FSMA

FINANCIAL SERVICES AND MARKETS AUTHORITY

Communication

FSMA_2014_13 dated 13/11/2014 (update 17 April 2018)

Communication to companies that distribute investments investing in movable or immovable goods

Scope:

This Communication is addressed to companies (offerors and intermediaries) that distribute investments in movable or immovable goods to retail clients within the territory of Belgium.

Summary/Objective:

The FSMA has observed an increasing number of offers being made in Belgium of direct or indirect investments in movable or immovable goods such as artworks, collectors' items, old manuscripts, alcoholic drinks, old coins, commodities, plantations and real estate located both in Belgium and abroad. These investments are offered to the general public as alternatives to traditional savings products, which at the moment offer very low returns.

The Belgian Parliament recently decided to introduce a new category of investment instruments (Article 4, §1, 3°*bis*) into the Prospectus Law, which comprises alternative investments in movable goods and in farming operations.

On the occasion of the entry into force of Article 4, §1, 3°*bis* of the Prospectus Law, the FSMA wishes to draw the attention of offerors and intermediaries distributing alternative investments in movable and immovable goods to the financial legal framework and the resulting obligations that may apply to them.

1. INTRODUCTION

Financial legislation contains a wide range of rules intended to protect the financial consumer. Thus, the prospectus legislation is intended to protect investors and safeguard the efficiency of the market. In view of these objectives, the most important rule is the obligation to provide appropriate and comprehensive information, in the form of a prospectus, about the instruments being offered and about their issuers.

Whereas the European Union's prospectus legislation applies only to securities offered to the public or admitted to trading, the Belgian Parliament has opted to apply the legislation on this matter both to securities and to certain other forms of investment, the two categories being jointly referred to as "investment instruments".

The definition of the concept of "investment instrument" in Article 4, §1 of the Law of 16 June 2006 on public offers of investment instruments and admission of investment instruments to trading on regulated markets (the "Prospectus Law") includes categories 3° and, as from 1 November 2014, 3°*bis,* which apply to certain alternative investments.

The recent extension of the concept of "investment instrument" to include category 3°*bis* responds to the increase in offers to the general public in Belgium of direct or indirect investments in a wide variety of movable or immovable goods as alternatives to traditional savings products.

In conjunction with the entry into force of the new category of investment instruments in Article 4, §1, 3°*bis*, the FSMA has decided to examine, in this Communication, the question of which alternative investments are covered by the financial legislation and what the resulting obligations are for the offerors and intermediaries concerned. Under point 2, the concept of "alternative" investments is discussed in greater detail, as is the question of the legal classification of alternative investments in the financial legislation. Under point 3, the legal obligations of offerors and intermediaries are explained, as well as the sanctions imposed for non-compliance with those obligations.

2. CONCEPT AND LEGAL CLASSIFICATION

2.1. Concept of "alternative" investment products

In this Communication, the term "alternative" investment products is used to refer to all those types of products that are offered to the public for purposes of investment and that have directly or indirectly to do with movable or immovable goods (such as artworks, collectors' items, old manuscripts, alcoholic drinks, old coins, commodities, plantations and real estate both at home and abroad) and which do not take the form of traditional investments, which are clearly defined in the financial legislation.

Real estate certificates and units in real estate investment trusts, among other things, are examples of traditional, legally defined real estate investment products that fall outside the scope of alternative investments as referred to in this Communication.

This Communication also does not apply to the following products, for which separate regulations have been issued:

(i) the particularly complex structured products to which the moratorium on the distribution of such products to retail investors applies;

(ii) the financial products whose distribution to retail clients is banned under the FSMA Regulation of 3 April 2014[1]; and

(iii) the financial products whose distribution to retail clients is banned under the FSMA Regulation of 26 May 2016[2].[3]

2.2. Classification as an investment instrument (Article 4, §1, 3° and 3°*bis*, Prospectus Law)

Until now, alternative investment products were evaluated principally in the light of Article 4, § 1, 3° of the Prospectus Law:

> "3° rights that are directly or indirectly associated with movable or immovable goods held in a de facto or de jure association, joint ownership or group in which the rightsholders do not have personal enjoyment of those goods, and that are managed collectively by one or more person(s) acting in a professional capacity".

