



## **AMF's response to the European Commission's Green Paper on retail financial services**

The European Commission published a Green Paper on retail financial services in December 2015. This Green Paper includes 33 questions relating to financial products and services that fall within the remit of the AMF, but also a broader scope concerning banking products and insurance. This public consultation, which will be closed on 18 March 2016, is aimed at helping the European Commission set a regulatory guideline to improve the opening up of the European market for retail financial services to the benefit of citizens and firms, whilst maintaining an adequate level of consumer and investor protection.

The creation of a single European market facilitating the cross-border supply of financial products within the European Union indeed serves investors, which thus have a wider investment scope. It also benefits economic agents by offering them more choices for funding.

However, the flexibility of this European market, and the opportunities that it creates, should not endanger investor protection and conditions for healthy competition between the players. These factors also lie at the heart of current work on the Capital Markets Union, which is aimed at reinforcing financing of the economy, notably by restoring investor confidence in financial markets.

The goal is to create a balance in the European regulatory framework in order to (i) facilitate the cross-border supply of financial products and services to retail investors throughout Europe, (ii) while supervising this offer efficiently and uniformly in order to ensure an adequate level of protection for retail investors.

The AMF answer covers four main subjects that fall within the scope of the AMF: (i) the UCITS product passport, (ii) consumer and saver protection, (iii) digitalisation, (iv) the rationalisation and accessibility of information relating to commercial conditions in a given country for cross-border providers.

## 1. Example of the success of the UCITS product passport in the opening up of the European market for retail financial services

The single European market presents material advantages for the industry and the consumer.

Question 1. For which financial products could improved cross-border supply increase competition on national markets in terms of better choice and price?

European Union law has already proved highly successful with regard to the cross-border supply of financial products, with a positive effect in terms of choice and price.

**The established Community mechanism (UCITS product passport), which enables marketing of UCITS throughout the European Union by means of a simple notification procedure, is a remarkable example** in this regard. The UCITS Directive<sup>1</sup> has enabled the marketing of UCITS situated in any Member State to retail investors throughout the Union, for several years now, via a simplified notification procedure between the competent authorities, once the investment vehicle is authorised in a Member State in application of the harmonised framework provided in the directive.

**More than 6,500 foreign UCITS were thus marketed in France by means of the passport provided in the UCITS Directive at 31 December 2015.** Compared to the close to 12,000 funds (UCITS and alternative investment funds) marketed in France overall, these foreign UCITS contribute directly and substantially to the diversity of financial products available for French retail investors.

The success of this UCITS regime is attributable notably to the simplified procedure, in which the timeframe is shortened considerably, that professionals can benefit from to develop their cross-border activity while complying with harmonised rules within the Union. Its success is also clearly due to **taking appropriate account of the specific protection requirements for retail investors.**

This latter aspect is notably ensured by the UCITS Directive, within the framework of the passport commercialisation, by **making it possible for the authority in the host country, where the fund is marketed, to control** the information provided for the marketing of the fund.

→ **Supervision of marketing documents by the host country authority is essential to take into account the local characteristics of retail investors, for which only the national regulator is able to fully understand the issues and needs.**

Nevertheless, taking into account the issues and needs of retail investors properly also supposes **enabling the host country authority to supervise the way in which these activities are developed**, whenever the cross-border supply implies active marketing by foreign players not settled in the countries where they are operating.

This particularly true when these marketing actions fall within the supply of investment services through the free provision of services. European regulations should not result in host country authorities being deprived of any means to ensure that the provision of financial services on a cross-border basis is adapted properly to the specificities of retail investors on its own territory. In such situations, **the cross-border supply might endanger the proper protection of retail investors and harm the image of products coming from other Member States. It might also affect the conditions for healthy competition within the same State by subjecting players active in the same territory to different constraints in terms of marketing** (as they are set by their State of origin).

**Community law is aware of such situations and the difficulties that they create:** this applies, for instance, to the supply through the free provision of services of (i) investment services in application of MiFID, or (ii) UCITS management (and not mere marketing) as under the UCITS Directive.

