

**Marketing of Financial
Products to Retail
Investors: Belgian Financial
Services and Markets
Authority Issues Guidance
on New Rules**

A legal update from Dechert

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I. Introduction

On 27 October 2015, the Belgian Financial Services and Markets Authority (“**FSMA**”) issued circular **FSMA-2015-16** (the “**Circular**”) providing detailed guidance on the recently amended rules governing marketing materials used in connection with the offering of financial products to Belgian retail customers¹.

These new rules were introduced by Royal Decree dated 25 April 2014 as amended by Royal Decree dated 2 June 2015 (as so amended, the “**Transversal Royal Decree**”)².

The Transversal Royal Decree is part of the so-called 2013 Twin-Peaks II reform package³ which was enacted for the purpose of harmonizing the marketing rules applicable to **all types of financial products**, subject to certain exceptions set out below.

This new set of rules adds another layer to the Belgian legal framework for the protection of consumers of financial products and services. Their purpose is to provide a set of common and comprehensive rules and procedures to reinforce the protection of retail clients whenever financial products are marketed to them.

The new rules entered into force on 12 June 2015, exception being made for advertisements and other marketing documents distributed prior to 12 June 2015, which are temporarily exempt from the new rules. Such previously distributed materials must, however, be amended to comply with the rules of the Transversal Royal Decree, **as from 1st January 2016**⁴.

It should be noted that the entry into force of certain provisions of the Transversal Royal Decree relating to the obligation to produce a KID (“*key information document/fiche d’information/informativefiche*”) containing the key characteristics of the financial product (e.g. costs, guarantees, risks, etc.) has been postponed indefinitely by Royal Decree dated 2 June 2015 amending the Transversal Royal Decree (the “**Amending Royal Decree**”). Such postponement measure has been adopted in order to avoid potential discrepancies with the upcoming EU PRIIPs regulation and other European initiatives, such as the revision of the Insurance Mediation Directive (also known as “**IMD II**”).

The Circular has been issued by the FSMA in order to clarify certain provisions of the Transversal Royal Decree and to provide answers to various practical questions raised in connection with the implementation of the new marketing rules.

1 The text of the FSMA Circular can be found on the following links:

Dutch version: <http://www.fsma.be/nl/Supervision/finprod/pubinfoobligations/circmedprak.aspx>
French version: <http://www.fsma.be/fr/Supervision/finprod/pubinfoobligations/circmedprak.aspx>.

2 Royal Decree dated 25 April 2014 on information obligations in connection with the marketing of financial products to retail clients (as amended by Royal Decree dated 2 June 2015). The consolidated text of the Transversal Royal Decree can be found on the following links: Dutch version:

<http://www.fsma.be/nl/Supervision/finprod/pubinfoobligations/wetteksten/wetgeving.aspx>
and French version: <http://www.fsma.be/fr/Supervision/finprod/pubinfoobligations/wetteksten/wetgeving.aspx>.

3 The Twin-Peaks II package includes (i) the Law dated 30 July 2013 on the strengthening of the protection of consumers of financial products and services, and the powers of the FSMA, and containing various other measures and (ii) the implementing Royal Decrees dated 21 February 2014 and 25 April 2015.

4 As the case maybe, they will need to be (re-)approved by the FSMA (e.g. factsheets related to UCITS funds).

II. New regime governing marketing materials related to financial products distributed to retail customers in Belgium

General scope of application

"Marketing" is defined very broadly as the presentation of a financial product, in any manner, to induce a non-professional customer or a potential customer to purchase, subscribe, adhere to, accept or sign up for a financial product.

The Circular emphasizes that "marketing" ("*commercialisation*" / "*commercialisering*") is to be interpreted broadly. "Advertisement" is defined as any communication specifically aimed at promoting the sale of a financial product, regardless of the channel through which or the way in which it occurs (including for instance, teasers, texts, slides, banners, and marketing on social networks such as Facebook and Twitter). The rules apply not only to advertisements but also to all other documents and notices distributed in the context of the promotion of a financial product. However, corporate action messages, general reputation campaigns for a financial institution or educational brochures are not considered as marketing materials within the meaning of these rules. Corporate notices related to publicly distributed collective investment undertakings (e.g. UCITS) also fall outside the definition of advertisements since their purpose is not to promote the sale of shares of such collective investment undertakings.

