

## The new rules on marketing with respect to UCITS

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# What can Liedekerke Banking mean for you?

**Know-how:  
Newsletters and training**

**Advice:  
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**Negotiations:  
With the FSMA and the BNB**

**Litigation:  
Winning your case**

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- **The bigger picture : More « transversality », less « proportionality » ?**
- **Law in action : UCITS marketing rules and interaction with other laws**
- **Capita selecta : Analysis of the FSMA Circular 2013-13**

# The bigger picture (1/3)

## More « transversality », less « proportionality » ?

	Prospectus Law 16 June 2006	UCI Law 3 August 2012	AIFMD Draft Law
<b>UCITS</b>	Red	Green	Red
<b>UCIs other than UCITS</b>	Yellow	Yellow	Yellow
<b>Debt instruments (UCI underlying)</b>	Green	Red	Red
<b>Branch 23</b>	Red	Red	Red



N/A



Only applicable if



Applicable

# The bigger picture (1/3)

## More « transversality », less « proportionality » ?

	Prospectus Law 16 June 2006	UCI Law 3 August 2012	AIFMD Draft Law	MiFID Law 2 August 2002	LMPC 6 April 2010
UCITS	Red	Green	Red	Green	Green
UCIs other than UCITS	Yellow	Yellow	Yellow	Green	Green
Debt instruments (UCI underlying)	Green	Red	Red	Green	Green
Branch 23	Red	Red	Red	Green (1 May 2014)	Green



N/A



Only applicable if



Applicable

## The bigger picture (1/3)

### More « transversality », less « proportionality » ?

	Prospectus Law 16 June 2006	UCI Law 3 August 2012	AIFMD Draft Law	MiFID Law 2 August 2002	LMPC 6 April 2010	Draft Transversal RD	Moratorium
UCITS							
UCIs other than UCITS							
Debt instruments (UCI underlying)							
Branch 23				(1 May 2014)			



N/A



Only applicable if



Applicable

# The bigger picture (2/3)

## More « transversality », less « proportionality » ?

	Prospectus Law 16 June 2006	UCI Law 3 August 2012	AIFMD Draft Law	MiFID Law 2 August 2002	LMPC 6 April 2010	Draft Transversal RD	Moratorium	
UCITS	Product regulation			Services regulation				
UCIs other than UCITS								
Debt instruments (UCI underlying)								
Branch 23						(1 May 2014)		

## The bigger picture (3/3)

### More « transversality », less « proportionality » ?

	Prospectus Law 16 June 2006	UCI Law 3 August 2012	AIFMD Draft Law	MiFID Law 2 August 2002	LMPC 6 April 2010	Draft Transversal RD	Moratorium
UCITS	<b>Max</b>	<b>Min</b>	<b>Max</b>	<b>Min</b>	<b>Local</b>		
UCIs other than UCITS							
Debt instruments (UCI underlying)							
Branch 23							



## The bigger picture (3/3)

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UCITS	<b>Max</b>	<b>Min</b>	<b>Max</b>	<b>Min</b>	<b>Local</b>		
UCIs other than UCITS							
Debt instruments (UCI underlying)							
Branch 23							

« Het voorliggend ontwerp beoogt dan ook een verbetering van de pre-contractuele informatie die beschikbaar is voor niet-professionele cliënten, en draagt er daarbij zorg voor om [...] binnen de grenzen te blijven die de Europese wetgever toelaat [...] »

Draft Rapport to the King, p. 4

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Draft Rapport to the King, p. 4

Compatibility with the Prospectus Directive and MiFID to be questioned...

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## UCITS v. MiFID

- « UCITS marketing rules » or « MiFID marketing rules » ?
  - Cumulative application (Cf. 2013 BEAMA/Febelfin Marketing Checklist)
  - « Strictest rule prevails »
  - Not always evident in practice

« De publiciteitsregels bedoeld in deze circulaire (ICB-reglementering) en de publiciteitsregels in artikel 8 van het KB van 3 juni 2007 tot bepaling van nadere regels tot omzetting van de richtlijn betreffende de markten voor financiële instrumenten (MiFID-regels), moeten beiden gerespecteerd worden in publicitair materiaal m.b.t. ICB's. Doch, indien de regels van elkaar zouden afwijken, is de strengste regel van toepassing. [...] »

