"Client protection under Belgian financial law: recent developments in information duties, product intervention and beyond"

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Abstract

L'autorité de surveillance des marchés financiers belge (la 'FSMA') a récemment multiplié les initiatives pour la protection des 'consommateurs financiers'. Elle a contribué à l'élaboration des règles légales nouvelles en cette matière, et a également émis des règlements, avertissements, circulaires et autres communications dans ce cadre. Une question mérite cependant d'être posée: cet activisme va-t-il à l'encontre de la sécurité juridique, de la compétitivité du secteur financier belge, et, dans une certaine mesure, des 'consommateurs financiers' eux-mêmes ? Nous tenterons d'y répondre en examinant les évolutions les plus récentes dans ce domaine au niveau (1) des obligations d'information précontractuelle et publicitaire, ainsi que des règles de responsabilité, contrôle et sanctions qui y sont liées, (2) de la 'gouvernance-produit' et (3) des 'pouvoirs d'intervention-produit'. Ces développements ont été introduits ...

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Client protection under Belgian financial law: recent developments in information duties, product intervention and beyond[1]

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1. Introduction

Client protection on Belgian financial markets is one of the top priorities of the Belgian financial supervisory authority (the Financial Services and Markets Authority or 'FSMA'). Heavily criticized during the Belgian financial crisis for not having intervened on time, the FSMA's pro-activity in recent months is striking. It participated in the drafting of several laws or Royal decrees and issued many regulations, warnings, circulars or other communications. But does the FSMA go too far too fast to the detriment of legal certainty, the competitiveness of the Belgian financial sector and, to some extent, financial clients themselves?

In this article, we try to find an answer to that question by examining some of the most recent developments in client protection on Belgian financial markets:[3] (1) the provisions relating to pre-contractual and marketing information obligations,[4] and related liability, supervision and sanction regimes, (2) evolutions in product governance arrangements which are meant to reduce potential risks of failure to comply with investor protection rules and (3) 'product intervention powers' of the FSMA. These have been introduced in Belgian law through the following regulations: the 'Twin Peaks II package', which essentially provides for the strengthening of the supervisory and sanctioning powers of the FSMA as well as the MiFIDisation of the insurance sector; Book VI of the new Code of economic law, which deals with 'consumers' protection and market practices'; the transversal marketing Royal decree that seeks to implement a (standardized) key information document addressed to 'retail clients' for all 'financial products' and sets out specific requirements for marketing material related to those products; the FSMA label regulation, which imposes a risk label on specific financial products; and the FSMA prohibition on the distribution of several non-mainstream financial products to retail clients.

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[1] Researches for this contribution were made until 15 September 2014.

[2] PhD and Lecturer at the Catholic University of Louvain - Member of CRIDES.

[3] See for a European law assessment, G. Schaeken Willemaers, Client Protection on European Financial Markets – From Inform Your Client to Know Your Product and Beyond: An Assessment of the PRIIPs Regulation, MiFID II/MiFIR and IMD 2, Revue Trimestrielle de Droit Financier, Autumn 2014, available on ssrn.

[4] We leave aside the law of 19 April 2014 relating to alternative schemes for collective investment and their managers (the AIFMD law); it is mostly an implementation of the European AIFMD directive.

The rules discussed in this contribution are quite new - some of them are not even in force yet. This contribution's sole ambition is therefore to give preliminary comments and thoughts, awaiting the necessary experience to make a more in-depth analysis.

In the conclusions to this article, we give a critical assessment of the focus of the Belgian legislator on disclosure and on product intervention. We remind that increasing disclosure requirements is inefficient given the lack of competence, time and will to read of addressees. We also express our doubts about the ability of the financial education programs of the FSMA to change this situation. Given their associated risks, we share the view of the European financial markets' supervisor with respect to products restrictions and bans, which should be considered as measures of last resort. In essence, we favor point-of-sale regulation and product governance arrangements as regulatory approach to protect financial clients. And only to that extent do we support the FSMA pro-activity.

2. Twin Peaks II package: MiFIDisation of the insurance sector and beyond

2.1 Foreword

Belgian financial markets have a 'Twin Peaks' supervisory architecture. Since April 2011, the supervision of the financial sector and financial markets is shared between the FSMA and the National Bank of Belgium (NBB).

The Twin Peaks II reform[5] can be summarized in three pillars and came into force in April 2014.[6]

A first pillar extends to the insurance sector the clients' protection obligations that already applied to the banking sector. The same level of protection is consequently provided to all clients, regardless of the type or nature of 'financial product' (investment,[7] insurance or saving products[8]) and of the status of the

[5] Laws of 30 and 31 July 2013 seeking to reinforce the protection of users of financial products and services as well as the competences of the FSMA, and containing various provisions ((I) and (II)), Belgian State Gazette, 30 August 2013, 60090 and 60110 (the law of 30 July 2013 being referred to as 'Twin Peaks II'); Royal decree of 21 February 2014 relating to the application specificities to the insurance sector of Articles 27 and 28*bis* of the MiFID Law, Belgian State Gazette, 7 March 2014, 20144 ('Royal decree No. 1'); Royal decree of 21 February 2014 relating to rules of conduct and the rules relating to conflicts of interest management, set out by the law, in connection with the insurance sector, Belgian State Gazette, 7 March 2014, 20158 ('Royal decree No. 2'); Royal decree of 21 February 2014 modifying the law of 27 March 1995 relating to insurance and reinsurance intermediation and insurance distribution, Belgian State Gazette, 7 March 2014, 20133. See also FSMA_2014_02, Modification of the law of 27 March 1995 and extension of the MiFID rules of conduct to the insurance sector, 16 April 2014.

[6] See below for the exception relating to professional knowledge.

[7] Including securities and branch 23 life insurance products.

financial institution (credit institution, investment firm, managing company of collective investment schemes, certain collective investment schemes, insurance company, financial intermediary). More precisely, the MiFID rules of conduct set out in the MiFID Law[9] and in the MiFID Royal decree[10] are now applicable to insurers and insurance intermediaries,[11] to the extent and unless otherwise provided by the three Royal decrees of 21 February 2014.[12] Given that these new obligations are considered by the FSMA as provisions of general interest, this extension is relevant for Belgian and foreign insurance companies and insurance intermediaries doing business in Belgium.

