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THE LEGAL IMPLICATIONS OF DISCLAIMERS USED BY FINFLUENCERS

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The Legal Implications of Disclaimers Used by Finfluencers

Abstract

The emergence of "finfluencers" in the financial sector has raised critical concerns regarding their influence, particularly in light of high-profile cases involving celebrities and regulatory scrutiny. A noteworthy trend among finfluencers is the routine use of disclaimers emphasising their non-financial advisory role. This article critically explores the legal risks from an EU and Belgian financial law perspective that finfluencers seek to avoid with such disclaimers and the efficacy of such disclaimers in limiting or exempting finfluencers from civil liability under EU law. The analysis includes a specific focus on finfluencers specialising in crypto-assets, acknowledging the distinct regulatory challenges in this domain. The conclusion underscores the importance for finfluencers to exercise caution in their communications, emphasising that reliance on disclaimers alone may fall short in shielding them from potential administrative penalties and civil liabilities.

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Introduction

I. What is a finfluencer?

5. Finfluencers are social media influencers who focus on providing financial advice, education, recommendations and opinions, typically on platforms such as Instagram, TikTok, YouTube, Discord, Twitter, but also on self-made blogs and email newsletters, often in return for some form of direct or indirect remuneration. [13] They aim to influence the financial behaviour and decisions of their followers and audiences through the content they create and share. [14]

As noted by ESMA, an influencer is someone who is active on social media and has (i) the power to affect the purchasing decisions of others because of their authority, knowledge, position or relationship with the audience, and (ii) has a following in a distinct niche, with whom they engage. [15] In the case of a "finfluencer", that niche is financial topics, such as investments.

Finfluencers are a group of individuals who position themselves as financial experts based on personal experience and self-education, but who are typically not professionally licensed financial advisors and may not have any formal financial qualifications. [16] They share investment ideas, trading tips, budgeting advice and other financial content in a casual and relatable tone. They have developed large followings on social media platforms, particularly among younger audiences. They build influence and trust through consistent posting, interaction with followers and the use of hashtags such as #FinTok, #FinTwit, #StockTok, #Findependence. [17] Finfluencers earn money through sponsored content, affiliate marketing, advertising revenue from social platforms and by selling their own products or services, such as courses. [18] Virtually all finfluencers provide educational investment tips and/or specific

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[13] N. AGGARWAL, D. KAYE and C. ODINET, "#Fintok and Financial Regulation", *54 Arizona State Law Journal 333* 2023*, U Iowa Legal Studies Research Paper No. 2022-26, UCLA School of Law, Law-Econ Research Paper No. 23-01*, 2021, 3, Available at SSRN: https://ssrn.com/abstract=4216952; PFLÜCKE, F., "Regulating Finfluencers", (2022), 11, *Journal of European Consumer and Market Law*, issue 6, 213-214, https://kluwerlawonline.com/journalarticle/Journal+of+European+Consumer+and+Market+Law/11.6/EuCML2022036

[14] S. GUAN, "The Rise of the Finfluencer", *New York University Journal of Law and Business, Forthcoming, Santa Clara Univ. Legal Studies Research Paper No. 4400042*, 2022, 11, Available at SSRN: https://ssrn.com/abstract=4400042 or http://dx.doi.org/10.2139/ssrn.4400042

[15] ESMA, *Final Report on the European Commission mandate on certain aspects relating to retail investor protection*, 29 Aril 2022, 33 fn. 62.

[16] *The rising role of social media 'finfluencers'*, DELOITTE (Jun. 28, 2022), www2.deloitte.com/kh/en/pages/financial-services/articles/rising-role-social-media-finfluencers.html.

[17] N. AGGARWAL, D. KAYE, and C. ODINET, "#Fintok and Financial Regulation" *54 Arizona State Law Journal 333 (2023), U Iowa Legal Studies Research Paper No. 2022-26, UCLA School of Law, Law-Econ Research Paper No. 23-01*, 2021, 2, Available at SSRN: https://ssrn.com/abstract=4216952; de Regt, A., Cheng, Z., Fawaz, R. (2023). "Young People Under 'Finfluencer': The Rise of Financial Influencers on Instagram: An Abstract." In: Jochims, B., Allen, J. (eds) Optimistic Marketing in Challenging Times: Serving Ever-Shifting Customer Needs. AMSAC 2022. Developments in Marketing Science: Proceedings of the Academy of Marketing Science. Springer, 271;

[18] F. PFLÜCKE, "Regulating Finfluencers", *Journal of European Consumer and Market Law* 2022, issue 6, 213-214.

investment tips that they post on social media platforms. These investment tips range from general tips on how to invest available funds through certain brokerage platforms to general financial education on taxes [19], comparisons of brokerage accounts and regulated savings accounts [20], to more specific investment tips such as an opinion on the price of a particular financial product [21].

According to PFLÜCKE [22], finfluencers can be divided into four categories based on their intentions and how they are remunerated:

- The first category consists of finfluencers who discuss well-intentioned investment strategies and decisions. They are primarily compensated through advertising revenue.
- The second category involves finfluencers who discuss investment strategies and decisions with a malicious intent. They aim to manipulate the price of an asset, either inflating or deflating it, for their own benefit. This could include holding the asset themselves or taking a short position, such as in a "pump-and-dump" crypto scam.
- The third category includes finfluencers who promote and sell their own non-financial products, such as online courses, books or one-on-one coaching sessions.
- The fourth category comprises finfluencers who advertise third-party products and receive a commission on sales as compensation.

In the next section, we examine the extent to which providing aforementioned content carries a risk of breaching either European or national financial laws.

II. Risks to finfluencers from a financial law perspective

6. The premise of our analysis lies in the recognition that the provision of information constitutes a fundamental right and an important facet of the broader concept of freedom of expression, as enshrined in Article 11 of the EU Charter of Fundamental Rights. At the same time, financial regulation aims to ensure the stability of the financial system and the protection of investors. Financial legislation therefore intervenes when the information provided by the finfluencer meets the criteria for being categorised as "investment advice", "investment recommendations" or is considered to be financial advertising. [23]

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[19] www.youtube.com/watch?v=sADnR8p9SGM https://thecollegeinvestor.com/21317/best-online-stock-brokers/; www.youtube.com/shorts/H1-l-LbG3Fc;

[20] www.youtube.com/watch?v=ML41jHoR8a0; https://thomasguenter.medium.com/spaarboekje-overheid-brengt-meer-op-dan-beste-spaar-en-termijnrekening-6452fbcc7165

[21]www.youtube.com/watch?v=-6Mk61HHnqUhttps://www.tiktok.com/@quicktrades/video/7049816688283487534?is_from_webapp=1&sender_device=pc&web_id=7142886837647377925

[22] F. PFLÜCKE, "Regulating Finfluencers", *Journal of European Consumer and Market Law* 2022, issue 6, 213-214, https://kluwerlawonline.com/journalarticle/Journal+of+European+Consumer+and+Market+Law/11.6/EuCML2022036

[23] Under Belgian law, the information provided by the finfluencer may also qualify as 'financial planning advice' under the Financial Planning Act. See further: Wet van 25 april 2014 inzake het statuut van en het toezicht op de

In the context of this paper, it is important to note that the Unfair Commercial Practices Directive 2005/29/EC (hereafter: **UCPD**) has been excluded from our current analysis [24]. Nevertheless, it is worth noting that finfluencers are very likely to fall within the scope of the UCPD and will need to comply with its provisions. This includes, *inter alia*, compliance with the provisions on misleading practices set out in Articles 6 and 7 UCPD, as well as the requirement for transparent identification of commercial communications under Article 7(2) UCPD.

A. Investment advice

7. The relevant regulation on "investment advice" can be found in the Markets in Financial Instruments Directive II (hereafter: **MiFID II**) [25], and Delegated Regulation (EU) 2017/565 (hereafter: **MiFID II Delegated Regulation**) [26]. MiFID II is a regulatory framework established by the EU to govern financial markets and protect investors. Important for the purposes of this chapter is that MiFID II imposes various requirements on regulated financial institutions [27] when providing investment advice.

8. Investment advice is defined as "the provision of personal recommendations to a client, either upon its request or at the initiative of the investment firm, in respect of one or more transactions relating to financial instruments". [28] According to MiFID II, persons who provide investment services (such as investment advice) and/or perform investment activities as a regular occupation or business on a professional basis are subject to prior authorisation [29] by their home Member State in order to protect investors and the stability of the financial system. [30] Providing investment advice without the required authorisation under MiFID II is considered an infringement and can lead to sanctions. [31]

onafhankelijk financieel planners en inzake het verstrekken van raad over financiële planning door gereglementeerde ondernemingen en tot wijziging van het wetboek van vennootschappen en van de wet van 2 augustus 2002 betreffende het toezicht op de financiële sector en de financiële diensten.

[24] For more about the UCPD, see chapter *.

[25] Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (MiFID II).

[26] Commission Delegated Regulation (EU) 2017/565 of 25 April 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive.

[27] Such as investment firms (as defined in Article 4(1)(1) of MiFID II), credit institutions when providing investment services and activities (within the meaning of Article 4(1)(2) of MiFID II), investment firms and credit institutions (when selling or advising clients in relation to structured deposits), external Alternative Investment Fund Managers (AIFMs) (as defined in Article 5(1)(a) of the AIFMD) when providing investment advice under Article 6(4) (b) of the AIFMD and management companies (as defined in Article 2(1)(b) of the UCITS Directive), when providing investment advice under Article 6(3) , first subparagraph, (b) (i), of the UCITS Directive.

[28] Art. 4(1)(4) MiFID II.

[29] However, if the person qualifies for the exemptions set out in Article 2(1) of MiFID II or falls under an optional exemption applied by a Member State within the boundaries of Article 3 of MiFID II, then the person is not subject to the obligations imposed by MiFID II.

[30] Art. 5(1) MiFID II.

[31] Art. 70 MiFID II.

9. In practice, determining whether a communication qualifies as investment advice under MiFID involves satisfying five key tests, each of which must be answered in the affirmative. [32] For finfluencers, three key elements of the five key test are relevant, namely: (i) whether the communication constitutes a "personal recommendation"; (ii) whether the communication is directed exclusively to the public; and (iii) whether the communication relates to a transaction in a particular financial instrument.

Based on the definition in MiFID II, it is highly unlikely that a finfluencer's communication would qualify as "investment advice" due to the essential requirement of a "personal recommendation". This type of recommendation is only established when the advice is directly related to the individual circumstances of the viewer. [33] Conversely, the provision of objective information, such as facts or figures, without any comment or suggestion to the viewer, is not a recommendation. [34] As finfluencers often communicate in broad and general terms, their content will often fall outside the scope of a personal recommendation and therefore will not qualify as investment advice. However, there may be situations where a finfluencer's "tips" are tailored to an individual's situation, such as through specific courses or Q&A sessions, which may lead to a circumstance where that tip could be considered a "personal recommendation".