FSMA Circular 2013-13, para 85

## UCITS v. MiFID (Cont'd)

- « Marketing » or « investment advice »?
  - Be careful when marketing specific UCIs (in particular on the internet)
  - Examples:
    - Model portfolios indicating the percentage of UCIs to be invested in the portfolios
    - « Funds of the month »

« Publishing a list of "best products" or "funds of the month" would not, in itself, normally be regarded as investment advice. [...] Of course, if a list of best products was provided to one or more individual clients, rather than distributed through a distribution channel or to the public, it is possible that such a communication could meet the different tests described in this paper and amount to investment advice. »

ESMA, CESR/10-293, paras 63-64

## UCITS v. Draft Transversal RD

« [In reclame m.b.t. openbare ICBs] moet het bedrag per recht van deelneming waarop de garantie of kapitaalbescherming betrekking heeft, worden vermeld. Bovendien moet er worden verduidelijkt dat dit bedrag de provisies en kosten niet dekt die bij de inschrijving en de inkoop betaald worden of verschuldigd zijn. »

Art. 44 RD 12 November 2012

- KIID
  - Exemption (Art. 3, §3)
- Marketing
  - Art. 35 to 46 RD 12 November 2012 are repealed (...)
  - (...) With three exceptions :
    - Art. 37, §2, al. 2
    - Art. 39
    - Art. 44

## UCITS v. Draft Transversal RD (Cont'd)

### Art. 285bis (« Twin Peaks II »)

Onverminderd het gemeen recht inzake burgerlijke aansprakelijkheid en niettegenstaande elk andersluidend beding in het nadeel van de belegger, verklaart de rechter de aankoop van of de inschrijving op effecten van instellingen voor collectieve belegging nietig indien deze aankoop of inschrijving plaatsvond naar aanleiding van [...] een openbare aanbieding van effecten van een instelling voor collectieve belegging naar Belgisch of buitenlands recht, waarbij de bepalingen van de artikelen 60, 3, [...] niet werden nageleefd door de persoon met wie of door bemiddeling van wie de belegger een contract heeft gesloten.

Niettegenstaande elk andersluidend beding in het nadeel van de belegger, wordt de schade veroorzaakt door de aankoop of de inschrijving geacht het gevolg te zijn van de overtreding van de in paragraaf 1 bedoelde wettelijke bepalingen.

### Art. 27, 2 Draft Transversal RD

Niettegenstaande elk andersluidend beding in het nadeel van de niet-professionele cliënt, wordt de aankoop van, inschrijving op, toetreding tot, aanvaarding van, ondertekening van of opening van financiële producten door de rechter nietig verklaard indien zij hebben plaatsgevonden ingevolge: [...] commercialisering met gebruikmaking van reclame of andere documenten en berichten zonder dat de FSMA haar voorafgaande goedkeuring verstrekt had, hoewel dit verplicht was krachtens dit besluit.

Niettegenstaande elk andersluidend beding in het nadeel van de niet-professionele cliënt, wordt de schade veroorzaakt door de aankoop van, inschrijving op, toetreding tot, aanvaarding van, ondertekening van of opening van de betrokken financiële producten geacht het gevolg te zijn van de overtreding van de verplichte voorafgaande goedkeuring als bedoeld in het 1e lid.

UCITS v. Draft Transversal RD (Cont'd)

Art. 285bis (« Twin Peaks II »)

Onverminderd het gemeen recht inzake burgerlijke aansprakelijkheid en niettegenstaande elk andersluidend

beding in het  
 aankoop van  
 voor collectieve  
 inschrijving  
 aanbieding  
 belegging  
 bepalingen  
 door de belegger

Niettegenstaande de belegger de inschrijving van de in paragraaf 1 bedoelde wettelijke bepalingen.

Art. 27, 2 Draft Transversal RD

Niettegenstaande elk andersluidend beding in het nadeel van de niet-professionele cliënt, wordt de aankoop van

Art. 30ter (« Twin Peaks II »)

Plaintiff proves that he/she is (has been?) a subscriber to the UCI

Plaintiff proves the subscription

Plaintiff proves a violation of art. 27 MiFID Law (except for the duty of loyalty or the reporting duty)

Plaintiff proves that the violation was attributable to a regulated entity

Plaintiff proves damages

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van, ondertekening van of opening van de betrokken financiële producten geacht het gevolg te zijn van de overtreding van de verplichte voorafgaande goedkeuring als bedoeld in het 1e lid.