A second pillar focuses on the reinforcement of the efficiency and the action power of the supervision of the FSMA.

A third pillar strengthens the sanctioning powers of the FSMA, by tightening the civil liability regime.

These three pillars are summarized below to the extent relevant for the purposes of this article.

Twin Peaks II modifies various laws relating to the insurance sector, including the insurance intermediation law.[13] As from 1st November 2014, these laws are integrated - to a large extent as such - in the new so-called 'insurance code'.[14]

2.2 Inform your client

Twin Peaks II package provides for quality, content, means of communication, timing and responsibility requirements for information to be provided to insurance clients, without making any distinction between professional and retail clients.[15]

Any piece of information, including marketing information (even marketing by e-mail), provided by the service provider to (prospective) clients and relating to an offer or provision of insurance products must be '*correct, clear and not*

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[8] Including saving accounts, branch 21, branch 22 and branch 26 life insurance products.

[9] Law of 2 August 2002 relating to the supervision of the financial sector and to financial services.

[10] Royal decree of 3 June 2007 relating to the rules and specificities for the implementation of the directive relating to markets in financial instruments.

[11] The precise scope of the Twin Peaks II reform is outside the scope of this article.

[12] The MiFID rules of conduct are also made applicable to banking and investment intermediaries further to Twin Peaks II. The Royal decree that would provide particular rules for banking and investment brokers is still awaited.

[13] Law of 27 March 1995 relating to insurance and re-insurance intermediation and to insurance distribution.

[14] Law of 4 April 2014 relating to insurances, Belgian State Gazette, 30 April 2014, 35487.

[15] See also Articles 28 et seq; Articles 273 et seq of the 'insurance code'.

misleading'. This means, *inter alia*, that any piece of information must also identify the risks corresponding to any advantage put forward; be sufficient to enable the client to make an informed decision; and be drafted in a fluent language and avoid state of the art terms. It must also meet certain requirements in case of comparisons for instance,[16] reference to a specific fiscal treatment[17] or to the name of the FSMA.[18] Specific additional information requirements are provided for saving or investment insurances (branch 23 or branch 44), including in case of reference to, or simulation of, past performances or reference to future performances.[19]

As far as pre-contractual information is concerned, '*appropriate information*', and any substantial change thereto,[20] must be provided, be it in standardized format, *to enable the client to reasonably understand what is offered and make an informed decision*. Pre-contractual information must be provided essentially on (1) the service provider (contact details of the service provider, a reference to its registration/license and the address of the FSMA, language used, communication method) and the services, (2) the type of contract or service offered and the related conditions, (3) the risks relating to saving or investment insurances (branch 21 or branch 23),[21] (4) costs and charges,[22] and (5) tax disclaimer. Pre-contractual information also covers, *inter alia*, the scope and frequency of the client reports and a summary of the conflicts of interest policy and the inducements policy. A broker does not need to produce himself information about the insurance contract, such as the general Terms and Conditions, but well information about the insurance contracts of other insurance companies and information about the intermediation contract.[23] Until further details are provided by the FSMA on the records of their intermediation activities, and the period during which such records should be kept,[24] we would advise that a systematic procedure be put in place at intermediaries' to document any communication of information to (prospective) clients, with a view to prove that sufficient appropriate information was provided.

Information must be provided on paper or on any other durable medium or on a website (if the website is not a durable medium) provided that certain

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[16] Article 8, §3 of the MiFID Royal decree as detailed by Articles 11 and 13 of Royal decree No. 2.
[17] Article 8, §7 of the MiFID Royal decree as detailed by Articles 11 and 13 of Royal decree No. 2.
[18] Article 8, §8 of the MiFID Royal decree as detailed by Articles 11 and 13 of Royal decree No. 2.
[19] See Article 8, §4 and Article 12 of the MiFID Royal decree as detailed in Article 13 of Royal decree No. 2.
[20] Eg, a change to the franchise, to the coverage or to the costs.
[21] Reference to a label will not be sufficient in that respect (FSMA circular of 16 April 2014 cited above).
[22] The FSMA regulation detailing the specific information to be provided in that respect is still awaited.
[23] Comp. with the KID under the transversal marketing Royal decree, discussed below.
[24] Article 12 *septies*, §2 of the insurance intermediation law.

conditions are met.[25] We would suggest that clients be divided into two groups, those who correspond with the insurance company/intermediary via e-mail, and who would receive any information on the website or via e-mail, and the others, who will then have to sign any piece of information provided and for whom a systematic update of their client file will have to take place.

The information must be disclosed before the service is provided or the contract is signed unless it is a distance contract or a telephone contract, in which case it must be provided immediately afterwards and certain conditions must be met.[26] The FSMA considers that the client must have sufficient time to ask any complementary piece of information deemed necessary.

Twin Peaks II package provides that the person who is in contact with the client is in principle in charge of providing the relevant information. In the insurance sector, it could be the insurance firm (in case of direct distribution or indirect distribution via tied insurance agents) or the non-related intermediary (insurance broker (who acts through its subagents as the case may be) or non-tied insurance agent (who acts through its subagents as the case may be)). In practice, the FSMA recommends that the service providers agree among themselves who among them shall provide what information to the client to avoid duplications and compliance with applicable requirements.[27] The insurance company and the insurance intermediary are in charge of the drafting of their respective information.

Any marketing information must be recognizable as such and consistent with any other information disclosed and shall contain the pre-contractual information[28] unless reference is made to document(s) containing such information.

2.3 Know your product

The new rules impose that service providers know and are able to explain to clients the essential characteristics of the financial products and services they market. This also applies to the persons responsible for the distribution within them and any person they employ, particularly those who are in contact with

[25] See Articles 5 and 10, §4 of the MiFID Royal decree.

[26] See Article 10, §5 of the MiFID Royal decree as detailed by Articles 11 and 13 of the Royal decree No. 2.

[27] This is even more relevant as the definition of 'tied agent' is narrower than the definition of 'appointment' under the transversal marketing Royal decree discussed below which also provides for mandatory pre-contractual information (in the form of a standardized information sheet) when marketing to retail clients.

