



Communication CBFA_2009_11 of 5 March 2009

Recommendations of the CBFA regarding advertisements and other documents and announcements relating to an operation referred to in Title VI of the Law of 16 June 2006 on public offers of investment instruments and on the admission of investment instruments to trading on regulated markets (recommendations published on 22 April 2008 and updated on 5 March 2009)

Scope:

These recommendations apply to investment instruments referred to in the Law of 16 June 2006 on public offers of investment instruments and on the admission of investment instruments to trading on regulated markets (hereinafter “the Law”) that is, principally transferable securities, with the exception of investment instruments issued by undertakings for collective investment. They do not apply to individual life insurance policies belonging to classes 21, 23 and 26.

Summary/Objectives:

The Law provides that all advertisements, as defined in Article 11 of the Law, and other documents and announcements relating to an operation referred to in Title VI of the Law (hereinafter “advertisements”) must be submitted to the CBFA for approval prior to their publication (Article 60).

In view of the general nature of the rules set out in Article 58 of the Law, and in particular with regard to the requirement not to be misleading, the CBFA has deemed it useful to issue a number of recommendations that it considers will aid in complying with Article 58. These recommendations are without prejudice to particular solutions that may be adopted for certain advertisements depending on the specificities of the case at hand.

I. Introduction

These recommendations apply to investment instruments referred to in the Law of 16 June 2006 on public offers of investment instruments and on the admission of investment instruments to trading on regulated markets, that is, principally transferable securities, with the exception of investment instruments issued by undertakings for collective investment. They do not apply to individual life insurance policies belonging to classes 21, 23 and 26.

The Law provides that all advertisements, as defined in Article 11 of the Law, and other documents and announcements relating to an operation referred to in Title VI of the Law (hereinafter “advertisements”) must be submitted to the CBFA for approval prior to their publication (Article 60)¹.

Article 58 of the Law provides general rules governing the contents of advertisements as these are defined above, namely:

- advertisements must state, where applicable, that a prospectus has been, is being or will be published and indicating where investors can obtain a copy;

¹ Inasmuch as the advertisements and other documents and announcements are disseminated at the initiative of the issuer, the person asking for admission to trading, or intermediaries designated by them.

- information contained in advertisements must not be misleading or inaccurate;
- information provided in advertisements must be consistent with the information contained in the prospectus;
- advertisements must be clearly recognizable as such.

In view of the general nature of the rules set out in Article 58 of the Law, and in particular with regard to the requirement not to be misleading, the CBFA has deemed it useful to issue a number of recommendations that it considers will aid in complying with Article 58. These recommendations are without prejudice to particular solutions that may be adopted for certain advertisements depending on the specificities of the case at hand.

It should be noted that the recommendations set out below are without prejudice to the legal obligations that apply to the provision of investment services relating to financial instruments. Article 27 of the Law of 2 August 2002 on the supervision of the financial sector and on financial services, supplemented by Article 8 of the Royal Decree of 3 June 2007 laying down detailed rules on the transposition of the Directive on markets in financial instruments (hereinafter the Royal Decree of 3 June 2007), provides a series of rules that apply where regulated undertakings within the meaning of this legislation distribute advertisements in the context of providing investment services.

These recommendations take their inspiration from the above-mentioned rules, inasmuch as they reflect the same intention. This also means that potential contradictions can be avoided.

Finally, it should be remembered that these recommendations apply without prejudice to the Law of 14 July 1991 on trade practices and the information and protection of consumers, as applied to financial instruments by the Royal Decree of 5 December 2000 rendering applicable to financial instruments and securities certain provisions of the Law of 14 July 1991 on trade practices and the information and protection of consumers.

II. Pertinence of these recommendations depending on the type of medium used

The CBFA is aware that advertising can take various forms depending on the medium being used. The information provided in these advertisements will be determined by the nature of the medium used.

