

Distribution of certain derivative financial instruments to retail clients: a prospective ban?



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On 8 January 2016, the Financial Services and Markets Authority (“FSMA”) initiated a consultation on a draft regulation governing the distribution of certain derivative financial instruments to retail clients. The FSMA, which has over the years been pointing out the particularly risky nature of these derivatives, noted that a great deal of these instruments were being distributed to retail clients in Belgium by means of dedicated electronic trading platforms. In that respect, the draft regulation sets up a proper groundwork and aims at tackling the issue by pursuing two main cumulative objectives.

Firstly, the FSMA seeks to prohibit the marketing of a series of over-the-counter (“OTC”) derivative instruments to retail investors. The instruments affected will fall into one of the following categories:

- their maturity is less than 14 days;
- their underlying asset is a currency;
- their underlying asset is a non-mainstream asset (e.g. artwork, wine, commodity, precious metal), with the exception of gold; and
- they have a leverage ratio that is greater than five (exact leverage ratio yet to be confirmed).

Given the above, instruments such as binary options, contracts for difference and rolling spot forex transactions will clearly be in the spotlight.

Secondly, the FSMA is taking action to mitigate all kinds of distribution techniques seen as aggressive or inappropriate towards retail clients in respect of OTC derivative instruments. This means that marketing could be banned if at least one of the following practices is undertaken:

- establishing individual unsolicited communications with clients or prospects;
- repeatedly soliciting clients or prospects, irrespective of the form of long-distance

- communication used;
- using call centres for contacts with clients or prospects;
 - rewarding clients for introducing new clients or recommending any instruments or related services;
 - rewarding clients (except where they can withdraw an equivalent amount in cash without further conditions) or offering any benefit that is conditionally linked to certain transactions;
 - using inadequate methods of remuneration (on a pro rata basis linked to investments, gains or losses generated by the client); and
 - accepting credit cards for payment.

The regulation will enter into force upon finalization of the provisions by the FSMA and subsequent approval by royal decree. All sector players were invited to submit their responses in writing by 25 January 2016 at the latest.