[28] Ie, information relating to the service provider, to the type of contract offered, to the costs and charges and to the nature and risks of savings and investment insurance.

the public.[29] This is a new obligation further to Twin Peaks II which applies to the entire financial sector.

This new requirement aims at enabling clients to ask questions about the financial product to whomever they are in contact with, irrespective of whether or not the service or the intermediation includes the provision of an advice.

2.4 Know your distributor and knowledge requirements

The liability regime of the Twin Peaks II reform suggests a "know your distributor" obligation for insurance companies using tied agents.[30] More specifically, the Royal decree modifying the insurance intermediation law provides for the full and unconditional responsibility of insurance companies using tied agents[31] – even where the tied agent uses sub-agents - for any action or omission relating to the rules of conduct, except in case of gross negligence. In case of gross negligence, the Royal decree provides for the joint responsibility of the tied agent. This responsibility of the insurance company using tied agents does not apply for actions or omissions outside the intermediation activity[32] of the tied agent. This means that, concretely, insurance companies should enact procedures and policies for the compliance with the rules of conduct by their tied agents.

The law also provides for a "know your distributor obligation" on non-tied insurance agents and insurance brokers using insurance sub-agents.[33] They bear full and unconditional responsibility for their action or omission where the sub-agents act for their account. They must therefore also supervise the activities of their sub-agents.[34]

Knowledge requirements are strengthened for the insurance sector further to Twin Peaks II. First, to level the playing field with the banking sector, all

[29] See Article 12 *sexies* of the insurance intermediation law, as introduced by Twin Peaks II - it will become Article 277, §2 of the 'insurance code' (in force on 1st November 2014). See as well Article 14, §1 *bis* of the banking and investment services intermediation law, introduced by Twin Peaks II.

[30] See for the banking sector, Art. 10, §4, of the banking intermediation law (providing for the responsibility in connection with rules of conduct of the bank using banking and investment agents).

[31] As defined in Article 1, 8° of the insurance intermediation law (Article 257, 5° of the insurance code), a tied agent is an agent who represents (acts in the name and for the account of) one insurance company and who falls within its complete responsibility or who represents more than one insurance company, each time within their complete responsibility and solely for a non-competing branch (eg, branch 21/23 for A and non-life for B).

[32] As defined in Article 1, 1° and 2° of the insurance intermediation law.

[33] As defined in Article 257, 2°, 3° and 4° of the insurance code.

[34] See for concrete examples of the split in responsibility between different types of intermediaries, the FSMA circular of 16 April 2014, at 14 (see above).

insurance and re-insurance intermediaries must prove, as a condition to be registered with the FSMA, that they know, and that the persons they designated as responsible for the distribution as well as the persons in contact with the public, know the rules of conduct applicable to them.[35] The requirements relating to professional knowledge are further detailed by the FSMA.[36] The FSMA should set out the details of a specific exam to replace the classes to be followed.[37] Second, further to the requirement to have a proper organization, service providers must make sure their compliance and internal audit functions do cover compliance with the rules of conduct, and establish specific policies and procedures in their respect. This applies explicitly to insurance companies and their marketing network, ie, their tied agents and the sub-agents of those tied agents. This being said, to the extent appropriate, this also applies to insurance intermediaries to enable the FSMA to supervise compliance with the rules of conduct.

2.5 Supervision

The FSMA supervises compliance with the rules of conduct and the provisions of any Royal decree or FSMA regulation enacted in their respect.[38]

In 2012, the FSMA developed a specific method for the supervision of the compliance with the rules of conduct by financial institutions to be used during on-site checks. Each year, the FSMA selects an area for particular focus, depending on the results of a risk assessment.[39] This methodology is now covering the insurance sector as well. The FSMA however stressed that supervision will be proportionate to the area.[40]

Twin Peaks II second pillar provides additional powers to the FSMA to investigate breaches, including 'mystery shopping' by members of the FSMA or third parties in order to check compliance with rules of conduct, and permanent remote access to the parts of internet websites reserved to clients.[41]

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[35] There is a transition period until 30 April 2015 for the following: insurance intermediaries registered as of 30 April 2014, persons designated as responsible for the distribution with a registered insurance intermediary as of 30 April 2014, and persons employed by a registered insurance intermediary as of 30 April 2014.

[36] For instance, the FSMA requires 6 hours minimum of classes for insurance intermediaries, persons responsible of the distribution and any person in contact with the public. See the website of the FSMA.

[37] Article 11, §3, 2° of the insurance intermediation law.

[38] Article 33 of the MiFID Law.

[39] Eg, conflicts of interests rules or the diligence duty (appropriateness and suitability tests).

[40] To respond to critics pointing out the too sharp implementation period for the Twin Peaks II package, the FSMA mentioned that it would spend the first months since implementation mainly on training, and much less on checks.

[41] The FSMA is however not entitled to gain access to clients' individual protected websites.

2.6 Liability regime

The liability rules set out in the Twin Peaks package (see above) do not supersede the common law liability regime.[42] Moreover they do not release tied agents from their duty to comply with conduct of business rules.

The Twin Peaks II package introduces a presumption of causal link for breaches of specific rules of conduct that occurred on or after 30 April 2014.[43] In an action under civil law,[44] and notwithstanding any contractual provision stating otherwise, in case of breach to specific 'rules of conduct'[45] by a 'service provider'[46] in the context of a 'financial operation',[47] and if the user[48] of the 'financial products' or 'financial services'[49] suffers a damage after the financial operation - the existence and the scope of which must be proven -[50] the financial operation is presumed to have taken place as a result of the breach, unless proven otherwise. If the claimant proves the causal link between the operation and the damage, there is no need to prove the causal link between the operation and the breach and the damage as well is presumed to be resulting from the breach.[51] In other words, Twin Peaks II creates a presumption that the investment decision would not have been taken had the relevant financial institution complied with the applicable conduct of business rules.

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[42] Pre-contractual information duties are sanctioned by Articles 1382/1383 of the Civil code and contractual information duties are sanctioned by Article 1134, al. 3 of the Civil code.

[43] New Article 30 *ter* of the MiFID law. This article has been extended to the insurance sector by Article 2/1 of the Royal decree of 20 February 2014. Note that Article 30 *ter* was slightly changed by the insurance code.