Certain types of media, such as posters, television and radio adverts or SMSs, contain succinct information. In the case of these media, it is the CBFA's opinion that at the very least, the recommendations concerning the name of the investment instrument, the identity of the issuer, the presentation of the yield, the capital refund, and charges and responsibility should be followed. Where the advertisements in question also address topics covered by other recommendations, the recommendations in question should also be taken into consideration.

In the case of detailed advertisements such as sales brochures, leaflets or e-mail messages, account should be taken, in the CBFA's opinion, of all the recommendations contained in this document. The recommendations relating to examples intended to illustrate the functioning of the investment instrument, to the simulation of future performance and to information on or simulations of past performance (insofar as examples or information on future or past performance are provided), and to negotiability are particularly relevant to these types of advertising.

Announcements published in the press which are intended solely to announce the availability of the prospectus may be limited to the information provided for in Article 31.3 of Regulation 809/2004 implementing Directive 2003/71/EC. In some cases, it might be appropriate to bear in mind certain recommendations, such as the one concerning the identification of the type of investment instrument.

III. Recommendations

General considerations

- Advertisements are not intended to replace the prospectus / base prospectus or the final terms of the offer. The CBFA therefore recommends that the place where investors can obtain the prospectus / base prospectus and the final terms of the offer be clearly and visibly mentioned.

- It is also desirable that advertisements should contribute, together with the prospectus and the summary, to a better understanding of the investment instrument being offered. This is the case where the information is presented in a reasonably clear manner.
- Care should be taken that the information provided in advertisements is correct and does not disguise, diminish or obscure important items, statements or warnings.

Name of the investment instrument

- A name ought to be chosen that is not likely to mislead the public. *In particular, one should avoid giving the impression that the capital is protected where this is not the case. Thus one should avoid speaking of a "bond" where the conditions of issue do not provide for a 100% redemption of the capital upon maturity. Similarly, one should avoid focusing the name of a product on the coupon rate if the latter does not apply during the entire investment period or if the capital is not protected. Finally, the name of the distributor should not be mentioned in the name of the investment instrument, in order to avoid giving the impression that the distributor is the issuer.*
- Where the investment product is presented under a commercial name in advertisements, care should be taken that the public can easily identify the prospectus relating to this issue. As regards the base prospectus, the link to the official name can be made in the final terms of the offer, in order to avoid confusion. *For this reason, where reference is made to the prospectus, the exact title of the latter should be given as well as the date when any supplements to it were approved.*

Identification of the type of investment instrument

- The description of an investment instrument should indicate clearly the type of instrument it is, in order to avoid any confusion with economically comparable products such as units in UCITS or insurance products.

Identification of the issuer of the investment instrument

- The issuer of an investment instrument should be clearly identified. *This recommendation is especially important where the investment instrument is commercialized by an intermediary who is not the issuer. . In that case, the CBFA recommends that the name of the investment instrument make reference to the issuer. This may be done using an abbreviation provided that this is a customary one and that its meaning is stated clearly elsewhere in the communication in question.*

Mention of risks

- It is desirable that advertisements give balanced information, both in terms of contents and of presentation, concerning the yields and the risks inherent in the investment instrument being offered. Thus one should avoid placing emphasis on the potential advantages of an investment instrument without at the same time indicating clearly and visibly the potential risks.

In this regard, the principal risks should be mentioned in such a way as to draw the investor's attention to them, taking into account the importance of the risks described and putting particular emphasis on those risks that are specific to the type of investment instrument being offered.

Where complex investment instruments, whose risks are difficult for investors to assess, are offered to the public, it may be useful to use a risk classification system. In that case, one should indicate who designed the risk classification system being used, and the criteria applied. As regards the description of these criteria, reference may be made to a website or a sales brochure containing this information.

Presentation of the yield of bonds and other debt securities

- It is recommended that the yield be presented as clearly as possible in order to allow investors to compare it with the yield offered on other products without having to make numerous calculations.

The rate should thus be expressed as an annualized percentage rate. Likewise, providing the internal rate of return (IRR), taking into account the charges that are known and applicable to all investors², will facilitate comparison with other products³.