A second major reason why there may not be "investment advice" is if the finfluencer's communication is directed to the public, as Article 9 of the MiFID II Delegated Regulation states that a "recommendation" is not considered to be a "personal recommendation" if it is made exclusively to the public. Most finfluencers distribute their content through a publicly accessible social media platform, so at first glance, a finfluencer communicating through such channels may not be considered to be providing investment advice under MiFID II. However, according to the ESMA's Q&A, "a recommendation concerning financial instruments made through internet websites, investment apps, and/or social media (including through (f)influencers) could, in certain instances, be regarded as a personal recommendation and not as issued exclusively to the public". [35] The use of the phrase "in certain instances" could, as noted above, imply a recommendation directed to a specific individual during a (private) Q&A session, or advice that is publicly stated but directed to a specific individual. In either scenario, a case-by-case analysis will be required to assess the specific communication of the finfluencer.

Finally, the finfluencer content may also not qualify as "investment advice" if the communication does not focus on financial instruments. It is also important that the investment tips relate to a *specific* financial instrument. General advice on a particular type of instrument, for example general information on bonds versus equities, or general

[32] ESMA, *Supervisory briefing on understanding the definition of advice under MiFID II*, 11 July 2023, 5-6, www.esma.europa.eu/sites/default/files/2023-07/ESMA35-43-3861_Supervisory_briefing_on_understanding_the_definition_of_advice_under_MiFID_II.pdf.
[33] ESMA, *Supervisory briefing on understanding the definition of advice under MiFID II*, 20 No. 67.
[34] ESMA, *Supervisory briefing on understanding the definition of advice under MiFID II*, 10 No. 27 and 28.
[35] ESMA, *Supervisory briefing on understanding the definition of advice under MiFID II*, 23 No. 78.

recommendations are not investment advice. [36] It should also be noted that not all finfluencers focus exclusively on financial instruments, but also, for example, on crypto-assets, which will be discussed separately in Part IV of this chapter.

B. Investment recommendation

10. Although many communications from finfluencers may not meet the criteria for being considered "investment advice" according to MiFID II, [37] certain statements have the potential to fall under the scope of the Market Abuse Regulation (hereafter: **MAR**). [38] The MAR is intended to bolster market integrity and safeguard investors by prohibiting insider trading, market manipulation, and the unlawful disclosure of inside information. For finfluencers, it is important to note that the MAR imposes obligations when making "investment recommendations". These rules related to "investment recommendations" are designed to prevent investors from being misled by allowing them to assess the credibility of an investment recommendation and the interests of the producer or publisher of the recommendation. [39]

It is worth noting that the rules under the MAR extend to situations where a person, whether residing inside or outside the EU, disseminates to a wide audience information proposing an investment decision in relation to EU financial instruments. [40] The act of disseminating information includes, *inter alia*, the exchange of opinions on the current or future price of particular shares. [41]

11. An investment recommendation is defined in Article 3(1)(35) of the MAR as "information recommending or suggesting an investment strategy, explicitly or implicitly, concerning one or several financial instruments or the issuers, including any opinion as to the present or future value or price of such instruments, intended for distribution channels or for the public".

Following Article 3(1)(34) of the MAR "information recommending or suggesting an investment strategy means information:

(i) produced by an independent analyst, an investment firm, a credit institution, any other person whose main business is to produce investment recommendations or a natural person working for them under a contract of employment or otherwise,

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[36] ESMA, *Supervisory briefing on understanding the definition of advice under MiFID II*, 15 No. 48. See also, *inter alia*, A. VAN IMPE, *MiFID II & MiFIR: Capita Selecta*, Limal, Anthemis, 2018, 201 No. 16.
[37] Cf. *supra*.
[38] Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (Market Abuse Regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC6/EC, OJ EU 2014, L173/1.
[39] AFM, *Investment Recommendations*, 2017, 4-5, www.afm.nl/~/profmedia/files/wet-regelgeving/marktmisbruik/brochure-investment-recommendations.pdf?la=en.
[40] ESMA, *ESMA's Statement on Investment Recommendations on Social Media*, 2021, 1.
[41] *Ibid*.

which, directly or indirectly, expresses a particular investment proposal in respect of a financial instrument or an issuer; or

(ii) produced by persons other than those referred to in point (i), which directly proposes a particular investment decision in respect of a financial instrument."

The definition of an investment recommendation is much broader than that of investment advice, which means that a finfluencer's opinion will quite quickly qualify as an "investment recommendation".

In assessing whether a communication qualifies as an "investment recommendation", the focus should be on the content of the communication itself, regardless of its name or label, as well as the delivery method, format or medium used. [42] In terms of the medium through which investment recommendations can be provided, ESMA explains that investment recommendations can certainly be made through social media: "Distribution channels can be analyst reports, articles, the traditional media, or even social media." [43] In its 2021 report, the AFM confirms that "expressing an opinion as to the value or price of a share on social media can easily qualify as an investment recommendation". [44]

Of course, before there can be an "investment recommendation", there must always be a "recommendation". Consequently, any communication that contains purely factual information about one or more financial instruments or issuers would not constitute an investment recommendation. [45] Content indicating that a financial instrument is "undervalued", "fairly valued" or "overvalued" should be considered as implicitly recommending or suggesting an investment strategy under Article 3(1)(34) of the MAR. [46]

Finally, an "investment recommendation" is contingent upon the circumstance wherein the communication pertains to "one or more financial instruments or their issuers". Communication that does not refer to either a financial instrument or an issuer, should generally not be considered an investment recommendation. [47]

12. In itself, the provision of an investment recommendation is not problematic as long as the person making the recommendation complies with the prescribed rules. In this regard, the

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[42] ESMA, *Questions and Answers on the Market Abuse Regulation (MAR)*, 25 November 2022, 32.

[43] ESMA, *ESMA's Statement on Investment Recommendations on Social Media*, 28 October 2021, (1-2), 1, www.esma.europa.eu/sites/default/files/library/esma70-154-2780_esmas_statement_on_investment_recommendations_on_social_media.pdf.

[44] AFM, *The pitfalls of 'finfluencing' - Exploratory study by the AFM into investor protection requirements relating to social media posts*, 9, www.afm.nl/~/profmedia/files/publicaties/2021/pitfalls-of-finfluencing.pdf.

[45] ESMA, *Questions and Answers on the Market Abuse Regulation (MAR)*, 25 November 2022, 34.

[46] Cf. ESMA, *Questions and Answers on the Market Abuse Regulation (MAR)*, 25 November 2022, 33-34.

[47] ESMA, *Questions and Answers on the Market Abuse Regulation (MAR)*, 25 November 2022, 32. ESMA explains "Communication relating solely to spot currency rates, sectors, interest rates, loans, commodities, macroeconomic variables or industry sectors and not referring to a financial instrument or an issuer would be considered as investment recommendation where it contains information assessed as allowing a reasonable investor to deduce that the communication is implicitly recommending specific financial instruments or issuers and provided that the other criteria of the definition of "investment recommendation" within the meaning of Article 3(1)(35) of MAR in conjunction with Article 3(1)(34) of MAR are met."

MAR provides that those who make investment recommendations shall take reasonable care to ensure that such information is objectively presented and must disclose their interests or indicate conflicts of interest concerning the financial instruments to which that information relates. [48] Furthermore, if a person suggests an investment strategy and thereby presents itself as having financial expertise or experience, or puts forward their recommendation in such a way that other persons would reasonably believe they have financial expertise or experience, the person can be considered an expert. [49] For experts, additional rules need to be followed. [50]

C. Financial advertising

13. While the previous two sections discussed both investment advice and investment recommendations given on the finfluencer's own initiative, it is equally plausible to contemplate scenarios in which a financial institution remunerates a finfluencer to promote a particular financial product or service of the firm. [51] In such cases, the content produced by the finfluencer may be considered as financial advertising.

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[48] Art. 20.1 MAR.

[49] Art. 1 (a) Commission Delegated Regulation (EU) 2016/958 of 9 March 2016 supplementing Regulation (EU) No 596/2014 of the European Parliament and of the Council with regard to regulatory technical standards for the technical arrangements for objective presentation of investment recommendations or other information recommending or suggesting an investment strategy and for disclosure of particular interests or indications of conflicts of interest (Text with EEA relevance).

[50] Art. 4 Commission Delegated Regulation (EU) 2016/958 of 9 March 2016 supplementing Regulation (EU) No 596/2014 of the European Parliament and of the Council with regard to regulatory technical standards for the technical arrangements for objective presentation of investment recommendations or other information recommending or suggesting an investment strategy and for disclosure of particular interests or indications of conflicts of interest (Text with EEA relevance): "*experts shall include in the recommendation the following information in a clear and prominent manner:*
(a) if the recommendation has been disclosed to the issuer to which the recommendation, directly or indirectly, relates and it has been subsequently amended, a statement to that effect;
(b) a summary of any basis of valuation or methodology and the underlying assumptions used to either evaluate a financial instrument or an issuer, or to set a price target for a financial instrument, as well as an indication and a summary of any changes in the valuation, methodology or underlying assumptions;
(c) an indication of the place where detailed information about the valuation or methodology and the underlying assumptions is directly and easily accessible, in the event that the person who produces recommendations has not used proprietary models;
(d) an indication of the place where material information about the proprietary models used is directly and easily accessible, in the event that the person who produces recommendations has used proprietary models;
(e) the meaning of any recommendation made, such as the recommendations to 'buy', 'sell' or 'hold', and the length of time of the investment to which the recommendation relates are adequately explained and any appropriate risk warning, which shall include a sensitivity analysis of the assumptions, is indicated;
(f) a reference to the planned frequency of updates to the recommendation;
(g) an indication of the relevant date and time for any price of financial instruments mentioned in the recommendation;
(h) where a recommendation differs from any of their previous recommendations concerning the same financial instrument or issuer that has been disseminated during the preceding 12-month period, the change(s) and the date of that previous recommendation are indicated; and
(i) a list of all their recommendations on any financial instrument or issuer that were disseminated during the preceding 12-month period, containing for each recommendation: the date of dissemination, the identity of the natural person(s) referred to in Article 2(1)(a), the price target and the relevant market price at the time of dissemination, the direction of the recommendation and the validity time period of the price target or of the recommendation."; ESMA, *ESMA's Statement on Investment Recommendations on Social Media*, 28 October 2021, (1-2), 2.