This Article will be relevant primarily for alternative real estate investments.

As regards alternative investments in movable goods and farming operations, the legal framework is expanded by the addition, through the Law of 4 April 2014[4], of the new category 3°*bis* of investment instruments to the Prospectus Law:

> "3°*bis* rights that make it possible to carry out a financial investment and that are directly or indirectly associated with one or more movable goods or a farm held in a de facto or de jure association, joint ownership or group managed collectively by one or more person(s) acting in a professional capacity, except where those rights provide for an unconditional, irrevocable and complete transfer of the goods in kind;
>
> The King may, by royal decree adopted upon the advice of the FSMA, extend or limit the types of goods to which the first paragraph applies."

Henceforth most financial investments in movable goods and farming operations will fall within the scope of the Prospectus Law, except where the goods are unconditionally, irrevocably and completely delivered in kind to the consumer.

[1] Regulation of 3 April 2014 of the FSMA on the ban on the distribution of certain financial products to retail clients, approved by the Royal Decree of 24 April 2014 (Belgian Official Gazette, 20 May 2014).

[2] Regulation of 26 May 2016 of the FSMA regulating the distribution of certain derivative financial instruments to retail clients, approved by Royal Decree of 21 July 2016 (Belgian Official Gazette, 8 August 2016).

[3] In this regard we refer to the explanatory memorandum to the Law of 4 April 2014 on insurance (*Parl*. *Doc.* Chamber, 2013-2014, 3361/001, p. 71): "This classification as an investment instrument is without prejudice to the power conferred on the FSMA under Article 30*bis* of the Financial Supervision Law to issue regulations that limit or ban the distribution of certain financial products to retail clients."

[4] Article 337 of the Law of 4 April 2014 on insurance, Belgian Official Gazette, 30 April 2014.

2.2.1. Constitutive elements

Both categories include a number of constitutive elements that must be cumulatively present before a product can be considered an investment instrument. Set out in schematic form:

	Article 4, § 1, 3°	Article 4, §1, 3°*bis*
(i)	a right to a movable or immovable good	a right to a movable good or farm
(ii)	held in a *de jure* or *de facto* association, joint ownership or group	
(iii)	managed collectively by a professional	
(iv)	renunciation of personal enjoyment	that makes possible a financial investment, unless an unconditional, irrevocable and complete transfer in kind is involved

Experience shows that condition (iv) and, to a limited extent, condition (ii) are open to interpretation. In what follows, an explanation is given of the FSMA's interpretation of these conditions.

2.2.2. Condition (ii): *de jure* or *de facto* association, joint ownership or group

The broad formulation of this condition is given in Article 4, § 1, 3° and now also in the new Article 4, § 1, 3°*bis* of the Prospectus Law.

It applies not only to cases where individual goods are brought into a *de jure* association or joint ownership, but also to individual goods that are *de facto* grouped together.

Thus there are examples of movable goods where each good is the individual property of a separate owner but where each owner entrusts it to one and the same professional custodian to be kept in one safe or in the same space or building. There are also examples of immovable goods such as holiday homes or bungalows, each of which belongs to a different owner but which are located on the same property.

Condition (ii) is therefore also met in cases where there is a purely *de facto* association or grouping of immovable goods, movable property or portions of farming operations. By contrast, a limited interpretation of condition (ii) that requires a *de jure* association or joint ownership (co-ownership) would go against the letter of the law.

In most cases it has been observed that condition (ii) appears to be met whenever conditions (i), (iii) and (iv) are met. In other words, the four conditions under Article 4, § 1, 3° and 3°*bis* form a whole and these conditions are always closely linked for the products in question.

2.2.3. Condition (iv): renunciation of personal enjoyment /no transfer in kind

If the applicable conditions (i), (ii) and (iii) are met (and a financial investment is possible pursuant to Article 4, § 1, 3°*bis*), then we are dealing with an investment instrument, unless:

- personal enjoyment is retained (Article 4, § 1, 3°); or
- an unconditional, irrevocable and complete transfer in kind is involved (Article 4, § 1, 3°*bis*).

2.2.3.1. Renunciation of personal enjoyment in Article 4, § 1, 3°

Article 4, § 1, 3° applies to instruments that have a direct or indirect link with movable or immovable goods, and involve the renunciation of personal enjoyment of those goods.