UCITS v. Draft Transversal RD (Cont'd)

Art. 4	Scope of the class action	
Onverm aanspr beding aankoc voor co	Articles 2-13; 15-18; 19-21bis	<ul style="list-style-type: none"> <li>▪ Market rules of regulated markets and MTF's (?)</li> <li>▪ Efficient and transparent pricing of securities (?)</li> </ul>
inschrij aanbier	Articles 23 and 23quater	<ul style="list-style-type: none"> <li>▪ Conflict of interests of settlement institutions</li> </ul>
beleggi bepalin door de belegge	Articles 24-33	<ul style="list-style-type: none"> <li>▪ Insider dealing and market abuse</li> <li>▪ MiFID rules of conduct (incl. insurance companies)</li> <li>▪ Rules of conduct on savings accounts</li> <li>▪ Potential rules on « labels » or product restrictions</li> <li>▪ New sanctions of art. 30ter</li> </ul>
Nietteg de bele de insc van de	Article 64	<ul style="list-style-type: none"> <li>▪ FSMA regulations (?)</li> </ul>
	Articles 87bis and 87ter	<ul style="list-style-type: none"> <li>▪ Registration of compliance officers (?)</li> </ul>
	Articles 146-149	<ul style="list-style-type: none"> <li>▪ Royal Decrees (?)</li> </ul>

## UCITS v. Law on Market Practices and Consumer Protection (« LMPC »)

« [D]e circulaire [doet] geen afbreuk aan de verplichtingen die voortvloeien uit de voormelde regels [nl. art. 83-94 WMPC, KB van 5 december 2000, art. 27 W. 2 augustus 2002 en art. 8 KB 3 juni 2007] »

FSMA Circular 2013-13,  
para 3

- No formal exemption
- Compliance risk is mitigated
  - Given the pre-approval requirement
  - Given the level of detail in FSMA Circular 2013-13
- But risk remains
  - Joint offers
  - Notoriety publicity (see next slide)

## UCITS v. LMPC (Cont'd)

- « Notoriety publicity »
  - Not drafted in the name and for the account of the UCI
  - Individual characteristics are not mentioned
  - FSMA Circular 2013-13, para 8, as confirmed by Art. 9, §2 Transversal RD
- Problem ?
  - Goes beyond « brand awareness » ?
  - Compatible with the LMPC ?

« [Een notoriteitscampagne betreffende de promotor, beheerder of financiële bemiddelaar van ICB's betreft informatie die niet opgesteld is in naam en voor rekening van de ICB en geen melding maakt van de individuele kenmerken van de betrokken ICB. Een dergelijke notoriteitscampagne [...] is niet onderworpen aan de bepalingen van deze circulaire, aangezien geen openbaar aanbod betreffende ICB's wordt gedaan. »

FSMA Circular 2013-13, para 8

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## Financial terminology

- Explain the meaning of financial parameters in glossary or on website (clear reference), such as:
  - « volatility »
  - « (positive/negative) correlation »
  - « risk spectrum »
- Use of the word « fund »
  - To be defined once
  - Name, legal form and nationality
- Regulated use of « security », « safety » or similar terms

## Financial terminology (Cont 'd)

« Capital guarantee »	« Capital protection »
Subscription price during initial subscription period is entirely, irrevocably and unconditionally guaranteed on maturity date	The subscription price during initial subscription period is entirely protected at maturity date
Guarantee is granted by a third party which is established in an EU member state and subject to prudential supervision Guarantee is embedded in formal agreement between UCI and guarantor	The UCI holds an investment strategy, that consists of investing in (i) deposits; (ii) debt instruments issued by a company that is subject to prudential supervision and established in the EEA; (iii) Debt instruments issued or guaranteed by a EEA Member State (in principle, not more than 20 % of the assets of the UCI)
Guarantee exists for every unit holder	Protection exists for any unit holder
Identity and solvency of guarantor and the guarantee conditions are mentioned in prospectus	Prospectus mentions: (a) the financial mechanism pertaining to capital protection; and (b) the fact that capital protection does not constitute a formal guarantee

## Financial terminology (Cont 'd)

- Article 88 of the LMPC
- Notions such as « capital guarantee » or « capital protection » can easily be considered « (possibly) misleading to the average consumer »
- Cf. Art. 30ter Twin Peaks II