The "marketing" concept covers both public offers and private placements. However, the definition does not apply to marketing actions which are addressed to discretionary asset managers acting for the account of non-professional customers, provided that the manager makes the investment decisions on behalf of its customers.

In order to be captured by the marketing rules, advertisements and other documents and notices must be distributed by a product "manufacturer"⁵, by an authorized distributor or intermediary or by someone who is acting on their behalf. The term product "manufacturer" is defined as the person who has developed or issued the financial product for marketing by itself or by a third party as further clarified with some examples. Any person which directly or indirectly receives any remuneration or advantage in relation to the marketing of a financial product is deemed to be acting on behalf of the product "manufacturer", authorized distributor or intermediary. Documents used by independent investment service providers are therefore outside of the applicable scope.

"Financial products" are broadly defined and include savings products, investment products as well as certain insurance products (with exemptions for specified pension products).

"Non-professional customers" are defined as non-professional customers under the MiFID regulations. The concept of "non-professional customer" in this context is broader than under the Belgian consumer protection laws. It includes certain companies, for example, small or medium-sized enterprises.

Exemptions

The Transversal Royal Decree does not apply:

- ▶ To the marketing of financial products that require an initial investment of at least EUR 100,000 or, in the case of open ended collective investment funds, of EUR 250,000; and

⁵ "*Fabricant*" / "*fabrikant*".

- ▶ to the marketing of a financial product previously issued, to the extent such marketing takes place in the context of a service which consists exclusively in the receipt and execution of orders (subject to certain further conditions).

The Circular also confirms that a resale of financial products between non-professionals is not subject to such marketing rules.

Requirements regarding the content of marketing materials

The Transversal Royal Decree and the Circular set forth detailed rules in line with the MiFID duty to provide clear, fair and complete information to non-professional customers.

- ▶ All marketing materials⁶ must satisfy a number of **general requirements** such as, but not limited to, the following:
 - The information may not be inaccurate or misleading⁷.
 - The potential benefits must not be emphasized without giving a clear and balanced indication of the related risks, limitations and/or conditions.
 - Important elements, declarations or warnings may not be concealed, mitigated or disguised.
 - The information must be presented in such a way that it is comprehensible for a non-professional customer⁸.

The FSMA Circular clarifies these requirements with a number of examples. It also offers further guidance for instance on the choice of the name of a financial product, avoiding the use of ambiguous or misleading terminology, etc.

- ▶ Apart from these general requirements, there are number of **minimum content requirements**, which to some extent depend on the nature of the financial product. These include, for example, the name of the product, the applicable law, its maturity date, principal risks, minimum subscription amount, reference to the prospectus or the KID, contact details of the Consumer Mediation Service⁹ and of the internal complaint service¹⁰, costs and applicable tax regime, etc. The FSMA has now confirmed in the Circular that these mandatory disclosures must be printed in the same size typeface as the remainder of document. In case of technical impossibility¹¹ certain exemptions are available. The Circular contains specific guidance as to how to apply these rules when the financial products can be purchased online.

6 Note that these requirements apply regardless of whether the materials are subject to a pre-approval by the FSMA.

7 The Circular specifies, for example, that the name of the financial product may not be misleading, subjective appreciations (not sustained by an independent external source) should be avoided, risks linked to conversion rates (if any) should be mentioned, etc.

8 If the use of a technical term cannot be avoided, a definition of such term should be provided.

9 The Consumer Mediation Service (“*Service de Mediation pour le Consommateur*”/“*Consumentenombudsdienst*”) is operational as from 1st June 2015.

10 I.e. the internal complaint service of the issuer of the marketing material.

11 Resulting from lack of space and/or the kind of information medium used.

- ▶ Finally, **specific detailed rules** are provided with respect to the use in advertisements of historical and future performance data, awards, ratings and comparisons. The Circular contains further guidance in this respect.