The concept of "personal enjoyment" takes two forms:

- First, there is the physical personal enjoyment of the underlying good: this is the use or inhabiting of that underlying good;
- Second, there is the economic personal enjoyment of the underlying good: this is the return on the underlying good (as opposed to a part of the pooled return on the group of goods among which the underlying good is included).

A crucial factor for interpreting the condition of "renunciation of personal enjoyment" is the *ratio legis* of Article 4, § 1, 3° of the Prospectus Law. In that provision, the lawmakers sought to extend the provisions for the protection of financial consumers contained in the Prospectus Law to certain alternative investments that exhibit the main characteristics of investments in companies.

The FSMA observes that in practice this provision is applied to many different situations, depending on the degree of renunciation of the personal physical and economic enjoyment. The various specific cases can be presented schematically as follows:

		"PHYSICAL" ENJOYMENT			
		PERSONAL USE			NO PERSONAL USE
		Complete	partial/temporary	choice	
"ECONOMIC" ENJOYMENT	RETURN ON UNDERLYING GOOD (i.e. retaining economic personal enjoyment)	**A** Not an investment instrument	**A** Not an investment instrument	**A** Not an investment instrument	**A** Not an investment instrument
	POOLED RETURN (i.e. renunciation of economic personal enjoyment)		**B** Not an investment instrument, unless physical personal enjoyment is not effective	**B** Not an investment instrument, unless physical personal enjoyment is not effective	**C** Investment instrument

This schematic representation illustrates the following approach to alternative real estate investments:

- Category C (green) - complete renunciation of physical and economic personal enjoyment

  The products in this category must always be treated as investment instruments within the meaning of Article 4, § 1, 3° of the Prospectus Law (regardless of whether the good can in fact be individualized within the group, joint ownership or association).

  A typical example is an investment in a particular hotel room that is rented out throughout the year, as a result of which the investor/owner him/herself cannot stay (except under the same conditions as any other tenant); the rental income from the room is pooled with the rental income from the other hotel rooms before the investor receives his or her pro-rated share (for example, in a hotel with 100 rooms this would be 1/100th).

- Category A (yellow) - no renunciation of economic personal enjoyment

  The products in this category are not investment instruments within the meaning of Article 4, § 1, 3° of the Prospectus Law.

If a consumer buys real estate without any form of pooled return, this bears no similarity to an investment in share capital. In the former case there is no "investment instrument" within the meaning of Article 4, § 1, 3° of the Prospectus Law.

A typical example of this category is an investment in an apartment at a holiday resort, where the return on the holiday resort is not pooled and distributed among the individual owners, but instead each owner receives the individual return on his or her apartment.

- Category B (blue) - renunciation of economic personal enjoyment, and thus pooled income but not a complete renunciation of physical personal enjoyment.

A less obvious question is the treatment of real estate investments which do involve pooled income (and thus entail renunciation of economic personal enjoyment), but where the investors do not completely or irrevocably renounce physical personal enjoyment or where they are are given the choice whether or not to do so. This can be the case where (a) the investors have the chance to spend some time occupying their individual property within the real estate complex (e.g. a predetermined number of days or weeks per year) or (b) at the time of purchase, they can choose between renting out their property entirely via a third party or occupying or renting out their dwelling themselves (in part, temporarily or entirely).

The FSMA is of the opinion that such alternative real estate investments are not to be considered investment instruments except in cases where the physical personal enjoyment is not effective. The starting point for this approach (not an investment instrument) follows the letter of the law, while the possible exception (*is* considered an investment instrument if the physical personal enjoyment is not effective) allows for the spirit of the law to be respected as well. In case of doubt, the offeror must demonstrate to the FSMA that the physical personal enjoyment is effective.

The determination in concrete cases of the "effective" nature of the physical enjoyment is reached not only by considering whether or not the physical personal enjoyment is vacated, but also by examining how the product is presented to the consumer. In so doing, the wording used in advertising brochures, for example, can serve as an important indication. In this way, account can also be taken of the actual or presumed intention of the parties.