[51] If the finfluencer is remunerated based on the number of new clients brought in through the finfluencer" channel, this is likely to be considered an inducement under MiFID II, which is in principle not allowed. See further L. SILVERENTAND, J. SPRECHER and L. SIMONS, "Inducements" in D. BUSCH and G. FERRARINI (eds.), *Regulation of the EU Financial Markets. MiFID II and MiFIR*, Oxford, Oxford University Press, 2017, 439–467; N. DE WAELE and S. KIERSZENBAUM, "The MiFID II Rules on Conflicts of Interest and Inducements: Reinforcement of

The regulation of financial advertising in the EU primarily resides at the level of the Member States – i.e., there is currently no harmonised European legislation governing the practice of financial advertising across all financial sectors. Nevertheless, distinct regulations exist within each sphere of the financial sector, encompassing guidelines applicable to regulated financial institutions when they seek to promote their own products or services. To illustrate, Article 24(3) of MiFID II requires investment firms to ensure that all information, including marketing communications, provided to clients and potential clients is fair, clear and not misleading. Subsequently, Article 44 of MiFID II Delegated Regulation delineates additional substantive prerequisites for "fair, clear and not misleading information". [52]

Thus, when regulated financial institutions launch a marketing campaign about their products or services, they must take into account the relevant EU sectoral financial legislation applicable to them, as well as any applicable local laws on financial advertising of the country where the communication is directed to its market. Depending on these national rules, finfluencers may also be subject to certain rules. [53]

14. In Belgium, the legal regime for financial advertising is mainly established by a combination of the Prospectus Regulation [54], the Belgian Prospectus Law [55], and the Royal Decree of 25 April 2014 [56]. The Prospectus Regulation regulates the advertising of a public offer or admission to trading of securities, while the Belgian Prospectus Law is broader and applies to investment instruments. [57] If the finfluencer is instructed to advertise a public offering in Belgium, then the finfluencer will be considered as an intermediary for the purposes of the

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the MiFID I Framework" in V. COLAERT, I. DE MEULENEERE, W. KUPERs and A.S. PIJCKE (eds.), *MiFID II & MiFIR: Capita Selecta*, Limal/Antwerpen-Cambridge, Anthemis/Intersentia, 2018, 115-153.

[52] For example, article 44 (2) MiFID Delegated Regulation: *Investment firm shall ensure that the information referred to in paragraph 1 complies with the following conditions:*
(a) the information includes the name of the investment firm,
(b) the information is accurate and always gives a fair and prominent indication of any relevant risks when referencing any potential benefits of an investment service or financial instrument,
(c) the information uses a font size in the indication of relevant risks that is at least equal to the predominant font size used throughout the information provided, as well as a layout ensuring such indication is prominent,
(d) the information is sufficient for, and presented in a way that is likely to be understood by, the average member of the group to whom it is directed, or by whom it is likely to be received,
(e) the information does not disguise, diminish or obscure important items, statements or warnings,
(f) the information is consistently presented in the same language throughout all forms of information and marketing materials that are provided to each client, unless the client has accepted to receive information in more than one language,
(g) the information is up-to-date and relevant to the means of communication used.

[53] For example, in the Netherlands, the AFM confirms that finfluencers may receive a remuneration for financial advertisements on behalf of brokers and/or banks. However, the finfluencer is subject to a.o. the Dutch Advertising Code, the Advertising Code for Social Media & Influencer Marketing, and in some cases, the Dutch Media Act. Cf. AFM, *Finfluencing*, www.afm.nl/en/sector/themas/digitalisering/finfluencing.

[54] Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC.

[55] Law of 11 July 2018 on public offers of investment instruments and admission to trading of investment instruments on a regulated market .

[56] Royal Decree of 25 April 2014 on certain information obligations for the marketing of financial products to retail clients.

[57] FSMA, *FAQs about advertisements for investment instruments when they are offered to the public, admitted to trading and distributed to retail clients*, FSMA_2021_09, 2021, 5.

Belgian Prospectus Law and will therefore have to comply with the advertising rules of this law. [58] On the other hand, the Royal Decree of 25 April 2014 deals with the professional marketing and advertising of financial products, namely investment products, savings products and insurance products. [59] All advertisements disseminated to retail clients for the marketing of financial products by the regulated entity [60] must meet the relevant advertising conditions of the Royal Decree. Furthermore, and crucially for the finfluencer, any person who receives, directly or indirectly, any remuneration or benefit in connection with the marketing is deemed to be acting on behalf of the regulated entity. Therefore, a finfluencer who is paid or even receives an indirect benefit (e.g. lower transaction fees or a more favourable interest rate on loans) for promoting a financial product, must comply with the relevant rules on advertising of the Royal Decree of 25 April 2014. "Marketing" is defined as "presenting a financial product, in any way whatsoever, with a view to encouraging an existing or potential retail client to purchase, subscribe to, enter into, accept, subscribe for or open the financial product". [61] An "advertisement" means "any communication intended specifically to promote the purchase of a financial product, regardless of the channel by which or the way in which it is done". [62] The Belgian Financial Services and Markets Authority (hereafer: **FSMA**) has confirmed in its relevant circular that advertisements shared via social media fall within the scope of the Royal Decree of 25 April 2014. [63] Finfluencer content advertising on financial products in Belgium must comply with various general requirements [64] and minimum content [65] as set out in the Royal Decree of 25 April 2014.

The question remains as to whether a finfluencer is subject to financial advertising rules when it advertises a financial service of a regulated entity in Belgium. As the Prospectus Regulation

[58] Article 22 of the Prospectus Law stipulates that these conditions apply to all advertisements and other documents distributed on the initiative of the issuer, the offeror, the applicant for admission to trading or their appointed intermediaries. According to the FSMA's FAQ on crypto-assets, an influencer qualifies as an intermediary for distribution purposes. See FSMA, *FAQ about crypto*, 3, www.fsma.be/en/faq/faq-about-crypto. By analogy, a finfluencer can be considered as an intermediary for advertising purposes under the Prospectus Law.

[59] Article 2, first paragraph, 39° of the Law of 2 August 2002 on the supervision of the financial sector and on financial services. See Article 2, 12° of the Royal Decree 25 April 2014. See Article 2, 13° of the Royal Decree 25 April 2014. See Article 2, 14° of the Royal Decree 25 April 2014.

[60] More specifically, the manufacturer, the regulated distributor or the regulated intermediary, provided that they are in a position to issue, transfer or open the financial products in question.

[61] Article 2, 1° Royal Decree 25 April 2014.

[62] Article 2, 11° Royal Decree 25 April 2014.

[63] FSMA Circular FSMA_2015_16 of 27/10/2015 (update 30/07/2019).

[64] To illustrate, the information contained in the advertisement must not be inaccurate or misleading; important matters, statements or warnings shall not be concealed, weakened or obscured; advertising must be clearly recognisable as such; the information is presented in such a way as to be comprehensible to a non-professional client; the potential benefits of the financial product should not be emphasised without also providing a correct, clear and balanced indication of the risks, limitations or conditions involved. The limitations, risks or conditions should be presented legibly in a character size that is at least identical to the character size used for the benefits (…).

[65] For example: the name of the financial product; if the name of the financial product does not refer to the name of its manufacturer or if it conflicts with the main risks associated with the product, additional information shall be prominently included in addition to the name of the product in order to draw the attention of non-professional clients specifically to this fact; with regard to investment instruments: a concise indication of the savings or investment objective, a statement of all costs and fees charged to the retail client, a brief description of the main risks and, if the financial product is directly or indirectly exposed to a potential credit risk of more than 35% on one or more specific entities, the identity and creditworthiness of such entity(ies) shall be prominently disclosed; (…).

and the Belgian Prospectus Law only cover advertising for a public offer or an admission to trading of *securities* or *investment instruments*, and the Royal Decree of 25 April 2014 only covers the advertising in connection with the marketing of *financial products*, [66] we conclude that the advertising of financial services by a third party falls out of the scope of these Belgian financial advertising rules. The same conclusion applies to payment instruments since they are not subject to these financial advertising rules. Furthermore, Book VII of the Belgian Code of Economic Law, which regulates payment services, does not include any provisions on third-party advertising of payment instruments. In any case, when offering financial services, the marketing communications of the Belgian financial institution must be fair, clear and not misleading. Marketing communications must be clearly identifiable as such (article 27bis of the Law of 2 August 2002 on the supervision of the financial sector and on financial services). Under MiFID II, there are (currently) no provisions regulating third-party advertising carried out in the name and on behalf of the investment firm. Of course, as mentioned above, the EU Directive on Unfair Commercial Practices 2005/29/EC is likely to be applicable.

Finally, new rules on financial advertising are in the pipeline as the European Commission has adopted a Retail Investment Package [67] aimed at better protecting retail investors when making investment decisions in line with their needs and preferences. [68] Part of this protection relates to influencer marketing, where the proposed measures aim to implement stricter rules for marketing communications in the financial industry. It introduces new rules to prevent unbalanced or misleading marketing practices and clarifies the responsibilities of investment firms, particularly in relation to digital channels and the involvement of third parties. Investment firms will be required to have a defined marketing communications policy to ensure that advertisements are fair, clear, and not misleading. In addition, investment firms will be held liable for the content and compliance of marketing communications, irrespective of whether finfluencers or other third parties are compensated or merely motivated to produce promotional content. Furthermore, there will be a new requirement to display risk warnings in all information materials related to "particularly risky products". [69]

[66] Article 2, 3° Royal Decree 25 April 2014.
[67] Proposal for a Directive of the European Parliament and of the Council amending Directives (EU) 2009/65/EC, 2009/138/EC, 2011/61/EU, 2014/65/EU and (EU) 2016/97 as regards the Union retail investor protection rules.
[68] European Commission, *Questions and answers on the Retail Investment Package*, https://ec.europa.eu/commission/presscorner/detail/en/qanda_23_2869.
[69] M. RAETZ, F. GLASOW, A. HOLDNER, A. GLOS, "Feels like MiFID III? - The Commission Proposal on the EU Retail Investment Strategy and what it means for firms", Freshfields Risk and Compliance Blog, 2023, https://riskandcompliance.freshfields.com/post/102iiuy/feels-like-mifid-iii-the-commission-proposal-on-the-eu-retail-investment-strat.

III. Exoneration of MiFID and MAR obligations

15. As mentioned in the introduction, many finfluencers preface their content with disclaimers stating that they do not provide investment advice and that their content is purely intended for educational or entertainment purposes. Commonly encountered phrases include:

"*The following content is for information and educational purposes only*",

"*This is not financial advice*", or

"*Do your own research*".