[44] And particularly contract law (actions in nullity of the contract) and liability law.

[45] Including, Article 27, §2 of the MiFID Law (correct, clear and non-misleading information); Article 27, §3 (appropriate information to be communicated in a understandable way); Article 2/1 of the Royal decree of 20 February 2014 implementing Article 30 *ter* of the MiFID Law, (information on costs and charges; all information requirements). The question rises whether the information duties are best efforts obligations or result obligations.

[46] See Article 30 *ter*, §1, al. 2 of the MiFID Law (including, so-called 'regulated entities'; banking and investment services agents; insurance companies and intermediaries and intermediaries in banking and investment services).

[47] As defined in Article 30 *ter*, §2 of the MiFID Law (very broad definition that includes lending, exchange, repayment and holding).

[48] Not defined. In the preparatory works, it is clearly stated that the concept of 'user' is not to be confused with the concept of 'consumer' in the consumer protection law (see below). We think that natural persons and professional clients are included. Another question is whether the claimant still needs to be a 'user' at the time of the claim.

[49] As defined in Articles 2, 39° and 40° of the MiFID Law.

[50] Article 30 *ter* does not provide any details concerning the damage that can be incurred. According to current case law on the basis of common contractual and tort law, the loss of a chance is repaired (loss of the chance not to sell the losing investment and/or to make a more valuable investment; no damages for the loss or the low income) or the "moral" damage that results from the inability to take an informed decision.

[51] Comp. with Article 61 of the Prospectus Law and Article 63 of the UCITS Law.

In practice, this presumption creates a reversal of the burden of proof: it will be up to the financial institution to prove that the breach of the conduct of business rules did not affect the investor's investment decision. The only benefit for the claimant would then be that in case of any doubts remaining at the end of the proceedings, the doubts should benefit the claimant. Nonetheless, the rebuttable character of the presumption is a strong limitation to the usefulness of this presumption of causal link to the benefit of the claimant.

The statute of limitation is five years as from the time the client knew of the damage or its aggravation. No action can be introduced on that basis after twenty years from the day following the day of the breach.

2.7 Sanctions

The Twin Peaks II package extends the existing powers of the FSMA to issue injunctions, public warnings and administrative fines to insurances companies and insurance intermediaries. It further increases and harmonizes the level of administrative fines to a maximum of EUR 2,500,000 for all regulated entities and EUR 75,000 for all financial intermediaries.

As a general rule, fines must be published, disclosing the name of the concerned person(s) unless such disclosure would seriously jeopardize the financial markets or cause disproportionate damage to the parties concerned.

It also introduces the possibility for the FSMA to suspend the marketing of a financial product on the Belgian territory as long as the breach is continuing (if necessary, this decision can be made public);[52] and introduces an injunction action in case of breach of rules of conduct.[53]

In addition, the Code of economic law provides for the possibility of a collective action[54] in case of breach by a company[55] of, *inter alia*, information duties,[56] to the detriment of 'consumers', as defined by the Code (see below). The breach must have occurred after 1st of September 2014 and certain conditions must be met that relate to the claimants, their representative and the procedure.

3. Book VI of the Code of economic law

[52] Article 36, §1, al. 4 MiFID Law.
[53] Article 125, 3° MiFID Law.
[54] Law of 28 March 2014, Belgian State Gazette, 29 April 2014, in force since 1 September 2014.
[55] Defined as a natural or legal person who pursues in the long term an economic goal, including associations.
[56] Article XVII.37, 17° of the Code of economic law refers to Article 27, §2 of the MiFID Law (correct, clear and not misleading information) and to Article 27, §3 of the MiFID Law (appropriate information), as well as to the implementing provisions of the MiFID Royal decree.

Book VI of the Code of economic law[57] is applicable since 31 May 2014 and reiterates most of the Law of 6 April 2010, which it replaces. It also transposes the Consumer Rights Directive 2011/83/EU. In addition, alongside the transposition, a limited number of areas were revisited and modified.

Book VI of the new Code of economic law contains provisions aimed at protecting 'consumers' - defined as natural persons who act outside any commercial, industrial, artisanal or self-employed activity[58] - where undertakings offer them products and services. Book VI applies *a priori* to financial services but for the four limited exceptions provided by the Royal decree of 23 March 2014.[59] This has important implications where securities are sold to 'consumers', even in a private placement.

The definition of 'financial services' in Book VI is much broader than the definition of 'financial services' in the MiFID Law. Book VI's definition covers on the one hand, services relating to bank (eg, bank accounts), credit (eg, loans), insurance, individual retirement, investments and payments, and on the other hand, 'financial instruments', 'securities', 'financial products' defined in the MiFID Law and 'investment instruments' defined in the Prospectus Law. [60]

Without getting into details, the Code provides for a general information obligation which applies if the information could not be derived from the context, rules relating to comparative marketing, distance contracts, off-premises contracts,[61] joint offers, abusive clauses, unfair - misleading or aggressive - commercial practices, unsolicited communications.

Any breach concerning 'financial services' can be searched and set out by the 'federal public service - economy' and by the FSMA (to the extent the firm, the transaction or the product concerned are subject to the FSMA supervision).[62]

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[57] Law of 21 December 2013, Belgian State Gazette, 30 December 2013, 103506.

[58] See Article I.1.2° of Book VI of the Code of economic law.

[59] Royal decree of 23 March 2014 relating to the adaptations of specific provisions of Book VI of the Code of economic law to certain categories of financial services, Belgian State Gazette, 3 April 2014, 28702. Article VI.3, §2 is not applicable to the price of investment instruments that are sold or offered for subscription, if the price is not pre-determined. Article VI.5 is not applicable to financial products expressed in a currency other than the EUR (except the related fees and costs). Articles VI.18 and VI.19 are not applicable to the sale or offer to subscribe (to a consumer) of investment instruments the price of which fluctuates on the financial market that the company cannot influence. Certain clauses are deemed not to be unfair.

[60] Article I.8, 18° of Book VI of the Code of economic law and the Report to the King.

[61] Note in that respect that Book VI implements the consumer rights directive 2011/83/EC in connection with contracts negotiated away from business premises. But this directive does not apply to financial services (see recital (32)). Nevertheless, Book VI and the implementing Royal decree do not provide for an exception of those rules to financial services.