An example would be an investment in specific hotel rooms in a distant location, where the income is pooled and divided among the individual owners according to a set distribution formula and where the individual owners can make use of their hotel room at no cost only for a very limited period. In such a case, various elements can lead to the conclusion that no effective physical personal enjoyment is involved, for example if the travel between the investor's residence in Belgium and the hotel takes longer than the free stay and where, moreover, the sales brochures present the investment as an alternative to traditional savings or investment products.

2.2.3.2. No transfer in kind in Article 4, § 1, 3°bis

Article 4, § 1, 3°*bis* of the Prospectus Law applies to instruments that are directly or indirectly associated with one or more movable goods or a farm, except in cases involving an unconditional, irrevocable and complete transfer of the goods in kind.

In Article 4, § 1, 3°*bis* of the Prospectus Law, this condition therefore applies only to the first form of personal enjoyment, namely, physical enjoyment.

The pooled nature of the second form, economic enjoyment, thus no longer constitutes an explicit condition for alternative investments in movable goods and farming operations: it is sufficient that a financial investment be rendered possible. When assessing individual cases in the light of Article 4, § 1, 3°*bis*, there will no longer be any distinction made between return on the underlying good and pooled return.

Condition (iv) for alternative investments in movable goods and farming operations can be presented in simplified schematic form as follows:

"PHYSICAL" ENJOYMENT– TRANSFER IN KIND			
Unconditional, irrevocable and full	**Conditional, revocable, partial or temporary**	**choice**	**none**
Not an investment instrument	Investment instrument	Investment instrument	Investment instrument

Concretely, this means that the Prospectus Law still does not apply to these types of alternative investments where personal enjoyment has not been renounced: that is the case where the "investor" has the full physical enjoyment of his or her goods through transfer in kind.

By way of comparison with the interpretation of Article 4, § 1, 3°, the new Article 4, § 1, 3°*bis* can be presented schematically as follows:

		"PHYSICAL" ENJOYMENT			
		PERSONAL USE			NO PERSONAL USE
		Unconditional, irrevocable and full	Conditional, revocable, partial or temporary	Choice	
"ECONOMIC" ENJOYMENT	RETURN ON UNDERLYING GOOD	Not an investment instrument	Investment instrument	Investment instrument	Investment instrument
	POOLED RETURN		Investment instrument	Investment instrument	Investment instrument

2.3. Classification as a financial product (Article 2, first paragraph, 39° of the Law of 2 August 2002)

Alternative investment products that are classified as investment instruments within the meaning of the Prospectus Law are also considered to be financial products within the meaning of Article 2, first paragraph, 39° of the Law of 2 August 2002 on the supervision of the financial sector and on financial services. This means that these alternative investment products also fall within the scope of the Royal Decree of 25 April 2014 imposing certain information obligations when distributing financial products to retail clients (the "Royal Decree on information obligations"), which has been in force since 12 June 2015.

2.4. Classification as a financial service (Article I.8, 18° of the Economic Law Code)

Those alternative investment products that are classified as investment instruments within the meaning of the Prospectus Law are also considered to be financial services within the meaning of Book VI of the Economic Law Code[5]. That broad concept covers any banking service or service involving credit, insurance, personal pension, investment or payment (Article 1.8, 18° Economic Law Code).

By contrast, alternative investment products are not considered financial services under the Law of 2 August 2002. That is to say, the latter concept applies only to services in the strict sense, and not to products.

[5] *Parl. Doc.* Chamber, 2012-2013, 3018/001, pp. 12-13.

2.5. Classification as a financial instrument (Article 2, first paragraph, 1° of the Law of 2 August 2002)

Alternative investment products are not financial instruments within the meaning of Article 2, first paragraph, 1° of the Law of 2 August 2002. They are not included in the list of instruments given in that provision[6].

3. LEGAL OBLIGATIONS AND SANCTIONS

As regards the distribution of alternative investments classified as investment instruments, there are a number of obligations that arise from legislation for which the FSMA is responsible for supervising compliance: first of all the Prospectus Law, as well as the above-mentioned Royal Decree on information obligations and Book VI of the Economic Law Code.

It must also be determined whether the alternative investment product qualifies as a PRIIP within the meaning of the PRIIP Regulation[7].

Because alternative investments are not at present classified as financial instruments, the so-called MiFID rules of conduct do not apply to them.