By issuing these disclaimers, finfluencers attempt to safeguard themselves from potential liability in case their followers encounter unfavourable outcomes following their suggestions. The question arises as to the legal significance of such disclaimers. Specifically, in what follows we aim to examine whether these disclaimers can limit or exempt finfluencers from civil liability.

A. Exoneration for faulty "investment advice"

16. As discussed in Part II, the provisions on investment advice are governed by MiFID II. [70] In this section, we explore the legal validity of exonerations concerning MiFID II obligations by examining two key aspects: (i) the civil law implications of MiFID II and (ii) the extent to which the use of an exonerative clause or disclaimer can limit or exclude the prescribed MiFID II obligations.

1. MiFID II and civil remedies

17. MiFID II itself does not contain any provisions that answer the question to what extent a breach of these regulatory rules for investment services can be *civilly* remedied. Traditionally,

[70] Cf. Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU Text with EEA relevance.

it has been argued that it is up to individual Member States to determine this. [71] - [72] In Belgium, there is no doubt that a client has a civil claim against the investment firm that has caused him damage by not complying with the MiFID II rules. [73]

18. Given that it is left to the discretion of each Member State to determine whether or not a violation of MiFID II has civil consequences, the issue of whether an exoneration or disclaimer for incorrect investment advice, provided to a financial consumer, is legally valid, must also be addressed at the national level.

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[71] For example, see E. MEZZANOTTE, FÉLIX, "Accountability in EU Sustainable Finance: Linking the Client's Sustainability Preferences and the MiFID II Suitability Obligation", *Capital Markets Law Journal*, Volume 16, Issue 4, October 2021, 482–502, Available at SSRN: https://ssrn.com/abstract=3822367 or http://dx.doi.org/10.2139/ssrn.3822367; Of lidstaten *verplicht* zijn om in een civielrechtelijke doorwerking van MiFID II regels te voorzien bestaat geen eensgezindheid. See, *inter alia*, E CALLENS, 'Recalibrating the Debate on MiFID's Private Enforceability: Why the EU Charter of Fundamental Rights is the Elephant in the Room' (2020) Eur Bus Org Law Rev 21, 759-787; M. KRUITHOF, "De Privaatrechtelijke Werking van de MiFID-2004 Gedragsregels: Een Analyse van de Mate Waarin Zij de Wederzijdse Rechten en Plichten van Dienstverlener en Cliënt Kunnen Aanvullen En Beperken" *Financiële Regulering in de Kering*, Vol. 14, Intersentia, 2012, 273–356; M. WALLINGA, 'Why MiFID & MiFID II do (not) matter to private law: liability to compensate for investment losses for breach of conduct of business rules' (2019) *ERPL* 27, 515–56; F. DELLA NEGRA, 'MiFID II and private law: enforcing EU conduct of business rules' (Hart Publishing, Oxford 2019).
In the *Genil* Case (CJEU 30 May 2013, no C-604/11), the Court of Justice of the European Union held that in the absence of EU legislation, it is up to the Member States to determine the contractual consequences of non-compliance with MiFID I obligations, as long as those consequences are subject to the principles of equivalence and effectiveness: "It should be noted that, although Article 51 of Directive 2004/39 provides for the imposition of administrative measures or sanctions against the parties responsible for non-compliance with the provisions adopted pursuant to that directive, it does not state either that the Member States must provide for contractual consequences in the event of contracts being concluded which do not comply with the obligations under national legal provisions transposing Article 19(4) and (5) of Directive 2004/39, or what those consequences might be. In the absence of EU legislation on the point, it is for the internal legal order of each Member State to determine the contractual consequences of non-compliance with those obligations, subject to observance of the principles of equivalence and effectiveness (see, to that effect, Case C-591/10 Littlewoods Retail and Others [2012] ECR, paragraph 27 and the case-law cited)." Cf. CJEU 30 May 2013, No. C-604/11, par. 57.

[72] STEENNOT provides a more nuanced view, asserting that while it is true that MiFID II does not require Member States to provide for civil remedies for a violation of the rules of conduct, the Unfair Commercial Practices Directive (2005/29/EC), as amended by the Modernisation Directive (2019/2161), does (R. STEENNOT, "Robo-Advisory Services and Investor Protection", *Law and Financial Markets Review* 2022, 1440-1459 No. 29). This is because STEENNOT argues that a violation of the MiFID rules of conduct will often qualify as an unfair commercial practice and article 11(a) of the UCPD determines that consumers who have been harmed by an unfair commercial practice must have access to proportionate and effective remedies, including compensation for the damage suffered by the consumer (R. STEENNOT, "Robo-Advisory Services and Investor Protection", *Law and Financial Markets Review* 2022, 1440-1459 No. 29.).

[73] Cf. M. KRUITHOF, "De Privaatrechtelijke Werking van de MiFID-2004 Gedragsregels: Een Analyse van de Mate Waarin Zij de Wederzijdse Rechten en Plichten van Dienstverlener en Cliënt Kunnen Aanvullen En Beperken" *Financiële Regulering in de Kering*, Vol. 14, Intersentia, 2012, 273–356, 308 with reference to M. TISON, "De civielrechtelijke dimensie van MiFID in rechtsvergelijkend perspecief", *Ondernemingsrecht* (Nederland) 2010, 303-313, 308; G. FERRARINI, "Contract Standards and the Markets in Financial Instruments Directive (MiFID)", *European Review of Contract Law* 2005, 19-43, 20; F. FERRARINI, "Contract Standards and the Markets in Financial Instruments Directive (MiFID)", *European Review of Contract Law* 2005, 19-43, 21; W. VANDEVOORDE, "De Bescherming van de belegger herbekeken. Een commentaar bij enkele instutionele en transactionele innovaties van de Belgische bepalingen tot omzetting van Richtlijn 2004/39 (de 'MiFID-Richtlijn') en Richtlijn 2006/73", *BFR* 2007/VI, 367-395, 382; M.-D. WEINBERGER, *Gestion de portefeuille et conseil en investissement: aspects contractuels et de responsabilités avant et après MiFID,* Waterloo, Wolters Kluwer, 2008, 166 No. 233.

2. Disclaimer for faulty investment advice

19. The context in which finfluencers share their opinions through social media platforms, contractual arrangements between the finfluencer and the viewer are often absent. [74] Instead, viewers or readers simply consume the opinions expressed by finfluencers. Consequently, the majority (if not all) interactions in this context are considered non-contractual, allowing the use of disclaimers instead of exoneration clauses to manage liability concerns.

Disclaimers serve as a technique to avoid liability [75] without the need for a formal contract. The rationale behind using disclaimers lies in the recognition that liability risks persist even in the absence of a contract. If a finfluencer were to commit a fault leading to damages, they could be held liable in a non-contractual setting. Therefore, disclaimers serve as a proactive measure to preclude specific behaviours, such as the expression of opinions, from being construed as potentially erroneous.

20. The question arises whether disclaimers actually exclude liability risks. Belgian law recognises that non-contractual liability is supplementary and can, therefore, be subject to conventional modifications. [76] The Supreme Court has repeatedly asserted that Article 1382 of the old Civil Code does not fall under public policy. [77] Consequently, under Belgian law, there is no inherent objection to non-contractual exoneration (or the use of disclaimers). Nevertheless, the principle of self-determination does have its limitations. In his doctoral dissertation, VERHEYEN explains that the freedom of potentially liable persons to avoid liability through a disclaimer is not unlimited. [78] In certain regulated sectors, statutory provisions prohibit parties to deal with liability matters. [79] For instance, statutory provisions explicitly forbid the exoneration of producers' liability towards consumers. [80] In such cases, where liability becomes mandatory due to regulatory intervention, exonerations for non-

[74] In addition to extra-contractual liability risks, there may also be contractual liability risks for finfluencers that enter into contracts with their audience (e.g., when it provides additional content). However, a discussion of contractual liability risks is beyond the scope of this publication.
[75] T. VERHEYEN, *Recente ontwikkelingen in het aansprakelijkheids- en verzekeringsrecht*, Mortsel, Intersentia, 2022, 346, nr. 502. De bedoeling van een disclaimer is om te vermijden dat een bepaalde *duty* ontstaat. Cf. T. VERHEYEN, *Recente ontwikkelingen in het aansprakelijkheids- en verzekeringsrecht*, Mortsel, Intersentia, 2022, 349 No. 505.
[76] T. VERHEYEN, *Recente ontwikkelingen in het aansprakelijkheids- en verzekeringsrecht*, 284 No. 415.
[77] Court of Cassation (*Hof van Cassatie*) 10 February 1981, *Arr.Cass.* 1980-81, 643; Court of Cassation (*Hof van Cassatie*) 29 May 1984, *Arr.Cass.* 1983-84, 1258; Court of Cassation (*Hof van Cassatie*) 12 December 1986, *Arr.Cass.* 1986-87, 500; Court of Cassation (*Hof van Cassatie*) 4 January 1993, *Arr.Cass.* 1993, 1; Court of Cassation (*Hof van Cassatie*) 13 February 1993, *Arr.Cass.* 1993, 185.
[78] T. VERHEYEN, *Eenzijdige beheersing van het aansprakelijkheidsrisico*, 373, No. 536.
[79] T. VERHEYEN, *Eenzijdige beheersing van het aansprakelijkheidsrisico*, 296 No. 430.
[80] Art. 10, § 1 wet 25 februari 1991 betreffende de aansprakelijkheid voor produkten met gebreken, *Belgian Official Gazette* 22 March 1991: "De aansprakelijkheid van de producent kan ten aanzien van het slachtoffer niet worden uitgesloten of beperkt bij overeenkomst."

contractual liability are not permissible. [81] Furthermore, disclaimers are prohibited for intentional misconduct [82], fraud [83], or when they erode the legal obligation between parties [84].

As mentioned, neither MiFID II nor the Belgian national transposition contain any provisions on civil law consequences in case of disregard of MiFID II rules. Since it does not contain provisions regulating non-contractual liability law, in principle nothing precludes a finfluencer from limiting or excluding its non-contractual liability by means of a disclaimer. Important here, however, is the question of when there could be intentional misconduct, fraud or bad faith, in which case the use of a disclaimer will be prohibited. [85] Suppose the finfluencer introduces its message with the disclaimer that it does not provide investment advice, but the hypothetical scenario arises in which they subsequently do so anyway. In that case, it is difficult to defend that someone who knowingly [86] provides investment advice could exclude his extra-contractual liability by means of a "this is not investment advice" disclaimer, considering that it is not permitted to exonerate liability for intentional misconduct.