[62] Article XV.11, §2 of the code of economic law and Article 45, §1, al. 1, 7° of the MiFID Law.

Non-compliance with Book VI is subject to criminal sanctions. The FSMA may also impose administrative sanctions. An injunction action can be brought.[63] Any breach of Book VI can also give rise to a collective action if all the conditions are met.[64]

An important question to resolve is to know what law is applicable where both the Code and one or more other Belgian laws regulate the same matter, as will often be the case. As a general rule, Book VI applies cumulatively with specific financial legislation. In case of a conflict, the Code is considered to be a *lex generali* and the adage '*lex specialis derogat generali*' applies.

However, important qualifications must be made depending on whether the matter is harmonized at European level.

If Book VI is not an implementation of European directives whereas the specific financial law implements a maximum harmonization directive or the other way around, any deviating rule of Book VI, or as the case may be of the specific law, will not be applicable. For instance, no deviating rule of Book VI can apply to the language requirements of the Prospectus Law.

If both the Code and the specific law implement maximum harmonization European directives, *lex specialis generali derogat* unless otherwise provided in the directives themselves or it is impossible to know which law is the *lex specialis*.[65]

If Book VI implements a minimum harmonization directive and the specific law implements a maximum harmonization directive,[66] or the other way around, any rule beyond minimum harmonization cannot be contrary to full harmonization.[67]

In case of provisions of Book VI not implementing any European directive whereas the special law implements a minimum harmonization directive or the other way around, or in case both Book VI and the special law implement minimum harmonization directives, the cumulative application cannot be contrary to the minimum harmonization.

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[63] Book XVII of the Code of economic law.

[64] Article XVII 37, 1°, c) of the Code of economic law.

[65] The Report to the King provides for the following example: application of the rules on distance selling to a public offer with distance selling: the investor-consumer shall receive the information provided for in the Prospectus Law and in Book VI (distance contracts).

[66] For instance, the application of the rules on misleading advertisements in Book VI to MiFID marketing.

[67] For instance, the provisions of MiFID II or IMD II relating to joint offers apply if the rules provided in that matter by the Code of economic law contradict them.

Moreover, the question of the applicable law is likely to be subject to discussion where, next to the Code, more peculiar layers of specific financial legislations are applicable.[68]

4. The transversal marketing Royal decree

4.1 Scope

The transversal marketing Royal decree[69] provides for a pre-contractual information sheet and marketing requirements as from 12 June 2015. It has a more limited scope than the pre-contractual and marketing obligations under the MiFID Law and the MiFID Royal decree discussed above as it only applies to the 'marketing'[70] to 'retail clients'[71] of 'financial products'[72] in Belgium.[73]

Besides, the Royal decree does not apply when the financial counterpart needed from the retail client is at least EUR 100,000 or at least EUR 250,000 in case of UCITS; in the context of order receipt and order transmission or order execution where the service provider is only remunerated for such services; in the context of pensions of the first and second pillars; and for insurance products covering large risks.

4.2 Pre-contractual information sheet ('KID')

Any person marketing a financial product to retail clients on the Belgian territory is in principle responsible for the drafting and the update of the KID. More specifically, the Royal decree provides for a cascade of responsibility. In case of regulated distributors or regulated intermediaries appointed[74] by the manufacturer, only the manufacturer of the financial product is in charge. In

[68] Eg, FSMA circulars (including FSMA circular 2013-13), FSMA moratorium, etc.

[69] Royal decree of 25 April 2014 setting out certain information obligations for the marketing of financial products to retail clients, Belgian State Gazette, 12 June 2014, 44471. See Article 27, §11 and Article 45, §2 of the MiFID Law which are the bases of this Royal decree.

[70] Defined as the presentation, in any manner, of a financial product to incentivize a (potential) retail client to buy, subscribe, adhere, accept, sign or open the financial product. This covers both public offers and private placements.

[71] Defined in Article 2, 29°, of the MiFID Law. In practice mainly physical persons and small companies are covered. The concept of 'retail client' is thus broader than the concept of 'consumer' under Belgian law. Comp. with scope of the general disclosure obligations under the MiFID Law (does not distinguish between retail and other clients).

[72] Defined in Article 2, 39° of the MiFID Law.

[73] Foreign entities conducting business in Belgium on a cross-border basis or through a branch therefore also fall under the new rules.

[74] Article 5, al. 2 transversal marketing Royal decree specifies when the manufacturer, regulated distributor or insurance intermediary should be considered appointing someone in the context of the responsibility cascade. Comp. with the (narrower) definition of 'tied agents' and the responsibility regime relating to the pre-contractual information under the MiFID Law (above).

case of delegation by regulated distributors or regulated intermediaries not appointed by the manufacturer, only the first distributor or intermediary is in charge and not the manufacturer nor the delegate. If an insurance intermediary appoints insurance sub-agents, without the insurance intermediary having been appointed by the manufacturer or a regulated distributor, only the insurance intermediary is responsible and not the sub-agents.[75]

The person in charge of the drafting and updating of the KID must pro-actively provide the information sheet and any update to entities that she appoints for marketing in Belgium. The same cascade applies.[76]

The mandatory KID must meet the requirements as to length, typography and minimum content. It must be a maximum of three A4 pages long document[77] written in a readable way, in non-technical language. It must contain the principal characteristics of the product to reasonably enable the retail client to understand the nature of the product and its risks. The information provided must be correct, clear and not misleading and consistent with any other pre-contractual information. It must allow for comparisons. It should be a stand-alone document although (precise) cross-references are permitted to complement or detail specific information contained in the KID. It must mention the entity where complaints can be logged. The label related to saving or investment products (see below) must be mentioned on the first page; no other risk assessment should be mentioned, unless otherwise provided. The Royal decree provides for other specific content requirements, including the requirements relating to any reference to a formula or to any reference to the FSMA. The fiscal treatment should be mentioned. The information sheet should be dated. As long as the financial product is marketed in Belgium, the person responsible for the drafting and the update of the KID shall publish updated KIDs on a website accessible by the public without charge. Reference to the specific location on the website where any update of the information sheet can be found shall be included in the KID.

