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## Twin Peaks II – Belgium

### Enhanced customer protection and strengthened supervisory powers

On 9 September 2013, a number of measures to improve the protection of Belgian investors and to strengthen the supervisory powers of the Financial Services and Markets Authority (the “**FSMA**”) entered into force. More measures will enter into force later this year. These new measures find their origin in two laws of 30 and 31 July 2013 (the so-called “**Twin Peaks II**” package)<sup>1</sup>.

Twin Peaks II substantially strengthens the supervisory powers of the FSMA and aims to improve market transparency and protection of investors. It builds upon the “Twin Peaks” supervisory architecture created in April 2011, under which the supervision of the financial sector and financial markets is shared between the FSMA and the National Bank of Belgium (“**NBB**”). Our newsletter on the Twin Peaks I reform [is available here](#).

Twin Peaks II also contains a number of measures that forestall certain EU initiatives which have not yet been formally adopted, including in the areas of market abuse and insurance mediation. It also adapts Belgian law to recently adopted EU legislation such as the Omnibus I Directive<sup>2</sup> and the Short-Selling Regulation<sup>3</sup>.

Certain key changes introduced by Twin Peaks II are summarised below.

<sup>1</sup> Law of 30 July 2013 “*visant à renforcer la protection des utilisateurs de produits et services financiers ainsi que les compétences de l’Autorité des services et marchés financiers, et portant des dispositions diverses (I) / tot versterking van de bescherming van de afnemers van financiële producten en diensten alsook van de bevoegdheden van de Autoriteit voor Financiële Diensten en Markten en houdende diverse bepalingen (I)*” and Law of 31 July 2013 “*visant à renforcer la protection des utilisateurs de produits et services financiers ainsi que les compétences de l’Autorité des services et marchés financiers, et portant des dispositions diverses (II) / tot versterking van de bescherming van de afnemers van financiële producten en diensten alsook van de bevoegdheden van de Autoriteit voor Financiële Diensten en Markten en houdende diverse bepalingen (II)*”

<sup>2</sup> Directive 2010/78/EU of 24 November 2010 amending Directives 98/26/EC, 2002/87/EC, 2003/6/EC, 2003/41/EC, 2003/71/EC, 2004/39/EC, 2004/109/EC, 2005/60/EC, 2006/48/EC, 2006/49/EC and 2009/65/EC in respect of the powers of the European Supervisory Authority (European Banking Authority), the European Supervisory Authority (European Insurance and Occupational Pensions Authority) and the European Supervisory Authority (European Securities and Markets Authority).

<sup>3</sup> Regulation (EU) No 236/2012 of 14 March 2012 on short selling and certain aspects of credit default swaps.

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## Strengthening the supervisory and sanctioning powers of the FSMA

### Broadening FSMA investigative powers

*Relevant for: all financial institutions active in Belgium (including credit institutions, insurance companies, investment firms, etc.) which are subject to Belgian conduct of business rules*

Twin Peaks II aims to improve consumer protection by extending the scope of the FSMA's special investigative powers. The FSMA is now equipped with broader powers to investigate how financial institutions do business and whether they comply with applicable conduct of business rules.

- (i) The FSMA is authorised to engage in “**mystery shopping**” (i.e., to approach regulated entities as a client, without mentioning its capacity as a regulator) in order to verify that applicable conduct of business rules are being complied with. For this, the FSMA may rely on its own staff or on external shoppers.
- (ii) Financial institutions must provide the FSMA, at its request, with **permanent remote access** to their internet banking websites on which information or offers are made available to clients. The FSMA is, however, not entitled to gain access to clients' individual protected websites.

### Reinforcing the sanctioning regime

*Relevant for: all financial institutions active in Belgium (including credit institutions, insurance companies, investment firms, fund managers, mortgage institutions, financial intermediaries)*

Twin Peaks II extends and harmonises the power of the FSMA to impose sanctions.

Previously, the FSMA was of the view that its supervision over **insurance companies and insurance intermediaries** was not supported by an effective **administrative sanctioning regime**. Twin Peaks II has corrected this by extending the existing powers of the FSMA to issue injunctions, public warnings and administrative fines to insurance companies and insurance intermediaries.

Twin Peaks II further increases and harmonises 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.

Fines must be published, disclosing the name of the concerned person(s), unless such disclosure would seriously jeopardise the financial markets or cause disproportionate damage to the parties concerned.

## Restriction of trading and products ban

*Relevant for: all market participants trading financial instruments listed on a Belgian regulated market, financial institutions marketing financial products in Belgium and listed companies*

In the event of exceptional circumstances disrupting the ordinary course of trading, the FSMA previously had the power to **suspend trading** in instruments of a listed company for a maximum period of two days. Twin Peaks II increases this maximum period to 10 days and includes a possibility for a further extension by Royal Decree.