3.1. The Prospectus Law

3.1.1. Obligation to publish a prospectus

Pursuant to the Prospectus Law, a prospectus must be published for every public offer of investment instruments within the territory of Belgium. Where an alternative investment product is classified as (i) an investment instrument (ii) and, moreover, where a public offer is involved (iii) on the territory of Belgium within the meaning of the Prospectus Law, then the issuer or offeror of the alternative investment product is required to publish in advance a prospectus that has been approved by the FSMA.

(i) The product offered must be classified as an "investment instrument" (see above, Title 2.2, on the classification of alternative investments as investment instruments).

(ii) Furthermore, the law requires that a "public offer" be involved. This concept is defined as follows in the Prospectus Law: "a communication to persons in any form and by any means, presenting sufficient information on the terms of the offer and the investment instruments offered so as to enable an investor to decide to purchase or subscribe to these investment instruments, and which is made by the person who is in a position to issue or transfer the

[6] It should be noted that the King is authorized, under Article 2, 1°, k) of the Law of 2 August 2002, to designate additional securities or rights to be classified as financial instruments for purposes of the legal provisions He shall indicate.

[7] Regulation 1286/2014 of the European Parliament and the Council of 26 November 2014 on key information documents for packaged retail and insurance-based investment products (OJ 9 December 2014).

investment instruments or by a person who acts for the account of the aforementioned person", in which "anyone who receives any remuneration or benefit, directly or indirectly in connection with the offer, is considered to be acting for the account of the person who is in a position to issue or transfer investment instruments" (Article 3, § 1, Prospectus Law).

Article 3, § 2 provides that in certain cases no public offer is considered to be involved, namely, where the communication is addressed to fewer than 150 people or exclusively to qualified investors, where the total value is at least EUR 100,000 per investor and per separate offer or where the nominal value per unit is at least EUR 100,000, or indeed where the total value of the offer is less than EUR 100,000.

(iii) Finally, the public offer of investment instruments must be made in Belgium. It makes no difference in this regard whether the company involved is Belgian or foreign. It suffices for the offer to be directed specifically to the Belgian public.

The Prospectus Law contains detailed rules governing the form and content of the prospectus. As a general rule, a prospectus must contain all information which, "*according to the particular nature of the issuing institution and of the securities offered, is necessary to enable investors to make an informed assessment of the assets and liabilities, financial position, profit and losses, and prospects of the issuer and of any guarantor, and of the rights attaching to such securities*" and that "t*his information shall be presented in a form in an easily analysable and comprehensible form*" (Article 44, § 1 Prospectus Law).

Non-compliance with the prospectus obligation is subject to criminal sanctions (Article 69, § 1, first paragraph, 2° Prospectus Law) and may also give rise to administrative fines imposed by the FSMA (Article 71, Prospectus Law). Furthermore, where the subscription took place in connection with a public offer for which no prospectus approved by the FSMA was published, the courts will declare the subscription for the investment instrument to be null and void (Article 68*ter*, § 1, 1°, Prospectus Law).

3.1.2. Advertisements

In the event of a public offer of investment instruments within the territory of Belgium, all advertisements and other documents and announcements relating to the offer must also meet certain requirements as to the contents (Articles 58-59, Prospectus Law), and must be submitted in advance to the FSMA for approval (Article 60, Prospectus Law). The advertisements must contain information that is accurate and not misleading and must be closely related to the contents of the prospectus.

Non-compliance with the rules regarding the prior approval of advertisements is subject to criminal sanctions (Article 69, § 1, first paragraph, 2°, Prospectus Law) and may also give rise to administrative fines imposed by the FSMA (Article 71, Prospectus Law). Furthermore, the courts will declare the subscription for the investment instrument to be null and void if the subscription took place further to an offer for which the advertisements and other documents and announcements have not been submitted in advance to the FSMA for approval (Article 68*ter*, § 1, 3°, Prospectus Law).

3.1.3. Monopoly on intermediation

There is a monopoly on intermediation in respect of the placement of investment instruments within the territory of Belgium (Article 56, Prospectus Law). This means that only the types of regulated financial institutions listed in the Prospectus Law may carry out intermediation in connection with an offer of such instruments.

"Intermediation" here refers to any action in respect of investors, in any capacity whatsoever and even if it is temporary or ancillary, involving the placement of investment instruments for the account of the offeror or the issuer, in exchange for remuneration or benefit of any type whatsoever offered directly or indirectly by the offeror or the issuer (Article 13, Prospectus Law).

