BELSIPA
Belgian Structured Investment Products Association

FINAL

Financial Services and Markets Authority (FSMA)
Rue du Congrès 12-14
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Advance copy per mail to Ms. Bénédicte Clerckx, FSMA

Brussels, 17 July 2015

FSMA consultation on the Draft CIRCULAR LETTER dealing with the implementation of the Belgian ROYAL DECREE on the distribution and marketing of retail financial products
Re: Reply to the consultation submitted by BELSIPA

Dear Sir or Madam, *dear Bénédicte,*

By way of this letter BELSIPA, the association bundling the voice of main issuers of structuredproducts to the Belgian retail market would like to outline their opinion on a number of items which above Circular Letter (*"Circulaire relative aux règles applicables aux publicités en cas de commercialisation de produits financiers auprès des clients de detail",* published as *"avant-projet"* on 16 June 2015 and hereinafter called "Draft Circular Letter") deals with in its published draft format.

Before doing so we regret to have to state our irritation and dissatisfaction with the fact that the rules of the Draft Circular Letter are already in practice applied to-date. This contradicts the idea of holding a consultation whose comments, insofar as they are assessed as legitimate points, should be included into the implementation of a legal act BEFORE any such implementation starts.

1. **General comments:**

a) Binding character
We have noted that throughout the Draft Circular Letter, much use is made of clauses whose binding character is doubtful as they are phrased along "it is highly recommended that", or similar wordings (i.e. *"het is aangewezen dat"*, *"il conviendrait" "het is raadzaam"*, *"il est recommandé", "het is aanbevolen te" etc.).* Given that the purpose of this Circular Letter is to clarify the interpretation of the Royal Decree with a view to giving legal certainty in its practical implementation we believe that statements should strictly be made in a way that they detail selected legal requirements set out in

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the Royal Decree where the latter are unclear. If such clarification is not clearly needed, no comment should rather be made as any such would only add to the legal uncertainty.

We believe above observation being especially important in the context of this Circular Letter as the area of retail financial products and services marketing is already regulated in Belgium in a highly complex fashion, considering the multiple layers created by existing and upcoming European legislation (MiFID1/MiFID2/MiFIR/PRIIPs), adding to which are the Belgian Twin Peaks law, the Belgian General Economic Law the current Royal (and other) Decree(s) and Circular Letters as well as the Moratorium[1], all of which are exploited by the FSMA in parallel as legal sources for their ongoing supervisory activity.

b) Moratorium

BELSIPA is in particular concerned about the references made in the Draft Circular Letter to the Moratorium, in sections 3.4.7 a) and d)[2], which are adding again to the legal uncertainty in the sense outlined above under 1 a). Not only do these references leave it unclear whether non-signatories of the Moratorium are addressed or bound by these references, but they also surpass dogmatic lines of distinctions between legal rulesets having a different nature, which means that they are also changed and interpreted under different conditions[3].

c) Previous circular letter

BELSIPA would like to point to the fact that that some definitions and criteria used in the Draft Circular Letter seem to overlap with existing definitions from the FSMA Circular Letter Number 2013-13. Clarification is needed on whether these definitions, where they are not fully coherent with each other are to be applied cumulatively or whether the draft Circular Letter replaces those previous definitions from the Circular Letter 2013-13.

d) MiFID and General Economic Law

The FSMA mandate on the Royal Decree on whose Draft Circular Letter this consultation is being held does not extend to items regulated under the MiFID regime and the application of the General Economic Law Codex. Consequently we believe that Chapters 5 and 6 should be deleted from the Draft Circular Letter as the areas they deal with are being covered by the Belgian General Economic Law Code and/or the rules implementing the MiFID1 directive.

[1] This means the Moratorium on the distribution of complex products to retail investors as of 29 July 2011, hereinafter referred to as "the Moratorium".
[2] See footnote 32 of the Draft Circular Letter.
[3] BELSIPA recalls again our often made comment that unlike rules from a national law or a royal decree any interpretation of the Moratorium needs to be agreed by the signatories of the Moratorium and cannot be done by the FSMA.

2. BELSIPA also has **particular comments** related to the following items:

a) Scope of application

In the view of BELSIPA the Draft Circular Letter draft does not sufficiently clarify as of when and until when the Royal Decree is applicable in the process of the conclusion of a contractual agreement.

BELSIPA would like to urge the FMSA here to consider the entire marketing negotiation and sales process at the retail point of sale from a more realistic angle.

It should be clarified that while the promotion/marketing of one or more financial products by way of presenting marketing material is well covered by the Royal Decree, the **actual negotiation and conclusion of the agreement is not covered**.

This consequently means for written/electronically exchanged documents introduced only in the conversation/communication between distributor and investor/client with the purpose of summarizing the agreed conditions for a contractual arrangement[4] that these should not be dealt with as marketing material and should not be covered by the Royal Decree.

b) Application to marketing material – point 3.1.1. of the Draft Circular Letter

BELSIPA would firstly like to urge for clarification that the EU-wide foreseen product information materials (such as the KIID document for UCITS funds or the summary of a securities prospectus) are not subject to the minimum content elements established by the Royal Decree in article 12.

BELSIPA would further suggest reconsidering whether for any other marketing material it is really necessary to foresee each time all of the minimum content elements listed in the Royal Decree. It should in our eyes be sufficient that if more marketing documents are handed over to the investor at least one of them fully lists all thirteen minimum elements. Otherwise the market runs the danger that marketing material is not readable anymore and cannot really fulfil the function it has in a market economy.

