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Belgian Advertisements Guidance

FSMA publishes its final version of the FAQs on advertising for investment instruments

Speed read

On 1 April 2021, the FSMA published a communication containing its final version of the Frequently Asked Questions on the requirements applicable to advertisements for investment instruments when they are offered to the public, admitted to trading or distributed to retail clients (the **FAQs**, click here for the [Dutch](#) and [French](#) versions, the English version is not yet available).

The FAQs aim to ensure compliance with the substantive requirements applicable to advertisements by providing clear guidance and clarification on good practices.

In this eAlert, we briefly discuss some highlights of the FAQs, in particular where, in our view and based on our experience, these FAQs mark a shift in practice.

For more information on the consultation process that led to the FAQs, please refer to our previous eAlert dated 3 December 2020 on the FSMA's draft Q&As (click [here](#)). For more information on the Belgian prospectus rules in the context of the entry into force of the Prospectus Regulation, please refer to our eAlert dated 31 July 2018 (click [here](#)).

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What is the background to the FAQs?

On 1 April 2021, the FSMA published a communication (FSMA_2021_09) containing the final version of the Frequently Asked Questions (**FAQs**) relating to advertisements for investment instruments that are offered to the public in Belgium, admitted to trading on a Belgian regulated market or Euronext Growth or Euronext Access market (or a segment of those markets), or distributed to non-professional clients. These advertisements must comply with a number of

general and specific substantive requirements pursuant to the European and the Belgian prospectus legislation. The FAQs also clarify when advertisements are subject to the FSMA's prior approval.

The publication of the final version of the FAQs follows a public consultation by the FSMA on the draft Q&As which ran from 23 November 2020 until 4 January 2021.

While we understand that the Belgian banking sector made a number of remarks, the overall content of the final version of the FAQs remains pretty much in line with the draft Q&As.

What are the main components of the FAQs?

The FAQs comprise three main parts, being:

- Part A – an explanatory note on the general framework for the general prospectus and advertisement requirements;
- Part B – general FAQs on advertisements for investment instruments that are offered to the public, admitted to trading or distributed to non-professional clients; and
- Part C – additional FAQs for financial institutions offering non-equity securities to the public or distributing non-equity securities to non-professional clients.

Part A of the FAQs contains a helpful summary of the general framework for prospectuses and advertisements by clarifying:

1. how the European prospectus rules are applied in Belgium;
2. what operations in Belgium are subject to the substantive rules on advertisements stemming from the European prospectus framework;
3. which rules on advertisements apply to the distribution of investment instruments to non-professional clients without a prospectus or an information note (based on the so-called "Transversal Royal Decree" of 25 April 2014, pursuant to which the rules on advertisements set out under the harmonised prospectus regulations also apply to some offerings for which the publication of a prospectus is not required);
4. what the term "advertisement" means;
5. whether awareness campaigns fall under the prospectus framework;
6. what is to be understood by "other documents and announcements" (as under Belgian law the scope of the advertisement rules extends to such documents and announcements);
7. what substantive rules apply to advertisements upon an offer to the public, an admission to trading or a distribution of investment instruments to retail clients;
8. which advertisements and other documents and announcements require prior approval of the FSMA; and

9. whether the FAQs are useful for advertisements and other documents and announcements which are not subject to the prior approval of the FSMA.

Part B of the FAQs contains a number of technical substantive rules on the content and format of advertisements. The questions range from how references to the prospectus, supplement and final terms should be made (question 2), which events should trigger an amendment to the advertisement and how such amendments should be made (question 4), to how the risks (question 7), return, costs and tax treatment (question 8) and liquidity (question 9) of the instruments should be described in the advertisement.

Part C of the FAQs focusses on financial institutions that offer non-equity securities to the public or distribute non-equity securities to non-professional investors. This concept includes, among other things, structured debt instruments (notes) with or without capital protection, bonds with fixed or variable interest in euros or foreign currencies, and securities with a leverage such as turbos and financial warrants and similar instruments. The questions range from whether the advertisement rules apply to general advertisements for specific types of investment instruments or the financial institution as such (question 1), to detailed recommendations concerning the name of investment instruments (question 2) and the determination of the type or nature of a structured investment instrument (question 3).