As a result, there is no inherent obstacle to finfluencers using disclaimers to limit or exclude their non-contractual liability. However, the key consideration is the determination of intent, fraud, or bad faith, as disclaimers cannot shield finfluencers from liability when they knowingly provide investment advice despite stating otherwise in their disclaimer ("this is not financial advice").

21. In addition, it is noteworthy that the ESMA concurs with the perspective that the incorporation of disclaimers does not preclude the characterisation of dispensing investment advice, given the fulfilment of all MiFID II criteria. In its recent Supervisory Briefing, the ESMA answered the question whether or not a firm could avoid providing investment advice using a disclaimer in its communications. [87] According to the ESMA, the inclusion of a disclaimer saying that the provided information was not "investment advice" does not change the nature of the communication:

> "*It is important to remember, though, that even if a clear, prominent and understandable disclaimer is provided stating that no advice or recommendation is being given, a firm could still be viewed as having presented a recommendation as suitable for the client. For example, if a firm stated that its product would suit a particular client's needs, the inclusion of a disclaimer saying that this was not advice would be unlikely to change the nature of the communication.*

[81] T. VERHEYEN, *Eenzijdige beheersing van het aansprakelijkheidsrisico*, Mortsel, Intersentia, 2021, 290 No. 423. See also, *inter alia*, S. STIJNS, *Leerboek verbintenissenrecht - Boek 1*, Brugge, die Keure/la Charte, 2022, 211.
[82] (Nl. Opzet) T. VERHEYEN, *Eenzijdige beheersing van het aansprakelijkheidsrisico*, Mortsel, Intersentia, 2021, 296 No. 430; I. CLAEYS and T. TANGHE, *Nieuw algemeen contractenrecht*, Mortsel, Intersentia, 2023, 756 No. 1010.
[83] T. VERHEYEN, *Eenzijdige beheersing van het aansprakelijkheidsrisico*, Mortsel, Intersentia, 2021, 498 No. 698; S. STIJNS, *Leerboek verbintenissenrecht - Boek 1*, 212.
[84] See Art. 5.89, §1 Civil Code. See also T. VERHEYEN, *Eenzijdige beheersing van het aansprakelijkheidsrisico*, 498, No. 698; S. STIJNS, *Leerboek verbintenissenrecht - Boek 1*, 214; I. CLAEYS and T. TANGHE, *Nieuw algemeen contractenrecht*, 758 No. 1014.
[85] Cf. *supra*.
[86] *Nemo censetur ignorare legem*.
[87] CESR, Questions & Answers, "Understanding the definition of advice under MiFID", www.cesr-eu.org (Ref. CESR/10-293), April 2010, 13.

If the other tests are also met, the firm would be viewed as providing investment advice, the disclaimers used by the firm therefore cannot prevent this qualification. Any disclaimers (or other similar types of statements) aimed at limiting the firm's responsibility with regard to the provision of advice would not in any way impact the characterisation of the service provided in practice to clients." [88]

"*While disclaimers may be of some use to firms seeking to ensure that they do not inadvertently present financial instruments as suitable for particular clients, they will also need to take other steps to achieve this. As noted earlier, a firm that does not intend to give advice will need to ensure that, for example, its internal systems and controls and staff training appropriately reflect this.*" [89]

In other words: describing a service as non-advised will not in any way impact the characterisation of the service provided in practice to clients. [90]

B. Exoneration for a faulty "investment recommendation"

22. As observed, the MAR imposes certain obligations when a communication qualifies as an "investment recommendation". Again, the question arises as to the civil law consequences in case of non-compliance with MAR obligations. The MAR stipulates administrative and criminal sanctions for non-compliance but remains silent on civil law implications. Similar to the Market in MiFID II, we explore whether a violation of MAR obligations may lead to civil law consequences, and if so, whether a finfluencer can limit or exclude these risks through a disclaimer.

1. Civil law implications of the MAR

23. As mentioned, the Market Abuse *Regulation* replaced the Market Abuse *Directive* (MAD). This Directive, like the MiFID, did not contain any provisions regarding civil law effect. Similar to MiFID, one must conclude that Member States were responsible for determining the extent to which non-compliance with the old MAD could result in civil

[88] ESMA, *Supervisory briefing on understanding the definition of advice under MiFID II*, July 2023, (1-38), 19, No. 65, available at: https://www.esma.europa.eu/sites/default/files/2023-07/ESMA35-43-3861_Supervisory_briefing_on_understanding_the_definition_of_advice_under_MiFID_II.pdf; See also: CESR, Questions & Answers, "Understanding the definition of advice under MiFID", www.cesr-eu.org (Ref. CESR/10-293), April 2010, p. 12, nr. 50.

[89] ESMA, *Supervisory briefing on understanding the definition of advice under MiFID II*, 19 No. 66, www.esma.europa.eu/sites/default/files/2023-07/ESMA35-43-3861_Supervisory_briefing_on_understanding_the_definition_of_advice_under_MiFID_II.pdf. See also CESR, Questions & Answers, "Understanding the definition of advice under MiFID", www.cesr-eu.org (Ref. CESR/10-293), April 2010, 13, No. 51.

[90] ESMA, *Supervisory briefing on understanding the definition of advice under MiFID II*, 19 No. 65; CESR, Questions & Answers, "Understanding the definition of advice under MiFID", www.cesr-eu.org (Ref. CESR/10-293), April 2010, p. 5, nr. 9; CESR, Feedback Statement, "Understanding the definition of advice under MiFID", www.cesr-eu.org (Ref. CESR/10-294), 9 No. 33; M.-D. WEINBERGER, "II. – - Examen de la définition du conseil en investissement" in M.-D. WEINBERGER (ed.), *MIFID – Questions spéciales - Bijzondere vraagstukken*, 1e édition, Bruxelles, Larcier, 2010, 253-254 No. 49.

consequences. In other words, under the MAD, as with MiFID II, there was no obligation on Member States to attribute civil law consequences to a failure to comply with MAD obligations. In the *Immofianz* case, the Court of Justice of the European Union confirmed that a Member State is only required to ensure that the principles of equivalence and effectiveness are respected when determining the extent of damages in case of non-compliance with MAD requirements:

> *"While it is true that, unlike Article 25(1) of the Prospectus Directive, Article 28(1) of the Transparency Directive and Article 14(1) of the Market Abuse Directive do not expressly refer to the civil liability regimes in the Member States, the fact remains that the Court has previously ruled that, in respect of the award of damages and the possibility of an award of punitive damages, in the absence of European Union rules governing the matter, it is for the domestic legal system of each Member State to set the criteria for determining the extent of the damages, provided that the principles of equivalence and effectiveness are observed (see, by analogy, Joined Cases C-295/04 to C-298/04 Manfredi and Others [2006] ECR I-6619, paragraph 92, and the judgment of 6 June 2013 in Case C-536/11 Donau Chemie and Others [2013] ECR, paragraphs 25 to 27)."* [91]

24. It was generally accepted in Dutch case law that an infringement of the key provisions of MAD, [92] as implemented in the Dutch Financial Supervision Act [93] until 3 July 2016, constituted a tort (unlawful act) on account of a breach of a statutory duty (Article 6: 162(2) Dutch Civil Code). BUSCH explains that under MAR, everything essentially remains unchanged in the Netherlands. [94] However, these civil law consequences of a failure to comply with MAR obligations are less self-evident in other Member States, such as Germany, and former Member State, the UK. [95]

25. To conclude under Belgian law that an infringement of a MAR obligation, and more specifically of the obligations prescribed on the matter of "investment recommendations", constitutes a civil fault, it would have to be decided that an infringement of the aforementioned

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[91] CJEU 19 December 2013, no C-174/12, NJ 2014/184, paragraph 40.
[92] Being: (i) the prohibition of insider dealing (Article 14(a) in conjunction with Article 8(1) MAR); (ii) the prohibition of unlawful recommendation and disclosure (Article 14(b) in conjunction with Article 8(2) MAR and Article 14(c) in conjunction with Article 10(1) and (2) MAR, respectively); (iii) the prohibition of market manipulation (Article 15 in conjunction with Article 12 MAR) and (iv) the requirement of prompt public disclosure of inside information (Article 17 MAR). Cf. D. BUSH, p. 297
[93] Wet op het financieel toezicht.
[94] D. BUSH, 297, who explains that in the Netherlands, it will be even easier for aggrieved investors to prove a breach of the obligation to provide public disclosure of inside information.
[95] D. BUSH, 297, with reference to, for Germany: A. HELLGARDT, "Europarechtliche Vorgaben fu¨r die Kapitalmarktinformationshaftung—de lege lata und nach Inkrafttreten der Marktmissbrauchverordnung", *Aktiengesellschaft* 5/2012, 154–68. See for the UK: P.L. DAVIES, S. Worthington and E. MICHELER, *Gower's Principles of Modern Company Law* (10th edn, Sweet & Maxwell / Thomson Reuters 2016) paras 26.24, 16.29, 30.7–30.10, 30.53, 30.55.

rules (i) violates a legal rule that imposes a certain behaviour, or (ii) implies a disregard for normal prudent behaviour. [96]

Given the fact that the European rules on market abuse currently take the form of a *regulation*, it does not need to be transposed into national law and by its very nature has a direct effect in Belgium. In contrast to other jurisdictions, the Belgian legal framework adopts the approach whereby the interests intended to be safeguarded by the law are not considered when determining a civil fault. Consequently, the violation of a statutory rule is sufficient to infer the existence of a civil fault. It is, however, required that the legal provision is clear enough, which is unmistakably the case in the case of the obligations prescribed by the MAR when issuing an investment recommendation. [97] It must, therefore, be concluded that a breach of the MAR obligation regarding investment recommendations qualifies as a civil fault under Belgian law.

2. Exoneration for MAR obligations

26. Again, we address the question of whether or not a finfluencer could exonerate himself from civil liability when violating the MAR-obligations regarding "investment recommendations". Essentially, the same reasoning applies as under MiFID II. Since it must be determined at national level whether a failure to comply with the MAR has civil law consequences, [98] the question whether exoneration or disclaimers are possible for civil law liability when violating the MAR obligations regarding "investment recommendations" must also be determined at Member State level.

Bearing in mind the limits that apply under Belgian law to extra-contractual exoneration (cf. *supra*), it seems again difficult to defend that a finfluencer could exonerate themselves if they claim not to issue an investment recommendation, and do so anyway. Such behaviour indicates that the finfluencer consciously does not wish to comply with obligations imposed on them, which is not possible since exoneration for intentional misconduct [99] is prohibited.