The most obvious example is the difficulties several European regulators have encountered with regard to **Binary Options and Forex trading platforms authorised in Cyprus** and acting through the free provision of services

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<sup>1</sup> EU Directive 2009/65/EC

throughout most of the Union. Host country authorities have been unable to provide an appropriate response to these players' non-compliance with regulation, and inappropriate marketing communication for target clients, owing to their own lack of competence in the free provision of services, while the activities targeted address retail investors on their territory. Faced with this situation, the authority in the country of origin of the said players is often disinclined to act with regard to the protection of investors settled in a different territory to its own, and where its knowledge of local distribution networks is often limited as well.

The AMF considers that **investor protection should be improved** by maintaining a form of supervision by the host country. This is especially true for aspects of marketing and marketing communication where the local authorities have strong legitimacy, without this leading to any change to current laws and established role-sharing between countries at the origin of the services and host countries. As we mentioned, this is often efficient. Such improvement requires creating smoother relationships between countries of origin and the host country and might involve setting up a form of delegation of authority between the competent authorities, which would give the host country authority the possibility to act on behalf of the originator to rapidly stop a practice or marketing ill-adapted to the target population. This proposal may be even more justified as it is rare to see authorities in the originating country control activities developed in the European Union by players settled on their own territory through the free provision of services.

**In any case, the cross-border supply of financial products can only be increased, to stimulate competition on national markets in terms of choice and price, if the crucially important consumer protection issues are fully taken into account.**

## 2. Major consumer protection issues with the opening up of the European market

Question 2. What are the barriers which prevent firms from directly providing financial services cross-border and consumers from directly purchasing products cross-border?
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The success of the European UCITS passport is the result of several factors: harmonised products, based on uniform financial instruments (equities, bonds, etc.) throughout the European Union and largely promoted to and well known to savers. At this stage, these conditions are not at all in place for this success to be reproduced on all savings products.

The language barrier, closed product distribution systems and national bias are the main obstacles to the promotion of financial services throughout the European Union. In this regard, **local supervision of products authorized in other Member States could constitute a powerful tool to reassure savers interested in taking up these products.**

Similarly, in view of the existing differences between products, the quality of professional advice to clients should remain the central element in financial product distribution in order to prevent any risk of massive mis-selling. However, this advice should take into account a large number of factors, and this should be the case for each Member State.

**Tax treatment is another major barrier to the cross-border provision of financial products among Member States.** In France, for instance, the success of each savings product depends on the level of taxation applied to the product in question. Most of the savings products available to the general public, ranging from the livret A savings passbook, through the PEA equity savings plan, to life insurance products, benefit from specific tax advantages. Consumers reason in terms of net returns when choosing their financial products, and this situation implies – aside from harmonising the tax treatment of savings across the EU – perfect knowledge by all professionals of the local taxation rules applied to each of their products, and to rival products.

**The social and economic organisation of Member States also has to be taken into account when setting up a single market.** By way of example, a significant proportion of financial investments are structured around the organisation of the saver's future retirement, which involves knowing how each national pension system works, or else the provider risks selling a product ill-adapted to the consumer. Hence it is not easy to market a retirement savings product designed for one Member State in other Member States with different pension systems, which are more or less protective than in the originator country. It is thus impossible to reproduce the logic that worked successfully in the case of the UCITS for this type of product, or other financial products aimed at settling health or dependency issues for example. Massive mis-selling is not an option given the financial, human and societal issues at stake and any marketing project has to be accompanied with the greatest caution and heightened control.

**Differences in rights** must be taken into account prior to considering any systematic marketing throughout the European Union. Financial products are frequently embedded in mechanisms that draw on company or civil law (property or inheritance law for example). However, there is still considerable disparity among the Member States, which creates a major risk of consumers not being able to identify all existing risks, which they may think they are protected against by their national regulations, whereas this may not be the case at all.

**The European market is also still criss-crossed by major cultural differences** which fall outside the scope of the Product Oversight and Governance (POG) guidelines and should be taken into account:

