate, and/or execution power to take up this role. Creating the ability for host NCAs to take up this role in addressing the risk of regulatory and supervisory arbitrage would improve supervisory effectiveness on cross-border provision of financial services.

## Proposals aimed at strengthening host supervisory and enforcement abilities

**The AFM and AMF advocate for the above-described risks to be addressed. The most meaningful tool in this will be to establish primary supervisory responsibility on matters of conduct, where it is most effective, with the host State.**

Given the rise in digital possibilities we witness a strong increase in the provision of cross-border financial services without a branch. We therefore propose to reconsider whether the physical presence

of a firm in a host Member State should still determine the home/host division of responsibilities. A future-proof cross-border supervisory set-up is best suited by placing responsibilities for conduct supervision where they are most efficient: with the NCA of the host Member State. For firms that operate in many different Member States, joint action through supervisory working groups at centralised ESA level may be envisioned. To the extent this is already legally possible<sup>8</sup>, steps should be taken to ensure time delays to initiate joint action are limited as much as possible. In any case, ESAs should be informed early in the process whenever NCAs begin to investigate cross-border cases. Proportionality for affected firms should be ensured. One way in which this could be done is through minimum thresholds. Such thresholds should be set at a point that can meaningfully indicate the intention of a firm to be active in a host Member State. Whether this should be done based on absolute numbers of clients or by looking at numbers relative to total clientele should be carefully considered.

The transfer of supervisory responsibility of conduct requirements to the host competent authority is not unprecedented in European legislation. One example, regarding supervision of disclosure requirements, exists in the IORP Directive.<sup>9</sup> To be effective, supervisory responsibilities need to be accompanied by enforcement powers. The Consumer Protection Cooperation (CPC) Regulation serves as a good example of supplying host competent authorities with such enforcement powers. The CPC regulation allows host NCAs to intervene in their own jurisdiction, by issuing a notice and takedown order for websites, through national court, in case of serious risks to consumer protection.

#### *Extension of host NCA abilities under MiFID 2 article 86*

At a minimum level, host supervisors and ESAs should be better equipped to intervene in a timely fashion in the event of serious risks to investor protection and the proper functioning of markets. MiFID 2 Article 86 regulates cooperation between home and host supervisory authorities in the retail investment market. The article provides ultimate powers for host NCAs to intervene in the event of investor protection risks. In practice, however, employing this article is a highly time-consuming process. As a result, (sometimes grave) damage to consumers can persist for a long time. The AFM and AMF believe this article should be amended to make it a more effective and worthwhile tool to use in order to protect investors. Establishing a limited timeframe within which home NCAs must act once solicited by the host NCA could be an important first step. In this regard, we support ESMA's technical advice on the application of administrative and criminal sanctions under MiFID 2<sup>10</sup>. Alternatively, allowing host NCAs to use temporary measures against firms which can be lifted once home NCAs take appropriate action could also serve to ensure that the protection of consumers prevails over the protection of financial interest of firms. In addition, host NCAs need to be enabled to join forces in their supervisory duties and fact-finding exercises vis-à-vis firms that pose serious risks to investors in their jurisdictions. One way in which such a joining of forces could be facilitated is by enabling host NCAs to opt-in to an Article 86 cease and desist measure initiated by another host NCA<sup>11</sup> with regard to a specific firm, without having to initiate the Article 86 procedure in its entirety for each separate host NCA.

---

<sup>8</sup> For instance, through article 45b of the ESMA regulation.

<sup>9</sup> IORP article 11 (10): "The IORP shall be subject to on-going supervision by the competent authority of the host Member State as to the compliance of [...] the host Member State's information requirements."

<sup>10</sup> [https://www.esma.europa.eu/sites/default/files/library/esma35-43-2430\\_ta\\_on\\_mifid\\_ii\\_sanctions\\_and\\_measures.pdf#page=20](https://www.esma.europa.eu/sites/default/files/library/esma35-43-2430_ta_on_mifid_ii_sanctions_and_measures.pdf#page=20)

<sup>11</sup> Under the condition that the host NCA is aware of MiFID 2 infringements or (potential) investor protection issues.



## **2. Information sharing on cross-border activities**

**Vital information concerning cross-border activity performed by financial firms is insufficiently available and/or not shared quickly enough.**

An appropriate and effective framework for cross-border supervision of services requires up-to-date information on activities of firms operating on a cross-border basis. Competent authorities currently lack up-to-date insight in the services that are being provided in their respective markets on a cross-border basis.

Sudden increased activity with regard to the sales of a particular financial product or service, a large increase in clients in a specific (vulnerable) customers segment, or significantly increased or decreased revenue streams, are all examples of data which can serve as important indicators for NCAs to more closely examine the operations of a financial firm. In situations where a NCA is dealing with a financial firm in the capacity of host competent authority, this information is currently not readily available. Requesting information from such firms must go through the home NCA, who must then check whether the information provided by the firm appears accurate with respect to the practices identified in the host jurisdiction. This can create a delay in identifying problematic activity or at worst even cause such activity to go undetected all together.

*Passport notifications lack necessary information and are sometimes of insufficient quality.*

The Joint Committee Report on cross-border supervision of retail financial services<sup>12</sup> states that passporting notifications are not always complete in covering all the compulsory information or do not comply with the standard forms established by the relevant regulatory provisions. There are also reports that, in some cases, host NCA requests are met with a delayed reply. This hampers the effective supervision of financial institutions in the host Member State.

In addition, while the passport notification in its current form does ask passport holders to indicate for which services they wish to be passported, it does not require them to give an indication of the scale or timeframe on the actual delivery of these services. As such, neither the home or the host Member State is in a position to anticipate the real extent to which cross-border services will be provided or to signal that actual activity significantly exceeds or falls short of the initial intention.