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[96] P. VAN OMMESLAGHE and L. SIMONT, "De aansprakelijkheid van de bankier-kredietverlener in het Belgische recht", *TPR* 1986, 1095 No. 5. See also S. STIJNS and I. SAMOY, *Leerboek verbintenissenrecht - Boek 1bis*, Brugge, die Keure/la Charte, 2020, 52 et. seq. After the reform of the law of extra-contractual liability it remains that a fault constitutes a violation of a specific legal rule or a failure to comply with a duty of care. See in this regard Art. 5.146-5.147 of the Act of 6 August 2018 inserting the provisions on extra-contractual liability in the new Civil Code. For an analysis of these new provisions, see for example: GROTIUS-POTHIER ONDERZOEKSGROEP, "Een rechtsvergelijkende analyse van de Belgische hervorming van het buitencontractuele aansprakelijkheidsrecht: enkele suggesties voor wetgever en rechter", *TBBR* 2020, issue 3, 133-137. Zie Art. 6.7, §1 Wetsvoorstel houdende boek 6 "Buitencontractuele aansprakelijkheid" van het Burgerlijk Wetboek, 8 March 2023, No. 55-3213/007, www.dekamer.be/FLWB/PDF/55/3213/55K3213001.pdf.

[97] Cf. *supra*.

[98] Cf. *supra*.

[99] (Nl. Opzet) T. VERHEYEN, *Eenzijdige beheersing van het aansprakelijkheidsrisico*, 296 No. 430; I. CLAEYS and T. TANGHE, *Nieuw algemeen contractenrecht*, 756 No. 1010.

IV. Finfluencers focussing on crypto-assets

27. A particular group of finfluencers focuses exclusively on communicating about crypto-assets. Crypto-assets are defined in the Markets in Crypto-assets Regulation (hereafter: **MiCAR**) [100] as "a digital representation of value or rights which may be transferred and stored electronically, using distributed ledger technology or similar technology". [101]

As noted above, the obligations prescribed by MiFID II and MAR only apply to finfluencers whose communication revolves around one or more financial instruments (or their issuer in the case of MAR). Consequently, for finfluencers concentrating on content about crypto-assets, the initial question is whether a crypto-asset qualifies as a financial instrument. If the subject matter of a finfluencer's communication does not qualify as a financial instrument, the obligations under MiFID II and MAR will not apply. In order to establish analogous obligations for crypto-assets, steps have been taken at the European level to create a parallel legal framework for situations involving crypto-assets that are not financial instruments. Thus, if the communication concentrates on financial instruments, traditional financial regulations, including MiFID II and MAR, will apply. However, if the content of a finfluencer focuses solely on crypto-assets that do not qualify as financial instruments, in the future, the rules of the Markets in Crypto-assets Regulation (MiCAR) will apply. The MiCAR was published on the 31 of May 2023, but will not apply until 30 December 2024, with the exception of Titles III (Asset-Referenced Tokens) and IV (E-Money Tokens), which will apply from 30 June 2024.

Hereafter, we will explain the essential nature of a financial instrument and the criteria for classifying a crypto-asset as a financial instrument. Furthermore, we will examine the MiCAR, which aims to introduce obligations similar to those found in MiFID II. In particular, we will focus on the obligations that may arise for finfluencers who primarily communicate about crypto-assets that do not qualify as financial instruments.

[100] Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31 May 2023 on markets in crypto-assets, and amending Regulations (EU) No 1093/2010 and (EU) No 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937.
[101] Art. 3.1(5) MiCAR.

A. Financial instrument according to MiFID II

1. Financial instruments

28. As outlined above, the content produced by a finfluencer may qualify, under certain circumstances, as "investment advice" or an "investment recommendation". Crucially, for such advice or recommendation, the finfluencer's opinion must pertain to a (specific) financial instrument (or, in the case of a recommendation, to the issuer of such an instrument). In other words, if the subject matter on which the finfluencer is commenting does not meet the criteria of a financial instrument, then it cannot be considered to be an "investment advice" or an "investment recommendation". Therefore, it is essential to address whether crypto-assets qualify as financial instruments.

29. The definition of a financial instrument can be found in MiFID II. Article 4(1)(15) of MiFID II defines a financial instrument as "those instruments specified in Section C of Annex I". [102] This list includes (i) transferable securities; (ii) money market instruments; (iii) units in collective investment undertakings; (iv) various derivative instruments; and (v) certain emission allowances. [103] Since "crypto-assets" are not explicitly listed, they can only qualify as financial instruments if they fall within one of the enumerated categories.

i. Crypto-assets as "transferable securities"

30. In 2019, the ESMA stated that certain crypto-assets could potentially be classified as "transferable securities". [104] This viewpoint had already been supported in academic literature for some time.[105]

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[102] As implemented by Art. 2, 3° of the Investment Services Act, which cross-refers to Art. 2, 1° of the Act of 2 August 2002.

[103] More specifically, Annex I, Part C, MiFID II contains the following list of financial instruments: "*(1) Transferable securities; (2) Money-market instruments; (3) Units in collective investment undertakings; (4) Options, futures, swaps, forward rate agreements and any other derivative contracts relating to securities, currencies, interest rates or yields, emission allowances or other derivatives instruments, financial indices or financial measures which may be settled physically or in cash; (5) Options, futures, swaps, forwards and any other derivative contracts relating to commodities that must be settled in cash or may be settled in cash at the option of one of the parties other than by reason of default or other termination event; (6) Options, futures, swaps, and any other derivative contract relating to commodities that can be physically settled provided that they are traded on a regulated market, a MTF, or an OTF, except for wholesale energy products traded on an OTF that must be physically settled; (7) Options, futures, swaps, forwards and any other derivative contracts relating to commodities, that can be physically settled not otherwise mentioned in point 6 of this Section and not being for commercial purposes, which have the characteristics of other derivative financial instruments; (8) Derivative instruments for the transfer of credit risk; (9) Financial contracts for differences; (10) Options, futures, swaps, forward rate agreements and any other derivative contracts relating to climatic variables, freight rates or inflation rates or other official economic statistics that must be settled in cash or may be settled in cash at the option of one of the parties other than by reason of default or other termination event, as well as any other derivative contracts relating to assets, rights, obligations, indices and measures not otherwise mentioned in this Section, which have the characteristics of other derivative financial instruments, having regard to whether, inter alia, they are traded on a regulated market, OTF, or an MTF; (11) Emission allowances consisting of any units recognised for compliance with the requirements of Directive 2003/87/EC (Emissions Trading Scheme).*"

[104] ESMA, *Advice on Initial Coin Offering and Crypto-Assets, 9 January 2019*, ESMA50-157-1391, 23. See also A. CHAMBEROD, "Services d'investissement relatifs aux crypto-actifs – Impact pour les sociétés de bourse" in R. JAFFERALI et al. (eds.), *Entre tradition et 19uropa19ism*, Brussels, Larcier, 2021, 1019.

[105] For example, see P. HACKER and C. THOMALE, "Crypto-Securities Regulation: ICOs, Token Sales and Cryptocurrencies under EU Financial Law" (30 November 2017), 20-25 (Available at:

According to Article 4(1)(44) MiFID II, "transferable securities" are "those classes of securities which are negotiable on the capital market, with the exception of instruments of payment, [106] such as:

- shares in companies and other securities equivalent to shares in companies, partnerships or other entities, and depositary receipts in respect of shares;
- bonds or other forms of securitised debt, including depositary receipts in respect of such securities;
- any other securities giving the right to acquire or sell any such transferable securities or giving rise to a cash settlement determined by reference to transferable securities, currencies, interest rates or yields, commodities or other indices or measures".

To determine whether a specific crypto-asset can be considered a "transferable security", it is necessary to investigate whether the particular crypto-asset (i) is transferable, (ii) is negotiable on the capital markets, (iii) is standardised, and (iv) is comparable to a list of examples of typical transferable securities. [107]

31. In an effort to determine the legal status of crypto-assets and determine possible applicability of EU financial regulation, ESMA undertook a survey of National Competent Authorities (hereafter: **NCAs**) in the summer of 2018 with the aim to collect detailed feedback on the possible legal qualification of crypto-assets as financial instruments. [108] The survey showed that:

www.ssrn.com/abstract=3075820); I. BARSAN, "Legal Challenges of Initial Coin Offerings (ICO)" (2 November 2017), Revue Trimestrielle de Droit Financier (RTDF), n° 3, 2017, 62-63 (Available at: www.ssrn.com/abstract=3064397); P. MAUME and M. FROMBERGER, "Regulation of Initial Coin Offerings: Reconciling US and EU Securities Laws" (15 June 2018), 29-43 (Available at: www.ssrn.com/abstract=3200037); L. KLOHN, N. PARHOFER and D. RESAS, "Initial Coin Offerings (ICOs): Economics and Regulation" (26 november 2018), 27-33 (Available at: www.ssrn.com/abstract=3290882). See also SECURITIES AND MARKETS STAKEHOLDER GROUP, "Advice to ESMA: Own Initiative Report on Initial Coin Offerings and Crypto-Assets" (19 oktober 2018), ESMA22-106-1338, 12-16 (Available at: www.esma.europa.eu/sites/default/files/library/esma22-106-1338_smsg_advice_-_report_on_icos_and_crypto-assets.pdf).

[106] European Commission, *Q&As on MiFID*, 1, www.ec.europa.eu/info/file/80605/download_en?token=eUK6oZzj: "Instruments of payment' are securities which are used only for the purposes of payment and not for investment. For example, this notion usually includes cheques, bills of exchanges, etc." See further N. VANDEZANDE, *Crypto-assets: the European Legal Framework*, Mortsel, Intersentia, 2023, 282.

[107] These elements have already been extensively analysed in legal literature and it is not our intention to repeat this analysis. See P. HACKER and C. THOMALE, "Crypto-Securities Regulation: ICOs, Token Sales and Cryptocurrencies under EU Financial Law", 30 November 2017, 19-25, www.ssrn.com/abstract=3075820; P. MAUME and M. FROMBERGER, "Regulation of Initial Coin Offerings: Reconciling US and EU Securities Laws", 15 June 2018, 29-40, www.ssrn.com/abstract=3200037; K. PAUWELS and A. SNYERS, "De ITO: A new kid on the block in het kapitaalmarktenrecht", *RDC-TBH* 2019, issue 2, 188-191; M. HOBZA, "ICOs, Cryptoassets and MiFID II: Are Tokens Transferable Securities?", 5 November 2020, 5-9, https://ssrn.com/abstract=3725996. See further N. VANDEZANDE, *Crypto-assets: the European Legal Framework*, Mortsel, Intersentia, 2023, 285-296, who makes a further distinction between cryptocurrencies intended as a means of payment and cryptocurrencies intended as a means of investment.