- In the case of a fixed coupon rate, the period during which the fixed rate applies should be mentioned (e.g. fixed rate of 4% for 6 months) without making the percentage figure disproportionately prominent in relation to the mention of the period during which it applies.
- In the event of a variable coupon rate, the variability should be clearly indicated, and the manner in which the coupon will be calculated should be described. If the coupon is capped the percentage at which it is fixed should be indicated, although it need not be given particular emphasis. A clear distinction should also be made between a cap and a target rate of return. Moreover, if a cap is applied, the minimum coupon should also be specified (e.g. variable rate from minimum 0% to maximum 7%).
- In cases where the period in which a fixed coupon rate is offered is followed by a period in which the rate becomes variable, one should avoid giving the fixed rate of return disproportionate emphasis as compared to the information relating to the variable rate.
- In the case of investment instruments with a zero coupon rate for which the capital gain at term has an upper percentage limit, this cap should be indicated, although it need not be given particular emphasis, and the minimum rate of return should also be stated. Mentioning the minimum and maximum IRR, taking into account the charges that are known and applicable to all investors⁴, is particularly recommended for this type of investment instrument.
- In the event of a joint sale of two products (for instance, the joint sale of a fixed-rate certificate and a unit in a collective investment scheme), provided the Law on trade practices and the information and protection of consumers permits it, it is advisable to distinguish between the different products being offered and their respective returns.
- Where an investment instrument is denominated in a currency other than the euro, this currency should be clearly indicated, and it should be specified that the yield in euro may be influenced positively or negatively by fluctuations in the exchange rate.

Information concerning capital redemption in the case of bonds and other debt securities

- The capital protection offered by the issuer himself should be distinguished from a guarantee which is given by a third party in order to provide what the issuer does not. Therefore the CBFA recommends that the use of the term 'guarantee' in connection with capital redemption be reserved for the latter case.
- In the case of investment instruments without any kind of capital protection, a warning to this effect should be inserted in order to draw the attention of investors to this feature.
- In the case of investment instruments with partial capital protection or guarantee, it is advisable to indicate the percentage for which redemption is assured or guaranteed (e.g. notes with a 90% capital protection/guarantee).
- If the capital redemption or guarantee provided by a third party is subject to certain conditions being fulfilled, these conditions should be described.

² Where the investment instruments are commercialized by intermediaries who are not members of the distributing syndicate, the issuer and/or the lead manager is not always aware of the fees that may be charged by these intermediaries.

³ In sales brochures, attention should be drawn to the fact that the IRR is based on an assumed reinvestment of the coupons paid at the IRR.

⁴ Where the investment instruments are commercialized by intermediaries who are not members of the distributing syndicate, the issuer and/or the lead manager is not always aware of the fees that may be charged by these intermediaries.

- It should be clearly stated that the capital is protected only at maturity, in order to make it clear that if the instrument is sold before maturity, possibly on a market, it is likely to sell for a price below the nominal value.
- If the capital redemption is subordinate to the issuers' other debts, this should be mentioned and reference made to the documents containing an explanation of this subordination (sales brochure and prospectus).

Examples intended to illustrate the functioning of the investment instrument

- For particularly complex investment instruments, the CBFA considers that examples may be the best way to explain to investors how the instrument works.
- If advertisements contain examples, it should be made clear that these are provided by way of illustration only and thus do not constitute any guarantee of the effective return.
- Moreover, it is important to be attentive to following:
 - ensuring that the examples provided are based on realistic assumptions. It is also recommended that several different scenarios (neutral, positive, negative) be used;
 - stating the assumptions on which the examples are based;
 - taking into account known charges and taxes that are applicable to all investors⁵, or specifying their effect;
 - indicating the internal rate of return (IRR), taking into account all known charges.