This monopoly on intermediation does not impede issuers from placing their own investment instruments themselves (Article 56, paragraph 2, a), Prospectus Law).

The insurance intermediaries that are registered with the FSMA do not appear among the regulated financial institutions that are allowed to perform intermediation under the Prospectus Law. As a consequence, those registered intermediaries may not serve as intermediaries for alternative investment products that are classified as investment instruments within the meaning of the Prospectus Law[8]. The credit institutions and the investment firms that are allowed to provide placement services within the meaning of Article 46, 1°, 7 of the Law of 4 April 1995 on the legal status and supervision of investment firms do appear among the institutions that may perform intermediation. They may also trade via intermediaries in banking and investment services that are registered with the FSMA in accordance with the applicable legislation and regulations.

The intermediation monopoly also applies to certain non-public offers, namely, offers of investment instruments for a total consideration of at least EUR 100,000 per investor or per unit (Article 55, § 2, 2°, *juncto* Article 3, § 2, Prospectus Law). This means that alternative investment products that are classified as investment instruments with a value of at least EUR 100,000 per unit or per investor can be offered without a prospectus, but only directly by the issuer or via the intermediation of one of the regulated institutions referred to in Article 56 of the Prospectus Law. Especially as regards alternative real estate investments, this situation will often arise, given that they often have a value exceeding EUR 100,000 per unit. Such real estate investments may thus not be offered by (recognized) real estate agents, since the latter do not among the regulated financial institutions.

Non-compliance with the prospectus obligation is subject to criminal sanctions (Article 69, § 1, first paragraph, 2°, Prospectus Law) and may also give rise to administrative fines imposed by the FSMA (Article 71, Prospectus Law). Furthermore, where the subscription took place in connection with a public offer for which the intermediation monopoly was not complied with, the courts will declare the subscription for the investment instrument to be null and void (Article 68*ter*, § 1, 2°, Prospectus Law).

[8] The FSMA Regulation of 3 April 2014 (Belgian Official Gazette Of 20 May 2014 prohibits the distribution of Class 23 insurance contracts for which the return is linked to an internal fund that invests in non-mainstream assets. That sort of asset includes, in particular, commodities, artworks and consumer goods such as wine or whisky. Alternative investment products may not, therefore, be distributed by insurance intermediaries in the form of Class 23 insurance contracts.

3.2. The Royal Decree on information obligations

As mentioned above, alternative investment products that are classified as investment instruments within the meaning of the Prospectus Law also fall within the scope of the Royal Decree on information obligations, which entered into force on 12 June 2015.

The aforesaid Royal Decree regulates, among other things, the contents of advertisements and other documents and announcements disseminated when distributing financial products to retail clients. These rules supplement the advertising rules in this regard contained in the Prospectus Law (point 3.1.2 above).

The advertising rules of the Royal Decree on information obligations also apply to alternative investment products that are distributed to retail clients outside of a public offer (for example, within a circle of fewer than 150 retail clients) (Article 9, § 3 of the aforesaid Royal Decree).

In addition, the advertisements must not emphasize the potential benefits of an alternative investment product without also giving a fair, prominent and balanced indication of the associated risks, limitations or conditions. Moreover, the Royal Decree on information obligations also specifies that the risks, limitations or conditions must be mentioned legibly in a font size that is at least as large as that used to present the benefits (Article 11, 2° of the Royal Decree on information obligations).

If the name of the financial product does not refer to the name of its issuer or if the name belies the major risks associated with the product, then additional information must be displayed prominently alongside the name of the product in order to draw the attention of retail clients specifically to it (Article 12, §1, 1° of the Royal Decree on information obligations).

Non-compliance with the Royal Decree on information obligations when distributing alternative investment products is punishable by criminal sanctions (under Article 69, first paragraph, 2°, Prospectus Law) and may also give rise to administrative fines imposed by the FSMA (under Article 71, Prospectus Law).

3.3. Book VI of the Economic Law Code

Book VI of the Economic Law Code contains provisions that are intended to protect consumers[9] with regard to offers of products and services, including financial services, made by undertakings. As mentioned above, those alternative investment products that are classified as investment instruments within the meaning of the Prospectus Law are also considered to be financial services within the meaning of Book VI of the Economic Law Code.