The Royal decree provides for standard forms for regulated saving accounts or regulated saving deposits; term deposits; structured notes; derivative without capital guaranteed; bonds; shares; branch 21 life insurance (as saving, as saving for retirement, as long-term saving); branch 23 life insurance; etc. These standard forms should be complied with unless derogations are approved by the FSMA in advance.

Any person marketing a financial product must provide the KID to the retail client free of charge in due time prior to the transaction. Immediate ex-post

[75] Article 5 transversal marketing Royal decree.
[76] Article 6 transversal marketing Royal decree.
[77] 4 A4 pages if the information sheet includes number illustrations of formulae.

provision of the KID is however allowed in case of unsolicited distance sale where *ex-ante* provision is not possible.

The Royal decree provides for the means of communicating the information sheet: paper or, provided certain conditions are met, other durable medium or internet website.[78] The up-to-date KID must in any case be made available at all times on an Internet website as mentioned above.

Any mandatory KID, and any update thereof (but for limited exceptions), requires prior approval by the FSMA according to a specific approval procedure before being communicated to retail clients.[79] However, KIDs related to insurance products do not need prior approval by the FSMA before being communicated to retail clients. They can be subject to the prior approval of the FSMA if the FSMA confirmed that they relate to insurance contracts which do not call for any further comments. In that case, any marketing material related to the insurance product is also subject to the prior approval of the FSMA.

4.3 Marketing rules

The Royal decree also provides for rules applying to marketing materials, documents and notices communicated to retail clients when marketing financial products in Belgium.

Marketing material must be recognizable as such, cannot be misleading or incorrect and cannot minimize or hide important elements or warnings. It must be consistent with any other piece of contractual or pre-contractual information made available and must be easily read by a retail investor. Any confusion with marketing relating to the manufacturer or the distributor or the manager of the product is prohibited.

The Royal decree also provides for the minimum content of any marketing material.[80] There are specific provisions in connection with past, simulated or future performance mentioned in marketing material relating to 'saving or investment products'.[81] It also provides for specific content in case of reference to an award or a notation.[82] Certain conditions also apply with respect to comparisons.[83]

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[78] Article 7 transversal marketing Royal decree.
[79] Comp. with what is provided under the PRIIPs Regulation.
[80] Article 12 transversal marketing Royal decree. Comp. with the MiFID Law/MiFID Royal decree discussed above.
[81] Article 16 et seq transversal marketing Royal decree.
[82] Article 24 transversal marketing Royal decree.
[83] Article 25 transversal marketing Royal decree.

Prior approval by the FSMA in accordance with the procedure set out in the Royal decree is mandatory if the prior approval of the KID is mandatory.[84]

4.4 Voluntary KID

No mandatory KID is required in case of publication of a prospectus in accordance with the Prospectus Law; in case of a non-public offering under the Prospectus Law or the UCITS Law or the AIFMD Law; in case of specific prospectus-exempted offerings under the Prospectus Law,[85] in case of marketing of units of UCITS if a key investor information document has been drafted in accordance with the UCITS Law or the AIFMD Law.

In all those cases, the Royal decree provides for an opt-in: a voluntary KID can be drafted, with the same content as a mandatory KID.[86] But the procedure relating to the approval by the FSMA of marketing material shall be applicable and not the procedure relating to the approval by the FSMA of the mandatory KID.[87]

4.5 Supervision and sanctions

The FSMA supervises compliance with the transversal marketing Royal decree.[88]

As the transversal marketing Royal decree does not contain any specific provisions regarding responsibility and sanctioning in relation to marketing documents, only the default administrative, civil and criminal sanctions regime of the MiFID Law apply.

5. The FSMA label regulation

As from 12 June 2015, a standardized risk label must be mentioned in the KID provided for by the transversal marketing Royal decree and discussed above and in any marketing material relating to the marketing of 'saving' and 'investment products'[89] to 'retail clients' in Belgium.[90]

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[84] Article 26, §1 transversal marketing Royal decree. In practice, no prior approval of marketing documents is required in connection with insurance products (unless prior approval of the KID relating thereto is required) and prospectus-exempt private placements.

[85] Article 3, §2, 3° transversal marketing Royal decree referring to Articles 16, § 1, 3° and 8° and Article 18, § 1 of the Prospectus Law.

[86] We do not think that the Belgian financial sector is ready to bear the costs of having a voluntary KID the advantages of which being not evident to say the least.

[87] Article 10, §1, al. 2, 2° transversal marketing Royal decree.

[88] Article 33 of the MiFID Law.

[89] Defined in the transversal marketing Royal decree.

[90] Article 4, §2, 8° and Article 12, §1, 4°, c) transversal marketing Royal decree and Article 2 Royal decree of 25 April 2014 approving the FSMA regulation relating to the technical requirements of

The label should indicate to retail investors, in a standard form which allows for comparisons, the degree of risks (market risk and credit risk) related to the product without assessing the quality or the opportunity of the product/transaction.

Saving and investment products are organized in 5 categories to which a risk label corresponds. The division into product categories depends on (i) the type of debtor, (ii) the credit rating of the debtor and (iii) the product specifications.

The label is allocated by the person responsible for the drafting of the KID under the transversal marketing Royal decree.

The regulation also provides details for the presentation of the label, which is based on the energy label designed for electrical appliances and has been allegedly tested by a consumer panel.

Breaches of the FSMA risk label regulation can give rise to a collective action.[91] Compliance with the label regulation is supervised by the FSMA.[92]

6. The FSMA financial products ban regulation and beyond

The FSMA considers that disclosure is not sufficient to protect investors buying complex financial products and considers that this market is important enough to intervene.[93]

As discussed more at length elsewhere,[94] a voluntary moratorium applies since 1 August 2011 to the 'distribution' by a 'distributor' to 'retail investors' of 'structured products' that are deemed 'particularly complex' if they do not meet four pre-set criteria. Most Belgian financial institutions adhered to it. The IMF recently considered the moratorium to be effective in meeting its objectives of having more simple retail products and increased transparency to enable

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the risk label, Belgian State Gazette, 12 June 2014, 44567. The possibility of the label regulation was provided in Article 30 *bis*, 2° of the MiFID Law, further to Twin Peaks II.