[4] Such would be, for OTC derivatives, the final term sheet and order confirmation or the terms & conditions for an insurance contract. An indicative termsheet, used in conjunction with a marketing material should not be treated as a marketing material. If the accompanying marketing material contains the 13 required elements, the indicative term sheet need not. The goal of a termsheet is to enable the client to check whether the product matches the characteristics of the item to be hedged, to commercialise the product.

c) Exemptions

(i) "100k" exemption - point 2.2.1 of the Draft Circular Letter

BELSIPA would like to ask for clarity how the 100k exemption is being determined in the case of OTC derivatives, in particular whether it relates to the notional or premium amount[5].

(ii) Independent advice exemption – point 3.1.1 of the Draft Circular Letter

BELSIPA considers it misguided to use the fact of inducement payments as criterion to distinguish independent and non-independent advice and make this distinction a feature on which the application of the Royal Decree should depend. The MiFID understanding of "independence" does not seem to be applicable to the Royal Decree, hence also exemption rules under the Royal Decree are in this respect unclear.

(iii) Secondary market exemption - point 2.2.2 & 3.1.1 of the Draft Circular Letter

BELSIPA believes that the secondary market exemption should also apply to the primary market for OTC transactions, when a client requests several times the execution of similar OTC transactions.

Reason is that the repetitive execution of an order does *de facto* not imply commercialisation anymore, as the product is no longer presented by the bank but rather requested by the client.

BELSIPA believes that above exemption should also apply where an OTC trade (for whatever type of underlying) is executed by internal order matching ("internalisation"). Under the upcoming Mifid II, systematic internalisers have to publish prices. This publication aims at transparency, rather than commercialisation and should therefore be out of scope of this Royal Decree.

d) **Misleading character** of marketing material - 3.3 of the Draft Circular Letter

BELSIPA takes the view that the approach to set out detailed rules on what features are (and what are not) misleading is not covered by the Royal Decree and must also fail. The idea behind setting a standard for content in Article 12 of the Royal Decree was to define the mandatory minimum information, leaving it to the issuer to supply more. Elaborating a list with more detailed provisions, as the Draft Circular Letter does on 6 pages, deviates from the "minimum content" concept as it *de facto* enlarges again the content requirements. This runs against the intention of the Royal Decree.

Secondly, the mentioned detailed rules contain many anticipated/assumed single case situations whose occurrence is not foreseeable or likely. They again invite for

[5] Note that if the premium is considered, this would create a diverging treatment between for example the sale of an interest rate cap (with premium) and the sale of an interest rate swap (without premium).

interpretation on what is and what is not meant by them and thus increase the legal uncertainty.

In this context BELSIPA generally wishes to underline that the FSMA should better take, where relevant, single decisions on marketing material or product features and share these openly and in a much more transparent manner than now is the case with the entire sector. This should be a more efficient and reliable method to counter misleading marketing activities than by seeking to predefine any possible future occurrence.

e) **Subjective elements** in marketing material – point 3.3.3 of the Draft Circular Letter

BELSIPA disagrees with the approach to remove subjective elements from marketing material/activities. In a regular market economy the use of such statements (as "interesting", "exceptional", "fantastic" etc.) are inherent in the sales process. Customers are used to handling such statements with the regular precaution needed in their everyday life. The FSMA should generally take, as stated before, a more realistic approach to the sales process also on this end.

f) **Performance scenarios** (on historic yields, net yield indication, tax) - point 3.5.1 of the Draft Circular Letter

BELSIPA objects the inclusion of elements linked to the taxation of yields at the investor's end into the cost information to be given by the issuer/distributor, even if this inclusion is made conditional on its technical feasibility (page 28 point 3.5.1.).
At the retail point of sale, financial institutions are not positioned, nor do they intend, nor does the investor expect to receive tax information/advice linked to the taxation of financial profits according to the personal income tax situation. Obvious reason is that given the absence of knowledge of the individual tax status any statement made by a financial institution on the taxation of yields runs the danger to be incorrect.
Last not least, it was for this reason that the EU PRIIPs regulation does not foresee any more information elements for the Key Information Document which relate to the individual taxation situation of the investor.
We therefore strongly advise to delete references to tax law information and thereby remedy the existing contradiction in the draft Circular Letter between point 3.4.7 b), where information on yield before tax is asked for and point 3.5.1., where, as stated above, this is again pulled into question.

g) **Cost disclosure** - point 3.4.7. d) of the Circular Letter

BELSIPA is of the view that for rules on the disclosure of any cost element that is currently not part of the ongoing disclosure practice in Belgium the final technical rules on the implementation of the EU PRIIPs regulation should be awaited (which are

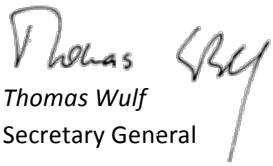
expected at the end of 2015). Otherwise the market runs the danger of establishing a cost disclosure routine in the Belgian retail sphere by way of this Draft Circular Letter which would then later have to be revoked again (similar to the amendments to the 2014 Royal Decree in its risk classification part) once the PRIIPs cost indicator requirements are known.
Such a situation may create a highly unwelcome confusion on the side of the retail investor for whom costs are already from the outset difficult to understand.

We would like to clarify in this context that the reference made on page 26 in footnote 35 of the Draft Circular Letter does not mean that the issuer profit margin has to be disclosed.

More generally we take this reference (in above footnote 35) again as an occasion to hint at the fact that such occasional and "interpreting" references between rulesets of a different nature (as the Moratorium and the Circular Letter), are adding to the level of legal uncertainty described above (see our General Remarks), leaving aside the question of their legal validity. They should therefore be taken out.

We hope you find these considerations useful and are available for any further explanation or information.

Yours sincerely,
In the name of the BELSIPA board,



Thomas Wulf
Secretary General