In addition, in case of exceptional circumstances threatening the stability of the financial markets, the FSMA may, after consultation with the NBB, take measures to **restrict trading** of financial instruments listed on a Belgian regulated market as well as related derivatives instruments or to impose conditions on such trading for an initial period of one month which can be extended up to three months. Any further extension must be imposed by Royal Decree.

Finally, Twin Peaks II provides the FSMA with the power to issue an injunction to **ban the marketing of certain financial services or products** for a specified period of time. Non-compliance with such injunction constitutes a criminal offence. The FSMA can furthermore **impose the use of labels** to increase transparency of certain financial products.

## Improving protection of clients

Twin Peaks II contains a number of measures aimed at creating a level playing field for all financial institutions. The purpose of these measures is to provide the same level of protection to customers, regardless of the type or nature of investment product (financial instrument, insurance contract, savings account, etc.) and of the status of the financial institution (credit institution, investment firm, insurance company, financial intermediaries).

## Extension of conduct of business rules to insurance companies and intermediaries

*Relevant for: Belgian and foreign insurance companies and insurance intermediaries doing business in Belgium*

Twin Peaks II **extends the existing MiFID conduct of business rules to insurance companies and intermediaries**. As a consequence, all providers of financial products, regardless of their qualification as financial instruments or insurance contracts, will have to provide their clients with information which is fair, clear and not misleading and will have to comply with the same set of conduct of business rules. The extension of the conduct of business rules to insurance undertakings and insurance intermediaries will enter into force on 1 January 2014.

## Know Your Product (KYP) obligation

*Relevant for: all financial institutions (including credit institutions, investment firms, insurance companies and financial intermediaries)*

Twin Peaks II requires all persons (sales teams) who are in contact with investors to have the necessary **knowledge to advise on the services and products they are selling** (i.e., a KYP obligation). This means that they must be able to explain to their clients the key characteristics of the relevant products and services.

The impact of the above requirements is significantly increased by the fact that Twin Peaks II (i) strengthens the powers of the FSMA to supervise these obligations (e.g., through mystery shopping and remote access) and (ii) equips the FSMA with a broader range of sanctions in case of breach (e.g., public warnings, injunctions, administrative fines, penalties, bans on the provision of certain financial products or services, or termination/suspension of authorisation).

## Tightening civil liability regime

### Presumption of causal link between a breach of applicable conduct of business rules and the investors' decision to enter into the relevant transaction

*Relevant for: Belgian and foreign institutions (credit institutions, investment firms, insurance companies, etc. and their intermediaries) doing business in Belgium*

This – rebuttable – presumption of causal link applies in connection with all types of investments relating to financial products or services in case of breach of conduct of business rules. It currently applies to Belgian and foreign credit institutions and investment firms and its application will be further extended to insurance companies and intermediaries.

If the client proves a breach of applicable conduct of business rules, his decision to enter into the relevant transaction will be deemed to result from this breach. 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. 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 rule did not affect the investor's investment decision.

Assuming the presumption is not reversed by the financial institution, the investor would be entitled to damages if he can prove (i) the breach of the conduct of business rules, (ii) the damage and (iii) the causal link between the damage and the investment.

This presumption will apply to transactions or services entered into or provided as from 9 September 2013, subject to publication of a Royal Decree further detailing the conduct of business rules that are covered by the presumption.

Twin Peaks II also provides for specific statutes of limitation for breaches of conduct of business rules, i.e. five years as from the date the client becomes aware of the damage or its aggravation without such period exceeding 20 years following the date of breach.

## **Presumption of causal link between breaches of licensing, prospectus or pre-approval requirements, and investors' damages**

*Relevant for: Belgian and foreign institutions (credit institutions, investment firms, insurance companies, etc. and their intermediaries) doing business in Belgium as well as issuers of financial instruments*

In case of breach of banking, investment or funds licensing requirements or prospectus and marketing documents approval requirements, Twin Peaks II provides for an irrefutable presumption that damages suffered further to purchases of, or transactions in, financial products are caused by such breach.

This presumption will, however, not apply in relation to EU financial institutions and issuers that have obtained all relevant authorisations in their home member state but have failed to comply with the applicable passporting requirements (e.g., public offer made in Belgium on the basis of a prospectus duly approved by the Luxembourg authorities which has not been duly passported in Belgium).

In the framework of public offers of financial instruments or listing of financial instruments on a regulated market, this irrefutable presumption complements the existing rebuttable presumption pursuant to which, in case the prospectus contains misleading or false information, the investors' damages are caused by such misleading or false information if such information is likely to create a positive appreciation on the market or to positively influence the subscription price of the financial instruments.

## **Nullity of transactions or services provided in breach of licensing, prospectus or pre-approval requirements**

*Relevant for: Belgian and foreign institutions (credit institutions, investment firms, insurance companies, etc. and their intermediaries) doing business in Belgium as well as issuers of financial instruments offered to the public in Belgium*

In addition to the above presumption regimes, Twin Peaks II introduces a regime of nullity for transactions or services provided in breach of licensing, prospectus and marketing document pre-approval requirements. For example, an investor may now request the annulment of a subscription of

shares in an investment fund if the relevant investment fund has been sold to the public in Belgium in breach of applicable authorisation obligations and/or without a duly approved prospectus or request the annulment of a purchase of securities issued in the framework of a public offer in Belgium if no prospectus has been approved or if the marketing documents used in Belgium have not been cleared beforehand by the FSMA.