[108] ESMA, *Advice on Initial Coin Offering and Crypto-Assets*, 9 January 2019, ESMA50-157-1391, 19 No. 81.

- "*Only four jurisdictions have developed the definition of 'class' in their regulation. Independently of whether the term 'class' has been introduced at national level, NCAs reported a similar interpretation, namely to form a class, units (i.e. crypto-assets in the cases presented) need to be interchangeable (some referred to the terms fungible/replicable with one another' or 'identical'), issued by the same issuer, show similarities and give access to the same (equal) rights to the same group of investors. Such rights can include the right to receive a portion of company's profit in the form of dividends, the right to participate in community management, e.g., voting rights, the right over a portion of company's assets or rights to share any surplus in the event of liquidation*". [109]
- "*Some NCAs (nine) completed the interpretation of a 'class' by the following criteria: to form a class, units should share the same characteristics, e.g., have the same nominal value, and/or represent standardised issued units, meaning that the contents/attributes of each security are not individually negotiated with investors, which allows them to be easily traded on a capital market.*" [110]

Consequently, following the interpretations mentioned above, some crypto-assets could be considered a "class of securities". [111] Furthermore, a "class" can only exist when the crypto-assets can be traded without further negotiations between parties. [112]

32. Regarding the negotiability on the capital markets, MiFID II does not provide a definition thereof.

In its Q&A of 2007, the European Commission explained that the concept of "negotiability" contains the notion that the instrument is tradable. [113] The reference to "capital markets" is also not defined, but the European Commission explains that the concept is broad and is meant to include all contexts where buying and selling interest in securities meet. [114]

Given the explanation given by the European Commission, in order to be "negotiable of the capital market", SNEYERS and PAUWELS conclude that securities do not need to be traded

[109] ESMA, *Annex 1 - Legal qualification of crypto-assets - survey to NCAs*, January 2019, ESMA50-157-1384, 4-5 No. 16.
[110] ESMA, Annex 1 - Legal qualification of crypto-assets - survey to NCAs, 5 No. 17.
[111] ESMA, Annex 1 - Legal qualification of crypto-assets - survey to NCAs, 5 No. 18.
[112] On this matter, see also P. MAUME and M. FROMBERGER, "Regulation of Initial Coin Offerings: Reconciling US and EU Securities Laws", 15 June 2018, 37, www.ssrn.com/abstract=3200037; K. PAUWELS and A. SNYERS, "De ITO: A new kid on the block in het kapitaalmarktenrecht", *RDC-TBH* 2019, issue 2, 189.
[113] European Commission, *Q&As on MiFID*, 22 February 2007, 22, https://financialmarketstoolkit.cliffordchance.com/content/dam/microsites/micro-facm/pdf/MiFID/MiFID1%20full%20text%20Q%20and%20A.pdf
[114] European Commission, *Q&As on MiFID*, 22 February 2007, 22, https://financialmarketstoolkit.cliffordchance.com/content/dam/microsites/micro-facm/pdf/MiFID/MiFID1%20full%20text%20Q%20and%20A.pdf

on a regulated market. [115] To qualify as "negotiable on the capital market", it is sufficient that crypto-assets are tradable on *exchanges*. [116]

33. Another element that is currently relevant in determining whether a crypto-asset is a transferable security is the presence or absence of an identifiable issuer against whom the holder of the crypto-asset can assert rights. [117] In Belgium, the FSMA has indicated that where there is no issuer, for example where computer code generates crypto-assets without the existence of a legal relationship between two parties (for example, Bitcoin and Ether), the MiFID rules of conduct are in principle not applicable: "*If there is no issuer, as in cases where instruments are created by a computer code and this is not done in execution of an agreement between issuer and investor (for example, Bitcoin or Ether), then in principle the Prospectus Regulation, the Prospectus Law and the MiFID rules of conduct do not apply.*" [118]

ii. Interim conclusion: are crypto-assets financial instruments?

34. The determination of whether a crypto-asset qualifies as a financial instrument is contingent upon a variety of factors. Classifying a crypto-asset as a financial instrument under the MiFID II hinges on how Member States interpret the notion of a "transferable security". A case-by-case analysis will always be required, where each crypto-asset must be assessed to ascertain whether it meets the criteria of a "transferable security".

Of particular significance in this classification process is the requirement that the crypto-asset must be issued by an identifiable issuer, and not solely generated through computer code.[119] This issuer-driven distinction holds considerable weight in determining whether the asset falls within the scope of a "transferable security" under MiFID II. [120]

It is important to note that the assessment of "transferable security" occurs at the national level, which can lead to divergent outcomes. As a result, a crypto-asset might be deemed a "transferable security" in one Member State but not in another, resulting in a fragmentation of

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[115] K. PAUWELS and A. SNYERS, "De ITO: A new kid on the block in het kapitaalmarktenrecht", *RDC-TBH* 2019, issue 2, 189.

[116] K. PAUWELS and A. SNYERS, "De ITO: A new kid on the block in het kapitaalmarktenrecht", *RDC-TBH* 2019, issue 2, 189, with reference to P. HACKER and C. THOMALE, "Crypto-Securities Regulation: ICOs, Token Sales and Cryptocurrencies under EU Financial Law", 30 November 2017, 21-22.

[117] E. CALLENS, "Financial Instruments entail liabilities: Ether, bitcoin, and litecoin do not", *Computer Law & Security Review* 2021, issue 40, 12 No. 3.2.2.; N. VANDEZANDE, *Crypto-assets: the European Legal Framework*, Mortsel, Intersentia, 2023, 294-295.

[118] FSMA, *Classification of crypto-assets as securities, investment instruments or financial instruments*, 22 November 2022, 3, www.fsma.be/sites/default/files/media/files/2022-11/fsma_2022_25_en.pdf.

[119] Looking ahead, it is plausible that future regulation may aim to address this issue by attempting to identify certain actors as issuers under certain conditions.

[120] Note that the European Commission introduced a proposal in 2020, aimed to modify the delineation of "financial instrument" within the context of the Markets in Financial Instruments Directive II (MiFID II) "*to clarify beyond any legal doubt that such [financial] instruments can be issued on a distributed ledger technology*". The proposed amendment would consist of replacing Article 4(1), point 15 MiFID II by the following: "'*financial instrument' means those instruments specified in Section C of Annex I, including such instruments issued by means of distributed ledger technology*". The proposed amendment will ensure that there can be no doubt as to whether, for example, a share distributed via distributed ledger technology still qualifies as a financial instrument. However, the amendment will not ensure that, for example, Bitcoin or Ether qualify as a financial instrument, as the requirement that an issuer must still be present before there can be a financial instrument remains untouched.

regulations within the European Union's single market. However, by the end of 2024, the MiCAR will fully apply, resulting in an appropriate framework with various obligations towards crypto-asset service providers and crypto-asset issuers.

2. MiCAR

i. What is MiCAR?

35. Given that crypto-assets may not always qualify as financial instruments and consequently may fall outside the obligations stipulated in MiFID II, a separate regulatory framework has been initiated at the European level to establish legal certainty and ensure consumer protection for crypto-assets within the EU. The MiCAR aims to create a comprehensive regulatory framework governing issuers of crypto-assets, crypto-assets service providers, and trading platforms operating within the EU. It is important to note that the European Commission wants to introduce analogous obligations for crypto-assets as those applicable to financial instruments. In other words, while MiFID focuses on traditional financial instruments such as securities and derivatives, MiCAR focuses on regulating crypto-assets.

36. Similar to MiFID II, MiCAR incorporates rules regarding the provision of advice. Article 3.1.(24) of MiCAR defines "providing advice on crypto-assets" as "offering, giving or agreeing to give personalised recommendations to a client, either at the client's request or on the initiative of the crypto-asset service provider providing the advice, in respect of one or more transactions relating to crypto-assets, or the use of crypto-asset services". Notably, the content of "providing advice on crypto-assets" closely mirrors the definition of "investment advice" as outlined in MiFID II, requiring a "personalised recommendation". [121] Therefore, when a finfluencer expresses their opinion about specific crypto-assets, it is generally unlikely to qualify as "advice on crypto-assets", particularly because, as previously explained, finfluencers typically avoid personalised recommendations and instead address a broad audience.

Consequently, just as it is uncommon for a finfluencer to offer "investment advice" under MiFID II, it is also infrequent for a finfluencer specialising in crypto-assets to provide "advice on crypto-assets" as intended under MiCAR.

37. In instances where "advice on crypto-assets" does occur (e.g., during a Q&A session), MiCAR specifies that " Crypto-asset service providers providing advice on crypto-assets […] shall assess whether the crypto-asset services or crypto-assets are suitable for their clients or prospective clients, taking into consideration their knowledge and experience in investing in crypto-assets, their investment objectives, including risk tolerance, and their financial situation

[121] Cf. *supra*.

including their ability to bear losses." [122] Additionally, crypto-asset service providers must comply with other obligations outlined by MiCAR. [123] - [124]

38. MiCAR also addresses various market abuse obligations, ranging from insider dealing, improper disclosure of inside information and market manipulation. Of particular relevance is that MiCAR essentially requires finfluencers to disclose their position in a particular crypto-asset when the finfluencer expresses its opinion on that crypto-asset and subsequently benefits from the impact of the opinion expressed on that crypto-asset. If the finfluencer does not disclose their conflict of interest when expressing their opinion, MiCAR will qualify such communication as market manipulation. [125]

ii. Exoneration for MiCAR obligations

39. The question also arises here as to whether a crypto-assets-focused finfluencer who would offer "advice on crypto-assets" can exempt themselves from potential liability by preceding their message with a disclaimer. Not surprisingly, similar to MiFID II, MiCAR does not determine the existence or extent of civil liabilities in the event of non-compliance with the prescribed obligations. In our view, the principles established under MiFID are fully applicable to MiCAR, which essentially entails the following:

- The civil law implications are determined at the level of the individual Member States;
- The possibility of exoneration for non-contractual damages must be established at the national level;
- Although exoneration through disclaimers is generally permissible under Belgian law, it remains difficult to argue that a crypto-finfluencer could exonerate themselves from the non-contractual damages arising from their erroneous advice. Notably, the same conclusion applies for finfluencers who try to employ disclaimers in an attempt to absolve themselves for potential liability for market manipulation.

In summary, the extent to which a finfluencer focusing on crypto-assets can rely on disclaimers to shield themselves from potential liabilities under MiCAR remains subject to the interpretation and regulations of each respective Member State. Nonetheless, it is pertinent to note that similar to the situation under MiFID II, complete exoneration for non-contractual damages due to misleading advice is unlikely to be fully upheld under MiCAR.