- **The level of financial literacy varies widely** among Member States. One of the most recent studies<sup>2</sup>, to take just one example, shows that while 71% of Swedish people have a sufficient level of financial literacy, this is only the case for 52% of French people and 22% of Romanians. Such a gap must be wholly considered when setting up a single market, notably with regard to the complexity of products and advice.
- Saving tendencies are also very diverse among European countries. **Savings rates vary widely**<sup>3</sup> between traditionally high-saving countries (Germany, France), less-savings countries (the UK, Scandinavia) and countries with few savers or a negative savings rate due to economic difficulties (Cyprus, the Baltic countries). The diverse behaviour of individual savers clearly lies behind these aggregate statistics. However, the products marketed in each Member State must correspond to local savings practices: individuals with a low savings rate should be directed towards liquid and risk-free products. More substantial savings may be partially invested in less liquid and higher-risk products.
- Likewise, financial consumers do not have the same historical experience, but knowledge and experience are two crucial aspects of informed investment. Differences in individual countries' systems and practices (welfare mechanisms, bank or corporate financing, individual or collective share ownership for example) mean that savers have more or less close contact with financial markets and financial instruments, which is a significant trend to be taken into consideration.
- **Lastly, specific cultural aspects also play a role in the way information should be addressed to savers.** Looking beyond financial literacy, all advertising or information documentation must be adapted to local populations so that it can play its role to the full: inform, explain, and warn. The tone of the content and the way it is written should be such that the public can easily assimilate all the necessary information. Advertising is based fundamentally on the cultural codes and specificities of the targeted population. This holds true for consumer products, and should be even more valid for products such as financial investments that have such major implications for the future of an individual. **It is essential that any form of advertising or commercial document be subject to the supervision of the host country authorities, which are the only ones able to know all the local cultural codes.**

Question 6. Do customers have access to safe, simple and understandable financial products throughout the European Union? If not, what could be done to allow this access?

Question 9. What would be the most appropriate channel to raise consumer awareness about the different retail financial services and insurance products available throughout the Union?

**Broadening the product offer will lead to a decrease in its clarity**, which should not be at the expense of the consumer's ability to understand, distinguish between these products and thus choose the products that best correspond to their situation. Bear in mind that retail savers are non-professionals that have varying degrees of appetite and capacity for financial questions.

In this respect, **the KID provided under PRIIPs regulation is a welcome** step towards the creation of a single market by endeavouring to allow comparison between a series of products whose performance depends directly or indirectly on market fluctuations (unit-linked life insurance contracts, structured bonds, structured deposits, etc.). However, as the discussions underway reveal, the creation of cross-sectional indicators allowing for impartial evaluation of the different

<sup>2</sup> <http://gflec.org/initiatives/sp-global-finlit-survey/>

<sup>3</sup> <http://ec.europa.eu/eurostat/tgm/table.do?tab=table&init=1&language=fr&pcode=tsdec240&plugin=1>

products with regard to the risks, costs or returns, is still complicated and costly to implement. Introduction of the KID will be a failure if the cost of implementing it is too high, compared to the advantage it will provide savers, as this cost will probably be passed on the investor or reduce the performance of the investment. This work, which is in the interest of savers, remains to be finalised and reproduced for the other classes of financial assets for the smooth introduction of the European single market.

The vast diversity of existing financial products in the EU adds to a wide variety of consumers and needs. The logic of the guidelines on Product Oversight and Governance (POG), which aim to define the different population categories for which each product would be appropriate, will also gradually work towards limiting the risk of ill-adapted sales.

**Advice must remain the cornerstone of the sales process, especially for patrimonial products, but the KID and the POG approach could usefully be supplemented by setting up independent comparative information** and explanations on existing differences between the savings and investment products available in the Member States. This would enable savers to grow accustomed slowly to the full spectrum of products available in the EU. These mechanisms could be set up directly by the EU authorities or indirectly by creating supranational consumer organisations likely to deliver both comparative information on the offers and to alert on potential mismatches due to differences in national situations.

Question 7. Is the quality of enforcement of EU retail financial services legislation across the EU a problem for consumer trust and market integration?

**The fact that complex products are not adapted to cross-border selling has created major problems of marketing and confidence in recent years:** in 2015, 40% of the 15,000 calls received by the AMF's Epargne Info Service (EIS) call centre for individuals concerned speculative trading platforms authorised in Cyprus and operating in France under the free provision of services arrangement. These platforms solicit French savers directly via aggressive advertising and with biased messages, and do not respect the minimum diligence to be carried out at the moment of authorisation, nor any body of saver protection regulations.