« Une pratique commerciale est réputée trompeuse si elle contient des informations fausses et qu'elle est donc mensongère ou que, d'une manière quelconque, y compris par sa présentation générale, elle induit ou est susceptible d'induire en erreur le consommateur moyen [...] et que, dans un cas comme dans l'autre, elle l'amène ou est susceptible de l'amener à prendre une décision commerciale qu'il n'aurait pas prise autrement : 1° l'existence ou la nature du produit; 2° les caractéristiques principales du produit [...] 3° l'étendue des engagements de l'entreprise, [...] »

LMPC, Art. 88

## Fund commentary

- Periodic information on the composition of the investment portfolio of a UCI
- Marketing material (>< reporting to existing clients on their UCI portfolio)
- Neutral, not misleading
- Information on investment policy may not be more specific than in prospectus and KIID

Prospectus/KIID	Fund commentary	
	Prohibited	Permitted
« Assets are principally invested in European bonds »	« Assets are principally invested in Belgian bonds »	« During the past reporting period, Belgian bonds were invested in »
« Quality bonds are invested in »	« Maximum of 40 % will be invested in bonds issued by a specific sector »	« During the past reporting period, 40 % was invested in bonds issued by a specific sector »



## Performance figures

- Only for UCIs established for at least 1 year
- Bar chart
  - To be established at end of calendar year
  - Annual performance of the UCI of last 5 or 10 years
  - If no data for 1 complete calendar year: statement that there are insufficient data
- Disclaimer
  - Past performance is no guide to future performance
  - Indication of costs and remunerations that are not included in calculation (if applicable)
  - Year in which the UCI is created
  - Currencies used in calculation of past performance

## Performance figures (Cont'd)

- Calculation
  - On basis of NAV
  - Assuming that the distributable income was reinvested
- Material changes
  - Past performance prior to material change continues to be shown
  - Warning that the performance was achieved under circumstances that no longer apply
- Benchmark
  - Comparison of past performance figures
  - On basis of external publicly available data
  - Same reference period

## Performance figures (Cont'd)

- Simulations
  - For periods for which no information available
  - To be stated prominently
- Feeder: no mere copy of figures of the Master, unless, for example, Master is Feeder's benchmark
- Future performance figures
  - Only if a reasonable certainty (via guarantee or derivatives) that the future performance will be effectively realized and paid out or capitalized on a particular date or dates
  - Prescribed form: annualized performance
  - Total costs and commissions to be included in calculation

## Awards

- Name of the institution granting the award
- Scale of the classification
- Date of publication
- Place of publication (e.g. name of magazine or newspaper) or link to website
- Category of UCIs
- Number of UCIs (or link to website)
- Explanation of symbols (if applicable) or link to website

### Example

«Fund XYZ among the winners of the [Morningstar Fund Awards 2014](#). On [20 January 2014](#), Fund XYZ managed by ABC won first prize in the [category “Best EUR Cautious Allocation Fund”](#). The Morningstar Rating [rates several thousand funds, based on an enhanced Morningstar Risk-Adjusted Return measure](#). Funds are ranked by their Morningstar Risk-Adjusted Return scores and stars are assigned using a [scale from one to five stars](#). [For more information please visit: \[...\] »](#)

## Website

- Prospectus, KIID, annual report, half-yearly report and latest NAV
- Message (when possibility of subscription without human intervention)
- Available by one click
- Performance figures: other rules apply on format, insofar as investor can select figures for period  $> 1$  year or for period  $\leq 1$  year
- Prohibition of disclaimer holding the ManCo or any other intermediary harmless in case of damage incurred by investor through incorrect or outdated information on the website
- If disclaimer regarding applicable law, mandatory reference to application of Belgian Data Protection Law of 8 December 1992
- Clear distinction between area for private investors and area for institutional investors (pop-up with possibility to return to appropriate area, new window)
- Reference to other website: new window

- Impact of the Transversal RD : More « transversality » , less « proportionality » ?
- Impact of Twin Peaks II : Severe sanctions (nullity), but likelihood that a plaintiff will rely on Art. 30ter; how to set up efficient protection against misselling class actions ?
- Impact of FSMA Circular 2013-13: Realignment needed of internal procedures on pre-approval ?

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