3. Additional obligations for crypto-influencers in Belgium: the Royal Decree on the Marketing of Crypto-assets to Consumers

[122] Art. 81.1. MiCAR.
[123] Art. 81.2-13 MiCAR.
[124] A "crypto-asset service provider" is defined in MiCAR as "a legal person or other undertaking whose occupation or business is the provision of one or more crypto-asset services to clients on a professional basis, and that is allowed to provide crypto-asset services in accordance with Article 59" **(**Art. 3.1.(15)). "Crypto-asset services" includes "providing advice on crypto-assets" (Art. 3.1.(16)(h)).
[125] Article 91(3)(c) MiCAR

i. Content

40. On 17 March 2023, the FSMA Regulation of 5 January 2023 placing restrictive conditions on the distribution of virtual currencies to consumers was ratified via a Royal Decree and published in the Belgian Official Gazette. The Belgian legislature introduced specific obligations through a Royal Decree (containing the FSMA Regulation) pertaining to the advertisement of virtual coins targeted at Belgian consumers, [126] particularly when such advertising is conducted as part of a professional activity or on an occasional basis. [127]

41. As defined by the Royal Decree, advertising entails "any communication that is specifically intended to promote the purchase of or subscription to one or more virtual currencies, regardless of the channel by which or the way in which this is done". [128] Considering this definition, content disseminated by finfluencers via social platforms can also be regarded as "advertising", subject to certain rules that must be observed. Essentially, when distributing advertisements regarding virtual currencies to consumers as a professional activity or on an occasional basis against compensation, [129] specific substantive rules must be followed (e.g., marketing materials must not be misleading or inaccurate, refraining from making statements about the future value or return of the virtual coin in question), [130] certain mandatory disclosures must be included (such as a warning regarding the inherent risks associated with crypto-assets) [131], and "mass campaigns" must be notified to the FSMA ten days prior to their commencement [132].

Moreover, it is essential to underscore that the Royal Decree particularly addresses instances where advertising is carried out as part of a professional activity or on an occasional basis against consideration. [133] As a result, finfluencers who communicate to their followers, for instance, to acquire Bitcoin, but do so outside their professional scope and without receiving any form of compensation, will not be subject to the provisions of the Royal Decree. In cases

[126] The proposed regulations only apply if the commercialisation activity is directed at Belgium. To determine whether there is commercialisation in Belgium, it must be determined whether or not the commercialisation is directed specifically at Belgian consumers. The Royal Decree explains in the explanatory memorandum that the use of a disclaimer stating that the activity is not aimed at Belgium is not, per se, sufficient to evade the obligations.

[127] Royal Decree of 8 February 2023 approving the FSMA Regulation of 5 January 2023 imposing restrictive conditions on the commercialization of virtual currencies to consumers., *Belgian Official Gazette* 17 March 2023.

[128] Freely translated from: "*elke mededeling die er specifiek toe strekt de aankoop van of inschrijving op een of meer virtuele munten te promoten, ongeacht het kanaal waarlangs of de wijze waarop dat gebeurt*". Cf. Art. 2, paragraph 1 Royal Decree of 8 February 2023 approving the FSMA Regulation of 5 January 2023 imposing restrictive conditions on the commercialization of virtual currencies to consumers.

[129] Art. 1, §1 Royal Decree of 8 February 2023 approving the FSMA Regulation of 5 January 2023 imposing restrictive conditions on the commercialization of virtual currencies to consumers.

[130] Art. 3 Royal Decree of 8 February 2023 approving the FSMA Regulation of 5 January 2023 imposing restrictive conditions on the commercialization of virtual currencies to consumers.

[131] Art. 4 Royal Decree of 8 February 2023 approving the FSMA Regulation of 5 January 2023 imposing restrictive conditions on the commercialization of virtual currencies to consumers.

[132] Art. 5 Royal Decree of 8 February 2023 approving the FSMA Regulation of 5 January 2023 imposing restrictive conditions on the commercialization of virtual currencies to consumers.

[133] Art. 1, §1 Royal Decree of 8 February 2023 approving the FSMA Regulation of 5 January 2023 imposing restrictive conditions on the commercialization of virtual currencies to consumers.

where the Royal Decree applies, only communications that explicitly aim to promote the purchase of virtual currencies will be classified as advertising. Thus, finfluencers who solely provide information without endorsing transactions or offering advice to sell specific crypto-assets (actions that cannot be construed as promotion) will not be considered as engaging in advertising and, correspondingly, will not be bound by the obligations prescribed by the Royal Decree.

ii. The value of a disclaimer

42. Again, the question may arise whether finfluencers falling under the scope of the Royal Decree and engaging in advertising can exempt themselves from non-contractual liability through the use of a disclaimer. The potential damage could arise when a follower purchases a crypto-asset as a result of the advertisement but incurs losses due to a decrease in the value of the crypto-asset promoted by the finfluencer.

First and foremost, it is important to note that the Royal Decree itself does not provide for civil remedies but instead stipulates that the Belgian Financial Services and Markets Authority (FSMA) may, under penalty of a coercive fine, order the person disseminating non-compliant advertisements to cease disseminating such advertisements or to refrain from such actions. Administrative fines may also be imposed in the event of non-compliance with the regulations. [134]

Taking into account the fundamental tenets of extra-contractual liability law, a follower who wishes to seek compensation from the finfluencer under private law must prove that the finfluencer's actions constituted a fault that directly caused the damages suffered. Non-compliance with the Royal Decree would be sufficient to establish the fault. If the follower can prove the causal link between the damage and the finfluencer's actions, the follower can, in principle, claim compensation for their losses.

Similarly to the previously discussed cases, it is difficult to argue that a finfluencer can exclude this risk of non-contractual liability through a disclaimer, as they cannot exempt themselves from liability for intentional acts. Assuming that everyone has (or should have) [135] a comprehensive understanding of the applicable rules, the argument that the influencer was unaware of the applicable financial regulations cannot be raised as a useful defence.

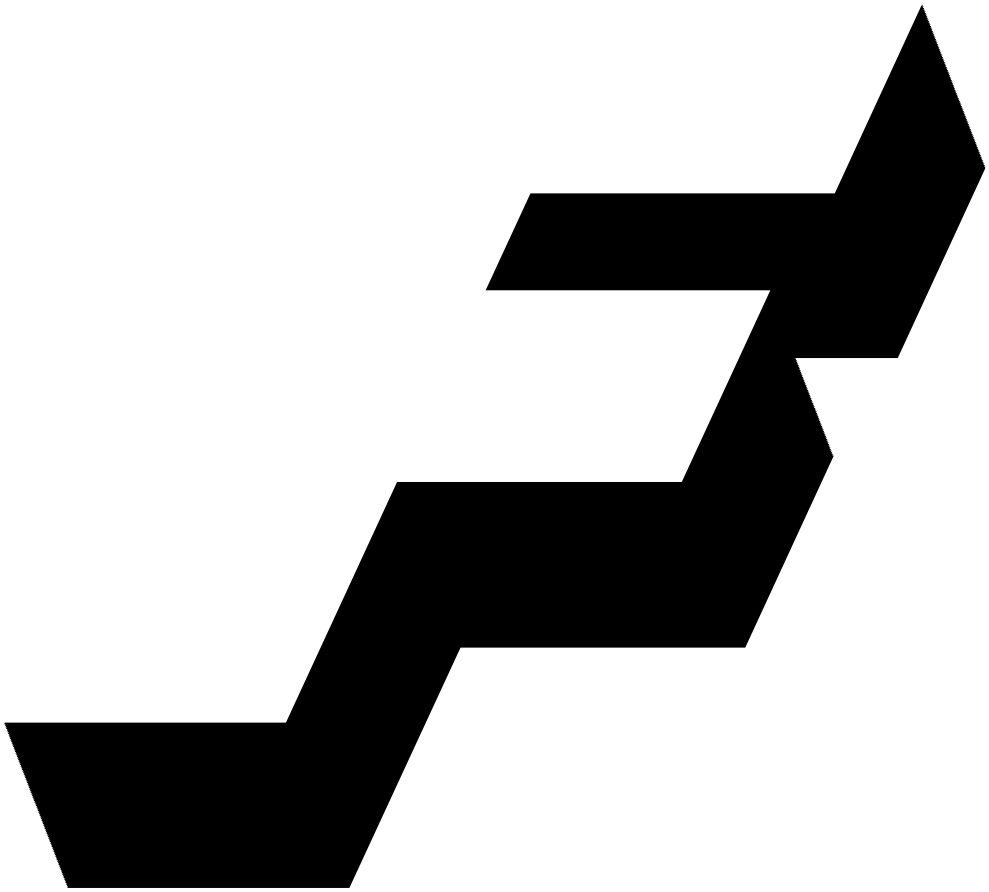
[134] Explanatory memorandum, 12.
[135] *Nemo censetur ignorare legem*.

Conclusion

43. In conclusion, it is evident that finfluencers must exercise caution in their communications, as they could be construed as providing "investment advice" or "investment recommendations" under certain circumstances. Typically, the financial "tips" offered by finfluencers will not qualify as "investment advice" due to their general avoidance of personalised recommendations. However, should their communication meet the criteria for "investment advice", finfluencers run the risk of breaching MiFID II obligations if they operate without the necessary licence. Given that most finfluencers are unlikely to hold this licence, it is evident that offering "investment advice" could result in administrative sanctions. It is important to emphasise that disclaimers are not sufficient to exempt them from civil liabilities.

In the majority of cases, a finfluencer's financial opinions will be categorised as "financial recommendations" under the MAR. This, in itself, is not problematic as long as the finfluencer complies with the obligatory disclaimer requirements set out in the MAR. Failure to comply with these obligations could lead to administrative penalties, and disclaimers do not serve as an effective shield against civil liabilities.

In addition, we discussed a specific segment of finfluencers focusing on "crypto-assets". It is crucial to note that not all crypto-assets qualify as financial instruments and therefore fall outside the regulatory scope of MiFID II and the MAR. Currently, analogous obligations to those in MiFID II through the MiCAR is however in force but will not apply until December 2024. Consequently, it can be established that finfluencers specialising in crypto-assets that do not qualify as a financial instruments, such as Bitcoin and Ether, are currently subject to fewer regulatory obligations under European law than to those communicating about traditional financial instruments. To address this disparity, certain Member States, including Belgium, have enacted national legislation imposing specific obligations on the communication of crypto-assets. Disregard for these obligations in Belgium may result in extra-contractual liability, which cannot be excluded by the use of a disclaimer.



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