[91] Article XVII.37, 17° of the Code of economic law refers to Article 30 *bis* of the MiFID Law which provides for the possibility for the FSMA to take the label regulation.

[92] Article 33 of the MiFID Law.

[93] The Belgian market for these products is considered to be worth EUR 83 billion at the end of 2011.

[94] See G. Schaeken Willemaers, Product Intervention for the Protection of Retail Investors: a European Perspective, in Laure Nurit-Pontier et Stéphane Rousseau (dir.), Risques, crise financière et gouvernance : perspectives transatlantiques (en italique), Montréal/ Zurich/Limal, Éditions Thémis/Schulthess/Anthémis, 2013.

comparisons.[95] The moratorium was meant to be only temporary. But it is still in force, more than 3 years after its entry into force.

Further to Twin Peaks II, the FSMA may prohibit or impose restrictive conditions to the marketing of financial products to retail investors.[96] On that basis, the FSMA issued the 'financial products ban regulation', which comes on top of the moratorium.[97] It entered into force on 1 July 2014 and prohibits the marketing[98] in Belgium of several 'non-mainstream' financial products to retail investors, whether or not in the framework of a public offer and irrespective of the nationality or place of business of the distributor.

Three categories of products are concerned by the ban: (1) financial products linked to life settlements, ie, traded life policy investments or financial products directly/indirectly[99] related to traded life insurances; (2) financial products directly/indirectly related to virtual currencies, like Bitcoin and Litecoin, (3) certain fund-linked investment instruments, ie investment instruments (other than UCITS and AIF) and insurance wrapper (branch 23) directly/indirectly linked to alternative investment funds (AIF) or, in the case of insurance wrappers, internal funds or AIF, investing directly/indirectly in non-conventional assets – assets that cannot be invested in by Belgian UCITS or Belgian undertakings for collective investment in claims (eg, raw materials, art pieces, wine, whisky). The alleged purpose of the prohibition is to ensure that funds which cannot be directly offered to the public in Belgium are not repacked as structured products (or other financial products) and subsequently marketed to retail investors in order to circumvent the regulated funds regulations. The Chairman of the FSMA declared that the list could be extended if necessary.

Compliance is supervised by the FSMA. The administrative sanctions provided in the MiFID Law as well as the power of the FSMA to suspend the marketing of the relevant financial products are applicable. This is without prejudice to default civil and criminal sanctions. In addition, a collective action can be brought in case of breach.[100]

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[95] Belgium - Technical Note on Securities Markets Regulation and Supervision, IMF Country Report No. 13/136, 16 May 2013. See also for an assessment by the FSMA, FSMA annual report 2013, at 48.

[96] Article 30 *bis*, 1° of the MiFID Law introduced by Twin Peaks II.

[97] Royal Decree of 24 April 2014 approving the FSMA Regulation of 3 April 2014 banning the marketing in Belgium of certain financial products to retail investors, Belgian State Gazette, 20 May 2014, 40095.

[98] Similar definition as under the transversal marketing Royal decree.

[99] A direct link means that repayment or return of the financial product is partially or completely related to the evolution or return of the underlying assets. An indirect link means that the issuer is financially dependent on the underlying assets to satisfy its repayment obligations under the financial product.

[100] Article XVII.37, 17° of the Code of economic law refers to Article 30 *bis* of the MiFID Law which provides for the possibility for the FSMA to take the product ban regulation.

In addition, the FSMA issued in June 2011 a public warning concerning the risks associated with speculative transactions on foreign currencies (FOREX products). The FSMA did the same in May 2014 in connection with binary options. The FSMA also recently issued a communication reminding of their obligations undertakings that distribute over the counter non-mainstream financial products on-line to retail investors in Belgium. It concerns all types of derivative products which are considered complex under the MiFID rules, including contracts for difference and so-called 'binary' options.[101] It considers these products to be often highly risky although presented as very simple products.

7. Conclusions

Cases of mis-conceptions and mis-sellings of financial products are numerous. Regulators worldwide are trying to tackle these issues as they negatively impact clients' confidence in sound financial markets and affect their savings. This in turn results in less support of the economy by suppressed demand and is illustrative of a misallocation of resources.

We discussed in this article two areas of focus for the Belgian legislator: disclosure and product intervention. These conclusions give a critical assessment of each regulatory approach.

Information asymmetries and the principal-agent problem have always been key drivers of the regulation of investment products aimed at the retail client. From that perspective, the transversal marketing Royal decree and the FSMA label regulation fit perfectly. However, there is irrefutable evidence suggesting that the investor does not have the time, the will or the competence necessary to read the documents made available to him.[102] Obviously, the Belgian legislator does not give much credit to it. To the contrary, the FSMA is dedicating an important budget to improve financial education of clients.[103] The FSMA believes that educational programs can enable clients to eventually understand the documents addressed to them. But can these general public programs really go beyond raising awareness to the complexity and risks related to financial markets alongside its many opportunities; and stressing the importance of professional financial advisers in taking the right investment decision? And even if the investors were/became qualified enough to understand the disclosures made available to them, this would leave whole

[101] FSMA_2014_05 of 25 July 2014, Communication for undertakings that distribute non-mainstream financial products (such as CFD's, binary options, etc.) online.

[102] The experience with MiFID showed that the delivery of documentation and the signature by the client do not automatically translate into a real understanding of what has been signed.

[103] See the dedicated website wikifin.be created on 31 January 2013. See also the financial education program that the FSMA suggested to introduce in (professional) high schools (see the press releases of June 2014 in that respect).

issues relating to lack of time and will to read financial information. Such lack of time, will and competence are probably the main reasons for retail investors' vast reliance on investment advisers. For these investors who rely on financial intermediaries' advice, disclosure is useless, be it in short standard form.

But more troublesome for the positioning of the Belgian market on the financial map are the following questions. What was the hurry to take the transversal marketing Royal decree and the label regulation? Was it incentivized by the then-approaching federal elections of May 2014 and the uncertainty of the political color of the next minister in charge of the Belgian economy?[104] It seems that the FSMA wants very badly to show that it can act, and that it can act quickly, to fulfil its main mission of clients' protection.[105] By doing this, the FSMA oversaw the fact that the disclosure requirements imposed by the transversal marketing Royal decree will in some important aspects be covered by the forthcoming European PRIIPs Regulation.[106] We would not so much criticize this front-running[107] if the enacted provisions did not go beyond what will be provided at European level.[108] But they certainly do[109] and this will negatively impact the competitiveness of the Belgian financial sector without sufficient related benefits as explained above.