Furthermore, Part C of the FAQs provides more detailed guidance on the elements that a financial institution should take into account when (i) determining the target recipients of the advertisement (question 4), the risks to be referred to in the advertisement (question 5), the presentation of the (expected) return and the capital redemption in the advertisement (questions 6 and 7), (ii) using examples to explain the functioning of the instrument (question 8) and (iii) describing the applicable costs in the advertisement (question 9).

The FSMA also highlights the relationship between the rules on advertisements as set out in the prospectus rules and the MiFID conduct of business rules containing rules on the provision of fair, clear and not misleading information including for advertisements when providing investment services or carrying out investment activities (as set out in Article 27bis of the Law of 2 August 2002 and Article 44 of the MiFID Level 2 Regulation 2017/565) (question 11). The FSMA rightfully notes, however without further clarifying in detail, that the scope of application of both sets of rules is different. The prospectus rules apply to advertisements concerning the offering of the investment instruments, whereas the MiFID conduct of business rules regulate the information to be provided to investors when offering investment services to such investors and both frameworks must be applied cumulatively (if applicable).

What are the key highlights and changes introduced by the FAQs?

As set out above, the FAQs aim to ensure compliance with the substantive requirements for advertisements by providing clear guidance and clarification on good practices. With this initiative, the FSMA aims to enhance the predictability of the FSMA's position in the advertisement approval process and to create a level playing field. This should speed up the advertisement approval process by reducing discussions over how the substantive requirements should apply in practice.

The FSMA states that the guidance set out in the FAQs should also be useful for advertisements that are not subject to the prior approval process, but nevertheless need to comply with the advertising requirements and remain subject to (*a posteriori*) FSMA supervision.

In general, the FAQs contain more detailed guidelines and guidance for advertisements than is the case for the FSMA's Circular 2015_16 of 27 October 2015 on the rules that apply to advertisements when marketing financial products to non-professional clients. That Circular clarifies the rules on advertisements laid down in the Transversal Royal Decree, which since the entry into force of the Belgian implementation of the harmonised regime applicable to advertisements under the Prospectus Regulation does no longer apply to advertisements in respect of investment instruments distributed to non-professional clients. Indeed, for such advertisements, the Belgian legislator provides that the harmonised European framework applies and not the Transversal Royal Decree. However, there does not seem to be a fundamental change in the FSMA's approach to advertisements.

Some of the key substantive novelties in the FSMA's guidance under the new FAQs are highlighted below:

- A couple of new general requirements applicable to advertisements (mostly deriving from the harmonised European prospectus rules) have been added, including:
 - mandatory updates of the advertisement to take place in specific cases; and
 - no reference to competent authorities to be included in the advertisements (except in respect of the approval of a prospectus by a competent authority).
- A couple of new specific requirements will have to be taken into account by financial institutions offering non-equity securities to the public or distributing non-equity securities to non-professional clients:
 - Additional rules to be reviewed with regard to the name of the financial product and in particular when referring to the (auto)callable or auto(switchable) nature of the product; to the issuer and its nationality; and when using subjective terms such as “best”, “top” or “smart”.
 - Specific rules in relation to the type or nature of structured products have been further developed in the FAQs, such as:
 - rules regarding the terminology of products to be used: ie, terms such as “capital protection” or “capital guarantee” should be avoided;
 - qualitative information to be included in order for investors to understand the precise nature of the contemplated investment;
 - specific warnings to be included (eg reimbursement of capital, bankruptcy of issuer/guarantor);
 - choice of underlying to be clearly stated;
 - detailed rules regarding the use of graphs showing past performance to be considered; and

- any confusion in the product description with economically comparable products (eg insurance products or units in UCITS) should be avoided.

To conclude, whilst the format has been amended (FAQs in lieu of a circular), it seems that no significant substantive amendments have been introduced by the FAQs, except in the sphere of structured products. We look forward to seeing how the clarifications set out above will be reflected in practice.

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