This rule will, however, not apply in relation to EU financial institutions and issuers that have obtained all relevant authorisations in their home member state but have failed to comply with the applicable passporting requirements.

Twin Peaks II also introduces a special civil sanction regime for mortgage credits that are provided in breach of applicable licensing requirements. According to this new regime, the obligations of a borrower towards a mortgage lender that has breached the Belgian licensing requirements are reduced to the reimbursement of the principal amount (i.e. no payment of interests). This special civil sanction regime already exists in the context of consumer credit.

### Extending market abuse regime

*Relevant for: all market participants*

Belgium has decided to move faster than the European Union on the review of the market abuse regime and to extend its scope of application as follows:

- > expanding the market manipulation prohibition to derivatives, i.e. financial instruments that are not listed and whose value depends on listed financial instruments (by making this change Twin Peaks II aligns the insider trading and the market manipulation prohibitions as far as derivatives are concerned);
- > expanding the market manipulation and insider trading prohibitions to credit default swaps relating to listed issuers; and
- > creating a new market abuse prohibition in relation to benchmarks (such as Euribor). This new prohibition applies to market manipulation conducted in Belgium or from the Belgian territory, regardless of the place where the benchmark is determined.

Twin Peaks II also adjusts the criminal and administrative sanctions applicable to breaches of the market abuse prohibitions.

## Increasing transparency and comparability of savings accounts

*Relevant for: credit institutions offering savings accounts in Belgium*

A “savings account” is defined by Twin Peaks II as any account from which no payments can be made due to contractual or legal restrictions. This includes, among others, term deposit accounts and so-called “regulated savings accounts” as defined in the Royal Decree of 27 August 1993.

Twin Peaks II contains a number of provisions aimed at increasing transparency and comparability of savings accounts offered in Belgium. The FSMA can now take action against credit institutions offering savings accounts which are falsely presented as qualifying for the withholding tax exemption under the Belgian Income Tax Code. Twin Peaks II further allows for new rules regarding savings accounts to be enacted by Royal Decree. Such rules may include changes to the qualifying conditions for the Belgian withholding tax exemption as well as restrictions on the use of materials to promote savings accounts and on the terms and conditions applicable to such accounts.

## Revised judicial injunctions regime

*Relevant for: all market participants*

Twin Peaks II rejuvenates the judicial injunction (“cease and desist”) procedure in case of violation of financial regulations and aligns this procedure with the general injunction procedure set out in the Belgian Law of 6 April 2010 on Market Practices and Consumer Protection.

Generally speaking, the new injunction procedure may be launched despite the existence of a parallel criminal procedure dealing with the same facts. Moreover, no decision can be taken in the criminal procedure until a final decision has been taken in the injunction procedure.

The new injunction procedure may be initiated before the President of the Commercial Court by the FSMA, by the competent Minister, by an interested party, by a consumer association and, now, by a professional association also. Such injunctive relief may be brought for actions or activities that have not yet started, but are on the verge thereof.

As regards advertisements and other publications, if the person who initiated such advertisements or publications is not known, is not domiciled or has no representative in Belgium, the injunction procedure may be initiated against the editor, the printer or the distributor.

The President of the Commercial Court may also order the publication of his decision, or a summary thereof, both inside and outside the premises of the offender, as well as in the press or by any other means.

## Implementing the Omnibus I Directive

*Relevant for: all market participants*

Twin Peaks II implements certain provisions of the Omnibus I Directive. The Omnibus I Directive amends a number of directives in the field of financial services following the creation of the new European system of financial supervisors. Under the new supervisory architecture, national competent authorities are required to cooperate in supervisory activities, on-site verifications, and investigations to ensure coherent cross-sectoral and cross-border supervision of the regulated entities. They are also required to cooperate with the relevant European Supervisory Authorities (ESMA, EBA and EIOPA). The implementing provisions ensure that there are no legal obstacles to the information sharing obligations contained in the regulations establishing the ESAs and that the relevant ESAs may intervene in case of problems of cooperation between national supervisory authorities. For example, Twin Peaks II provides for:

- (i) the notification to ESMA and the competent authorities of other Member States of any withdrawal of authorisation or the suspension or removal of a financial instrument from trading;
- (ii) the annual disclosure to ESMA of aggregated information regarding all administrative measures and sanctions. Where administrative measures or sanctions are disclosed to the public, the same shall simultaneously be reported to ESMA;
- (iii) the express derogation to professional secrecy requirements of the FSMA with regard to information transmitted to or exchanged between competent authorities and the ESA or the European Systemic Risk Board (ESRB); etc.

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