Our research has shown that the platforms authorised by the Cypriot regulator work essentially on the markets of other Member States (**their local clientele represents on average less than 0.5 percent of the total number of clients**). Hence, **the regulator of origin has very limited, if not zero, means of assessing the practices of the players it authorised**. Another problem has emerged in recent months, namely reselling of data of clients – who are already victims of poorly-regulated players – to unscrupulous players, which then call the clients to offer them, sometimes usurping the identity of the AMF and in return for money, a false funds recovery service.

**These types of practices undermine the confidence of savers in savings products sold from other member States.** Worse still, they undermine the savers' confidence in products from their own State and the regulator: the platforms in question do not hesitate to claim title to AMF approval by falsely assimilating the passport to authorisation from our authority.

Strengthened cooperation between the regulator in the originating State and that of the State(s) in which the products are marketed is thus essential in our view. Setting up the delegation of commercial controls by the regulator of the country of origin to the Member State where the product is being marketed would help compensate for the originator's lack of visibility on the real practices of providers barely present on its own territory. This would contribute to bolstering the confidence of clients and thus the creation of the single market.

Question 19. Do consumers have adequate access to financial compensation in the case of mis-selling of retail financial products and insurance? If not, what could be done to ensure this is the case?

The problem we identified above regarding differences in rights applicable, depending on the country of origin of the service, **may arise in a similar manner with regard to access to the ombudsman**: while the client may generally refer to the ombudsman his own State in the event of a dispute with the financial institution of another Member State, this rule does not apply if the professional in question specifies in his contracts that disputes fall within the competence of his own ombudsman. This raises the issue, aside from the question of language, of the type of mediation available in the institution's State, local laws, and even the capacity to dialogue, understand and be understood.

All these factors show that the creation of a single market for financial products, even if it may be an opportunity for the saver, also represents major challenges in terms of consumer protection. While financial instruments may be accessible directly, they are generally sold with wrappers adopted for tax and legal purposes, which, themselves, are adapted to cultural (the financial knowledge of populations, appetite or not for risk) and structural situations (taxation, rights, social protection) specific to each member State. Cross-border selling of these wrappers thus requires – to avoid potentially catastrophic massive mis-selling – specific and strengthened advice to the client, and reinforced supervision by local authorities to ensure these products are appropriate to local market conditions. **This is especially the case for all investment products sold essentially ‘on an export basis’ by firms authorised in a Member State where such products are not marketed:** in such a case, the State in which the products are sold must be able to control the sales documentation. Similarly, if the country of origin of such firms does not react rapidly to tackle practices creating a prejudice for savers, **the ESMA must be able to act quickly to avert a crisis of confidence, by having the power, for example, to temporarily or definitively suspend the passport.**

### **3. Digital: excellent opportunities, new forms of risk and the need for a comprehensive, protective and evolutionary regulatory framework**

The term “digital” is on everyone’s lips. The digital world has already swamped non-financial services, notably the telephony, media and distance selling segment, but it has now crossed the threshold of a very broad and diverse universe, that of investment products.

The first digital wave hit the banks and has shaken up some of the mainstays of their universal model over the past ten years. This has led to considerable investment in the banking sector to adapt and resist the economic strength of new entrants, which offer services viewed as less expensive, more easily accessible, comparable, fungible with other types of services and sometimes offered in partnership with other non-bank brands, to an increasingly broad clientele.

On-line banking has thus paved the way to the development of a new type of financial services and a new way of selling them to a growing number of clients, which already form part of a mass market. Alongside several pure players which have made this their business model, it has become one of the standard tools for client relations, and often complementary to in-branch sales (for the time being anyway). In this respect, online banking meets the new needs of consumers: even more mobility and proximity (I want to buy when I want, 24/24, and wherever I am, at home, on holiday, or abroad), fewer administrative constraints, and rapid and simple subscription.

**Savings management is undergoing its digital transition, as for other financial sectors.** The transformation of traditional players and arrival of new types of professionals means that the regulator has to react to the emergence of new models and accompany them, as relations with regulators are a key part of their start-up and learning phase.

It would seem that the entire investment product universe (insurance, structured products and funds), not just the already broad investment fund segment, is calling into question its distribution models.

The behaviour of savers is evolving as the new technologies take hold in their daily life, as are consumer habits. It is necessary to understand these **new consumer reflexes**, and more precisely the new forms of relationship investors have online with established investment service providers, and their offer. The change in saver protection rules could only respond fittingly to these new challenges on this condition alone.