*Lack of continuous reporting on cross-border activities*

Once a firm has gained access through its passporting rights, there is no obligation to continuously inform either home or host competent authorities of their actual activities in the respective markets. As a result, passport notifications and registers do not provide reliable insight in the actual activities of firms operating across borders. When a firm significantly scales up its activity in a host Member State, this is thus not identified. A firm may or may not be making use of its passporting rights; competent authorities are left in the dark.

---

<sup>12</sup> [https://www.eiopa.europa.eu/sites/default/files/publications/pdfs/final\\_report\\_on\\_cross-border\\_supervision\\_of\\_retail\\_financial\\_services\\_0.pdf](https://www.eiopa.europa.eu/sites/default/files/publications/pdfs/final_report_on_cross-border_supervision_of_retail_financial_services_0.pdf)

Proposal: minimum due diligence requirements for passporting and a European centralized database

**The AFM and AMF believe a potential remedy to the current issues surrounding information sharing could lie in introducing minimum due diligence requirements in the passporting system and establishing a centralized database on cross-border activities.**

*Passporting system should be reviewed and amended to contain minimum due diligence requirements*

The Joint Committee Report on cross-border supervision of retail financial services<sup>13</sup> put forward recommendations to achieve a more coordinated approach with respect to passporting. Amongst others, the report notes that the notification system of passports needs to be reviewed, considering that registers may contain non-updated information. The introduction of minimum due diligence requirements by NCAs before passports are granted could enhance consistent and high-quality gatekeeping by home NCAs. Asking and documenting intentions to provide certain services in particular host Member States would be a valuable addition to help NCAs recognise cross-border activities and potential risks at an early stage.

We propose the introduction of a requirement for NCAs to withhold, or withdraw, authorisation where a firm has clearly chosen to place its seat in a particular country in order to avoid stricter standards of other Member States where it will carry out most of its activity<sup>14</sup>. Article 56(6) of the Commission legislative proposal for a regulation on the market for crypto-assets (MiCAR) serves as an example for transposition to other sectoral financial services Directives: “The EBA, ESMA and any competent authority of a host Member State may at any time request that the competent authority of the home Member State examines whether the crypto-asset service provider still complies with the conditions under which the authorisation was granted.”<sup>15</sup>

*A centralised and up-to-date database on cross-border activities, at the ESA level, should be available in order to provide supervisors with necessary information to fulfil their duties*

The availability of such data at a centralized level allows NCAs and ESAs to better (re)act in cases where cooperation and coordination is needed. Access to up-to-date data on cross-border activities is important for both the gatekeeper function as well as for ongoing supervision purposes, including cooperation between NCAs, and thus for the continued protection of investors in cross-border market for retail investors.

The experiences and practices of EIOPA with regard to Solvency II data on cross-border services may well serve as an example. EIOPA is taking up a key role by collecting and disseminating relevant data on cross-border services on a continuous (annual) basis and by establishing cooperation platforms. The AMF and AFM believe this to be a good step in the right direction and would encourage ESMA to take a similar approach for cross-border activities in the area of investments.

---

<sup>13</sup> [https://www.eiopa.europa.eu/sites/default/files/publications/pdfs/final\\_report\\_on\\_cross-border\\_supervision\\_of\\_retail\\_financial\\_services\\_0.pdf](https://www.eiopa.europa.eu/sites/default/files/publications/pdfs/final_report_on_cross-border_supervision_of_retail_financial_services_0.pdf)

<sup>14</sup> As far as MiFID 2 is concerned, this would give more strength to the current recital 46.

<sup>15</sup> Commission proposal on MiCAR, Article 56(6).

## **Conclusion**

**In a world of increasing digitization and cross-border retail services, future-proofing the EU supervisory framework addressing current and emerging risks must include a more extensive and effective system for the exchange of relevant information between NCAs as well as broader abilities for a host NCA to effectively exercise supervisory powers where financial firms undertake meaningful activity in its jurisdiction.**

It is clearly undesirable that financial service providers that offer services on a cross-border basis are less effectively supervised than service providers operating in their home jurisdiction. In order to avoid the real risk of supervisory arbitrage and ensure adequate consumer protection, host supervisors and ESAs should be enabled to intervene in timely fashion in the event of serious risks to investor protection and the proper functioning of markets.

The AFM and AMF believe the principle that host NCA responsibility and authority with regard to conduct supervision is triggered by a physical office (i.e. a branch) in the host Member State should be revisited. Given the rapid rise of digitalization of financial services, a physical office is no longer a reliable indicator of significant activity within a specific jurisdiction. The host supervisor's understanding of local language, rules and regulations, and other local market specificities, put it in a better position to identify possible issues with regard to the conduct of financial firms in their jurisdiction. In addition, the host supervisor is more likely to be able to devote resources to an issue affecting consumers within its jurisdiction. Providing host NCAs with better enforcement tools will thus ensure more effective conduct supervision.

Host competent authorities and ESAs should be provided with up-to-date actionable information on passporting firms' activities, to enable the effective identification of (emerging) risks to consumers. This could be achieved by introducing minimum due diligence requirements in the passporting system and establishing a centralized European database on up-to-date cross-border activities.

Supervisory authority in terms of adequate regulatory instruments, responsibilities and enforcement power must be placed where it is most effective. An enhanced division of responsibilities between home and host NCAs with regard to the supervision of conduct requirements, one that is ready for the digital age, bolstering host NCAs' abilities, is necessary. This is the clearest path to ensure consumers within the Capital Markets Union will remain sufficiently protected, and to ensure their continued engagement with and trust in this union.