The FSMA is also a front-runner in interventionist, product-based regulation.[110] This raises several concerns. Has the FSMA correctly reconciled the moratorium/product ban regulation with the maximum harmonization retail

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[104] The minister in charge of Belgian economy until the federal elections of May 2014 was the socialist Johan Vandelanotte. The next one could belong to the liberal political parties.

[105] The FSMA usually drafts all financial regulations before they are discussed at political level.

[106] For the latest text, see position of the European Parliament adopted at first reading on 15 April 2014 with a view to the adoption of Regulation (EU) No .../2014 of the European Parliament and of the Council on key information documents for packaged retail and insurance based investment products (PRIIPs) (the 'PRIIPs Regulation').

[107] The PRIIPs Regulation wil not come into force before mid-2016 to be realistic.

[108] The transversal marketing Royal decree has a broader product scope than the PRIIPS Regulation as it relates to all financial products, packaged or not (non-life insurance included). Besides, the label regulation was enacted even though a similar amendment to the PRIIPS Regulation was not adopted at European level (in November 2013, the European Parliament suggested that products covered by the PRIIPs Regulation be labelled 'complex' at the top of the KID if, *inter alia*, they present their risk-reward profile or costs in an overly complicated manner or invest in underlying assets not commonly invested in by retail investors). The Belgian regulator did not give much credit neither to the IOSCO report stressing the moral hazards that could be involved in labeling (IOSCO, Regulation of retail structured products, final report, December 2013, at 22).

[109] Does the transversal marketing Royal decree meet the requirements set out in MiFID in connection with gold-plating provisions? Article 24.12 MiFID II (and similar provisions under MiFID I).

[110] See also, FCA, PS/13/3 "Restrictions on the retail distribution of unregulated collective investment schemes and close substitutes", June 2013.

investment services directives?[111] Is not there a breach of the principle of free movement of capital embedded in the EC Treaty?[112] We believe that a strategy of product intervention which is super-equivalent to European measures is likely to result in increased costs, to hinder access to the Belgian market, and to damage the competitiveness of Belgian firms while leaving retail investors exposed to detriment from firms nevertheless 'passporting-in' to the Belgian market.[113] These concerns make the case for favouring European level intervention by ESMA as provided for in MiFIR. But maybe did the FSMA consider that it had to intervene given that MiFIR is not yet in force? We can only regret that the FSMA did not pay more attention to the costs associated with product intervention.[114]

In that context, we believe in point-of-sale regulation, ie, increased focus on intermediaries' competence and ability to understand the products and to give proper as well as appropriate and unbiased advice taking into account only the interests of their specific client. This *inter alia* requires a revision of the practice to have sales objectives for intermediaries to which remuneration is linked. We also believe in proper product governance arrangements. MiFID II[115] and IMD II[116] are likely to have a far greater impact for investor protection than a disclosure-based legislation. It is therefore unfortunate that Twin Peaks II missed the opportunity to introduce the full range of point-of-sale regulation and product governance arrangements contemplated by MiFID II.[117] We would like

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[111] See Articles 91.1 and 91.2 UCITS IV; recital (71) AIFMD; and similar provisions of the Prospectus Directive.

[112] See article 56(1) EC Treaty. See also ECJ, *Commission of the European Communities v Kingdom of Belgium*, C-478/98, [2000] ECR I-07587 ('Declares that, by prohibiting the acquisition by persons resident in Belgium of securities of a loan issued abroad, under […], the Kingdom of Belgium has failed to fulfil its obligations under Article […] of the EC Treaty').

[113] See, in connection with the Belgian moratorium, Marc Wolterink, StructuredRetailProducts.com, December 2012 ('[…] Belgian investors are moving their capital and investments to trading platforms in other countries such as Germany and Switzerland').

[114] For the various costs in connection with product intervention, see G. Schaeken Willemaers, Product Intervention for the Protection of Retail Investors: a European Perspective, in Laure Nurit-Pontier et Stéphane Rousseau (dir.), Risques, crise financière et gouvernance : perspectives transatlantiques (en italique), Montréal/ Zurich/Limal, Éditions Thémis/Schulthess/Anthémis, 2013; G. Schaeken Willemaers, Client Protection on European Financial Markets – From Inform Your Client to Know Your Product and Beyond: An Assessment of the PRIIPs Regulation, MiFID II/MiFIR and IMD 2, Revue Trimestrielle de Droit Financier, Autumn 2014. Both articles are available on ssrn at http://ssrn.com/author=744349.

[115] Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending directive 2002/92/EC and directive 2011/61/EU (recast), OJ, 12 June 2014, L 173/349.

[116] Proposal for a directive on insurance mediation (recast), 2012/0175.

[117] The FSMA did suggest in a 2011 consultation a "product approval process" to be introduced internally at the distributors' level. Prior to any decision to distribute a structured product to retail investors, the distributor was to carry out a product approval process. The responsibility

also to remind a very simple, although so often forgotten fact. Regulations will not be effective in meeting their objective of clients' protection on financial markets if manufacturers and distributors lack ethos in their way of doing business. As experience shows, financial institutions do know the tricks to circumvent the purpose of regulatory provisions. It is time to restore what has been lost in too many financial markets players: a culture reflecting a strong commitment to offer products that work in the best interests of their clients. And this can only happen with a true and sincere will from management as it needs proper motivation and supervision.

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for deciding whether the process had been adequately carried out was to be with a product approval committee made up of members of senior management, in which at least the compliance and risk policy departments would have been represented. Distributors had the possibility for some aspects of the process to refer to information provided by the issuer or the entity responsible for the structuring. The process should have allowed to demonstrate, after due comparison with available alternatives, that the complex product offers added-value to the target market and that the services would have been offered in the interests of the investors. But it was maybe too complex and, given the negative reaction from the industry, the FSMA did not go through with its proposal.