Question 3. Can any of these barriers be overcome in the future by digitalisation and innovation in the FinTech sector?

Expansion of the Internet has **reduced distribution costs considerably** and facilitated access by professionals to the various national markets. Numerous barriers have been overcome more easily: it costs less to make information available in the local language, there is no longer any need to have a physical presence on each market, etc. However, the crucial barriers have not yet been surmounted: cultural differences, misunderstanding of the various products, lack of confidence in secure online payments and data protection, etc.

Question 17. Is further EU-level action needed to improve the transparency and comparability of financial products (particularly by means of digital solutions) to strengthen consumer trust?

**The new investment access channels, often viewed as simpler, more streamlined, and allowing immediate comparison of available products and solutions, present consumers with a very broad window of opportunities.** There are new remote subscription options and savers have both a broad choice of easily accessible providers at their disposal and a wide range of investment solutions to choose from. International players have thus successfully positioned themselves on the French online brokerage market. In order to make their choice, savers also have access to more abundant information on products and comparative data, notably for mutual funds and wrappers adopted for tax and legal purposes (e.g. unit-linked life insurance contracts).

New technologies potentially facilitate better interactivity between the professionals and savers. They enable the former to systematise their questionnaires prior to providing any advisory service. These digitalised questionnaires are standardised, ensuring the same level of quality (minimal), and can be controlled more easily. Digitalisation facilitates thus traceability and storage of information gathered via online questionnaires. The new technologies can also help maintain contact with clients and update changes in their situation, thus preventing mis-selling due to poor knowledge of the client's most recent situation.

However, the questionnaires remain declarative, and the client's answers cannot be challenged online unlike in face-to-face interviews. Similarly, as we noted during our recent mystery visits on-line, some sites may not provide any secure-response mechanisms, and even encourage clients to change their answers in order to get access to higher-risk products, which do not correspond to their original profile. This type of problem has to be resolved in order to prevent a "double hardship" cumulating being sold the wrong product and having no possible recourse.

**The digital world offers many opportunities that should benefit professionals and investors, but it also opens the door to numerous risks, which means that regulators have to change their rules and adapt them to new entrant models.**

Question 8. Is there other evidence to be considered or are there other developments that need to be taken into account in relation to cross-border competition and choice in retail financial services?

**Facility of access does not, however, imply simplicity regarding the products being offered.** The risks of a poor match between the product and the investor's need are increased automatically. Analysis of the product and its fundamental characteristics (performance/risk/liquidity) remain an essential part of the purchase. Is digital selling without an advice component appropriate for all products, and for all consumers? Do we not run the risk that complex products will often be proposed, while only experienced investors would be capable of understanding these perfectly, in terms of both the product and the related risk?

Digital (remote) relations are better adapted to the distribution of simple, comparable and reliable (safe) products geared to a population that is relatively autonomous in the management of its investments (having the necessary knowledge and experience). Conversely, **the more "financial" products, with local legal and tax characteristics, should not be sold without advice.**

Question 4. What can be done to ensure that digitalisation of financial services does not result in increased financial exclusion, in particular of those digitally illiterate?

Not all consumers are "connected", especially the elderly (people aged 75 and over), and when they are, the question arises of how well they are able to use online services. Even if this situation is temporary – the entire population is likely to be familiar with using digital tools in the decades to come – it might, during a transition period at least, lead to a form of financial exclusion. In addition, logging on does not necessarily imply appropriate use of the means available online. When they are connected, consumers might, through lack of objectivity and judgement, act precipitously without taking the time to reflect. More generally, certain savers may not be able to take advantage of the expected benefits of the digitalisation of information and the relationship between professional and consumer for lack of financial resources, or because they are reticent or find it difficult to adopt new information technologies.

Question 5. What should be our approach if the opportunities presented by the growth and spread of digital technologies give rise to new consumer protection risks?

The security of data and access to information on investments is a very important issue. In our view, there is a need for clear rules on traceability and responsibility relating to information, for new forms of advice disseminated notably on

social networks, and for personal data protection, as well as efficient mechanisms to fight against cyber criminality. These would complete the body of rules already binding on players through sector or cross-sectional laws that apply to fund management, banks, or any form of commercialisation.