The appendix to the Circular provides additional specific comments regarding the marketing of units of in collective investment funds.

Requirement of prior approval of marketing materials by the FSMA and powers of the FSMA

All marketing materials used in the context of a public offering or admission to trading on a regulated market of investment products (within the meaning of the prospectus legislation), or the public offer of UCITS, or in the context of offering of regulated savings accounts, must be pre-approved by the FSMA. The FSMA's prior approval must generally also be sought in case of amendments to such materials. The pre-approval powers of the FSMA currently apply only to marketing materials used in the context of a public offer, or admission to trading on a regulated market, or the public offer of UCITS. There is no change in this regard.

According to the Circular, the FSMA must review and approve draft documentation within 5 working days following their submission to the FSMA (15 days in case of marketing materials for UCITS). The FSMA will be deemed to have rejected the materials if they are not approved within this period.

Where the FSMA does not (yet) have authority to require pre-approval of marketing materials, it may make a post-distribution review and may use other supervisory tools to block the use of marketing materials which it considers to be a breach of the Transversal Royal Decree. These measures would include (i) issuing an order requiring the manufacturer of the marketing materials to apply the provisions of the legislation, (ii) publishing of the FSMA's viewpoint regarding a breach of the rules, or (iii) the imposition of a penalty. A marketing action may also be prohibited by way of a cessation order issued by the FSMA followed, if necessary, by a judicial cessation order issued by a competent court of law at the request of the FSMA.

III. Application of general market practices and consumer protection legislation

In addition to the requirements of the Transversal Royal Decree, marketing materials must also comply with the market practices and consumer protection rules contained in Book VI of the Belgian Code of Economic Law, which, as of 31 May 2014, also applies, as a general rule, to the marketing of financial products and services.

There are many uncertainties relating to the application in practice of the general market practices and consumer protection rules to financial products and services. The Circular addresses and attempts to clarify such areas of uncertainty e.g. regarding joint offers of products and comparative advertising. Insofar as joint offers are concerned, the FSMA considers that a joint offer which is not prohibited by article VI.81, §1 of the Code of Economic Law will not be considered as an unfair commercial practice so long as it does not distract the consumer's attention from the underlying financial product to the jointly offered benefit with a consequent alteration of the consumer's economic behaviour. With respect to comparative advertising, the FSMA draws attention to the fact that pursuant to Article VI.17 of the Code of Economic Law, comparative advertising may not trigger any confusion with the trademark or commercial name of a competitor, take unfair advantage of the notoriety attached to such trademark or commercial name, or cast any discredit upon a competitor's products.

IV. Conclusion: what has changed and what action is required?

As from 12 June 2015, all marketing materials for financial products distributed to retail customers in Belgium must be compliant with the new rules contained in the Transversal Royal Decree. This means that authorized distributors or intermediaries, as well as the product “manufacturer” (e.g. the issuer) marketing its own products (without distributor/intermediary), must ensure that all marketing material complies with the following new rules:

- ▶ The general requirements (e.g. no inaccurate or misleading information).
- ▶ The minimum standard content requirements (e.g. applicable law, contact details of the Consumer Mediation Service and of the internal complaint service, costs and applicable tax regime, etc.).
- ▶ The specific detailed rules (e.g. on the use in advertisements of past and future performance data, awards, ratings and comparisons).

Foreign entities conducting activities in Belgium (on a cross-border basis or through a branch) also fall under the scope of the new rules.

In anticipation of the **deadline of 1 January 2016**, all marketing materials which had been approved by the FSMA prior to 12 June 2015 should now be reviewed and amended to comply with the new rules and then submitted for (re-)approval by the FSMA, by no later than 31 December 2015. For instance, this will concern factsheets and any other marketing materials circulated with respect to collective investment undertakings publicly distributed in Belgium and any other marketing material issued in the context of a public offer or admission to trading on a regulated market.

Dechert LLP has the local expertise to assist our clients in achieving full compliance with Belgian marketing regulations. Should you wish to discuss with us the new rules or the Circular, please do not hesitate to contact us.

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