Indications of past performance

- Where advertisements contain an indication of past performance of an investment instrument, care should be taken that:
 - a) that indication is not the most prominent feature of the advertisement;
 - b) the advertisement includes appropriate performance information which covers the immediately preceding five years or the whole period for which the investment instrument has been offered if less than five years, or such longer period as the issuer may decide. In every case, that performance information should be based on complete twelve-month periods;
 - c) the reference period and the source of information are clearly stated;
 - d) the information contains a prominent warning that the figures refer to the past and that past performance is not a reliable indicator of future results;
 - e) where the indication relies on figures denominated in a currency other than the euro, the currency is clearly stated, together with a warning that the return may increase or decrease as a result of currency fluctuations;
 - f) where the indication is based on gross performance, the effect of commissions, fees or other charges is disclosed.

Simulated past performance

- Where advertisements include or refer to the simulated past performance of an investment instrument or a financial index, care should be taken that:
 - a) the simulated past performance is based on the actual past performance of one or more financial instruments or financial indices which are the same as⁶ or underlie, the financial instrument concerned;

⁵ Where the investment instruments are commercialized by intermediaries who are not members of the distributing syndicate, the issuer and/or the lead manager is not always aware of the fees that may be charged by these intermediaries.

- b) the conditions set out in points a) to c), e) and f) in respect of indications of past performance are complied with;
- c) the information contains a prominent warning that the figures refer to simulated past performance and that past performance is not a reliable indicator of future performance.

Information about the future performance of an investment instrument

- Where an advertisement contains information on future performance, care should be taken that:
 - a) the information is not based on or does not refer to simulated past performance;
 - b) it is based on reasonable assumptions supported by objective data;
 - c) where the information is based on gross performance, the effect of commissions, fees or other charges is disclosed;
 - d) it contains a prominent warning that such forecasts are not a reliable indicator of future performance.

Tax matters

- It should be clearly indicated whether the announced rate of return takes taxes into account. If the return is quoted before tax, it is recommended that the rate of withholding tax for the category of investors who form the primary target group (e.g. individual investors) be indicated. It is advisable as well to draw attention to any specific tax regime that applies to the investment instrument.
- Where reference is made to a specific tax treatment, it should be clearly indicated that the tax treatment depends on the individual situation of each investor, and that this may be subject to change at a later time.

Charges

- The charges over and above the subscription price that are known and applicable to all investors⁷ should be mentioned, and they should be included in the calculation of the internal rate of return.
- If, in addition to the charges mentioned in the advertisements, other fees are likely to be charged to the investor by intermediaries who are not members of the distributing syndicate, it is advisable to draw the attention of the investor to this fact and invite him/her to obtain more information on the matter.

Negotiability

- If it is mentioned that an investment instrument is or will be admitted to trading on a market, the market(s) where the instrument is being or will be traded should be mentioned.
- If reference is made to a mechanism ensuring the liquidity of off-exchange investment instruments, it is advisable to mention the principal ways in which the liquidity is ensured or to indicate where investors can obtain this information.

Responsibility

- Any mention that might suggest that the issuer, offeror or person asking for the admission to trading, or their designated intermediaries, may be exonerated from all responsibility for the contents of advertising material is to be avoided⁶.

⁶ It should be noted that the French text of the Directive as transposed by the Royal Decree of 3 June 2007, unlike the Dutch version, does not use the term "same as", but "similar".

⁷ Where the investment instruments are commercialized by intermediaries who are not members of the selling group, the issuer and/or the lead manager is not always aware of the fees that may be charged by these intermediaries.

Mentioning the name of a competent authority

By way of a reminder, no mention of the role of the CBFA or of any other competent authority in the EEA may be made in advertisements or other documents or announcements relating to a public offer or an admission to trading, except to mention the approval of the prospectus (see Art. 60, §5, of the Law of 16 June 2006).

⁸ By way of reminder, Article 61, §4, of the Law provides that these persons are required "to make good any damage caused by an advertisement or other document or announcement relating to the operation, published at their initiative, which contains misleading, incorrect or contradictory information relating to the prospectus, or by the inconsistency of these communications with the provisions of Article 58 or with any provisions laid down pursuant to this Article".