**Introducing a regulatory framework adapted to the forms of distribution, financial innovation and consumer behaviour in the digital world, would help respond to the new risks likely to emerge.** By way of example, the robust regulatory framework for crowdfunding players in France illustrates the obligation to accompany innovation and players, on the one hand, and to meet consumer needs for confidence, security, and transparency, on the other.

- The French ordinance of 30 May 2014 **helped lift the regulatory uncertainties that weighed on crowdfunding platforms**, which previously incurred the risk of penal sanctions, and gave them a precise, clear and much more flexible framework for development, than under the banking and financial regulations for traditional institutions. It **also provided the regulated platforms with high public visibility**.
- The ordinance allowed for the introduction of **much lighter consumer protection than the set-up for traditional institutions, but also more appropriate protection** for a sector where the professionals may only offer clients simple financial products (equities, bonds and simple loans), for limited amounts (o/w individually for loans) and after a process of gradual access to the site (for capital investment). Similarly, the creation of the official "*Plate-forme de financement participatif régulée par les autorités françaises*" (crowdfunding platform regulated by the French authorities) label has enabled consumers to **distinguish between regulated (and thus safe) platforms** and more questionable platforms, thus building confidence in the sector and developing the market. Through this framework, consumers now have access to a much broader range of investment products, which also meets their need for proximity.
- This regulation is associated with **vigilant monitoring by regulators and daily dialogue between the latter and crowdfunding players** to highlight their shortcomings, answer any questions, work with them in implementing their obligations and take into consideration any possible difficulties and requests. Moreover, the regulator is permanently engaged in teaching the general public about the best practices linked to this new type of investment (getting information, diversification, limits on amounts for example). This all falls within a **constant process of reflection on how to adapt the regulatory framework to development of the market**. Following such an approach for topics such as digitalisation would allow the authority to accompany and monitor the platforms daily and thus ensure balanced development of digitalisation.

Lastly, it would be premature to consider that the digital world as a whole is not only adapted to variety of financial services but also sufficiently calibrated to handle diverse categories of savers and institutional investors.

**The complementary nature of traditional and digital distribution networks** is due, on the one hand, to the fact that the digital sphere should not create any form of financial exclusion whatsoever among certain categories of savers that are not equipped or experience with new technologies, and/or, on the other, that investment solutions that are not adapted to online distribution and sales require, notably because of their characteristics, proximity accompaniment outside the digital world.

**Evolutionary and adapted to online distribution, or integrated in the sales process via a traditional physical channel, the advisory function thus retains, in all cases, its value added place in the distribution chain irrespective of the point of sale.**

#### 4. Clarity and predictability for financial service providers

Question 10. What more can be done to facilitate cross-border distribution of financial products through intermediaries?

Question 30. Is action necessary at EU level to make practical assistance available from Member State governments or national competent authorities (e.g. through 'one-stop-shops') in order to facilitate cross-border sales of financial services, particularly for innovative firms or products?

As we explained above, the opening up of the European market for retail financial services creates numerous opportunities for firms, financial services providers, and non-professional investors.

These opportunities harbour issues of how best to protect savers, as outlined above, which may justify certain regulatory measures in order to best respond to these issues. In return, it is necessary to consider the means that allow professionals to benefit fully from these opportunities in a regulatory framework that protect retail investors.

**In this regard, achieving a balance that would reconcile the opening up of the European retail financial services market with the protection required for retail investors relies on a clear and predictable regulatory framework applicable to this market.** The specific requirements for the supply of retail services have to be clearly provided, accessible and target all the players involved with retail investors in a given country.

Under these conditions, the regulatory requirements would allow for the fair treatment of players and conditions for healthy competition in a given territory, without the cross-border nature of the service provided by the professional having any impact on the regulatory obligations applicable. The publication of an accessible regulatory framework and its accessibility to professionals preserve the latter's capacity to anticipate the applicable framework and to adapt to it.

The example of UCITS product passports in France provides further significant illustration. The AMF has published various documents on its website that enable professionals which want to operate on French territory to understand the obligations applicable. The latter supervise the activities of all French or foreign professionals when they provide retail financial services in France, notwithstanding their country of settlement in the European Union.

**Based on this model, one could envisage an obligation for European regulators to create a section on their web site dedicated to foreign providers and which would provide explanations about the specific marketing regulations in the country in question.**