Book VI contains provisions, for example, regarding the ban on unfair terms in contracts with consumers (Article VI. 82 to 87) and regarding comparative advertisements (Article VI.17), regarding contracts entered into at a distance (Article VI. 54 to 63), regarding contracts entered into outside of points of sale (Article VI. 64 to 74), etc.

[9] According to the Economic Law Code, a consumer is "any natural person who acts for purposes outside his or her business, company, trade, or professional activity" (Article I.1, first paragraph, 2°, Economic Law Code).

The FSMA and the FPS Economy are both competent to supervise compliance with the rules of Book VI in the financial sector.

In the case of non-compliance with Book VI, criminal sanctions may be imposed. Pursuant to the Law of 2 August 2002, the FSMA may also impose administrative sanctions on those infringe on the rules.

3.4. The PRIIP Regulation

The PRIIP Regulation lays down requirements regarding the provision of summary information for packaged retail and insurance-based investment products ("PRIIPs"). The aim of the aforesaid Regulation, which applies since 1 January 2018, is to enable retail investors to understand and compare the key features of a PRIIP and the associated risks. Before making these products available to retail investors[10], the manufacturer of the PRIIP must draw up a key information document, or "KID", and publish it on its website. Persons advising on or selling the PRIIP must provide the retail investor with the KID in good time, before the latter is bound by any contract or offer. The form and content of the KID are described in the PRIIP Regulation and set out in detail in the Delegated Regulation[11]. These obligations apply regardless of whether the offer is public in nature as defined in the Prospectus Law.

Article 4, fist paragraph, of the PRIIP Regulation defines a packaged retail investment product as an investment "where, regardless of the the legal form of the investment, the amount repayable to the retail investor is subject to fluctuations because of exposure to reference values or to the performance of one or more assets which are not directly purchased by the retail investor."

In light of this broad definition, it is not excluded that certain alternative investment products may be classified as a PRIIP. In that case, the PRIIP manufacturer must draw up and publish the key information document in accordance with the requirements of the PRIIP Regulation and the Delegated Regulation.

If an alternative investment product traded in Belgium is classified as a PRIIP that is also offered to the public in Belgium, then the obligation on the part of the PRIIP manufacturer or the person selling the PRIIP to submit the KID in advance to the FSMA applies pursuant to Article 37*sexies*, § 2 of the Law of 2 August 2002 on the supervision of the financial sector and on financial services. The procedures for fulfilling this obligation are clarified in the Royal Decree of 25 December 2017 clarifying the obligation of prior submission of the key information document to the Financial Services and Markets Authority and containing various provisions and in the FSMA Communication of 29 December 2017 on the notification of key information documents for PRIIPs to the FSMA via the "FinPro" application (FSMA_2017_24 dated 29 December 2017).

[10] In accordance with Article 4 (6) of the PRIIP Regulation, a retail investor is "a retail client as defied in point 11 of Article 4 (1) of Directive 2015/65/EU".

[11] Commission Delegated Regulation (EU) 2017/653 of 8 March 2017 supplementing Regulation (EU) No 1286/2014 of the European Parliament and of the Council on key information documents for packaged retail and investment-based investment products (PRIIPs) by laying down regulatory technical standards for the presentation, content, review and revision of key information documents and the conditions for fulfilling the requirement to provide such documents.

The FSMA, as the competent authority, is tasked with supervising compliance with the PRIIP regulations in Belgium and is also responsible for taking measures or imposing sanctions if it identifies any infringements in this regard.

4. CONCLUSION

Without prejudice to the other applicable legislation for which the FSMA is not the competent authority, companies that distribute alternative investment products within the territory of Belgium (including intermediaries involved in the placement of these products) must ensure that they comply with the above-mentioned financial legislation, and more specifically with the Prospectus Law (prior approval of the prospectus and advertisements for public offers within the Belgian territory, as well as the monopoly on intermediation), the Royal Decree on information obligations (when distributing such products to retail clients) and Book VI of the Economic Law Code (when offering alternative investments to consumers). It must also be determined, in each case, whether or not the PRIIP Regulation applies (publishing and providing a key information document).