Conduct of business rules in the Belgian insurance industry : the presumption of causation for civil liability

Reference:

Illegems Steffi.- Conduct of business rules in the Belgian insurance industry : the presumption of causation for civil liability
European journal of commercial contract law - ISSN 1877-1475 - 4(2015), p. 109-126

Conduct of Business Rules in the Belgian Insurance Industry

The Presumption of Causation for Civil Liability

Steffi Illegems[1]

I. Introduction

1. During the last few years, the Belgian insurance industry has been subject to a variety of new or amended legislation. One of the most important innovations has been introduced by the so-called "Twin Peaks II-reform".[2] The main achievement of this legislation was to implement the *MiFID conduct of business rules* in the insurance sector, where those were previously only applicable to the banking and investment industries.[3] These conduct of business rules consist of several (pre)contractual information duties and other rules of conduct for insurance companies and insurance intermediaries, such as rules concerning inducements and conflicts of interest. Their feasibility and adequacy in the specific industry of insurance have already been questioned and criticized in the legal doctrine.[4] Principally, the compliance with conduct of business rules is supervised by the Belgian *Financial Services and Market Authority* (hereafter: "FSMA").[5] Thus, it is a matter of *public* financial law.

However, the aim of this contribution is to research the possibility of civil liability claims for the infringement of conduct of business rules. In this respect, Twin Peaks II has introduced a *rebuttable legal presumption of causation* that, in case of an infringement to a conduct of business rule, the *transaction* in question is deemed to be the result of the *infringement*, if the customer is suffering

[1] PhD-candidate Antwerp Liability Law and Insurance Chair (ALLIC), University of Antwerp, Belgium. This contribution is based on the author's lecture at the Workshop Liability & Insurance of the Ius Commune Conference 2015 on 27 November 2015 (Leuven, Belgium). The contribution has been updated until 11 February 2016.

[2] Acts of 30 and 31 July 2013 seeking to reinforce the protection of users of financial products and services, as well as the competences of the Financial Services and Market Authority, and containing various provisions (I) and (II), *Belgian State Gazette* 30 August 2013 (hereafter, the act of 30 July 2013 will be referred to as "Twin Peaks II"); Royal Decree of 21 February 2014 relating to the application specificities to the insurance sector in articles 27 and 28*bis* of the Financial Supervision Act, *Belgian State Gazette* 7 March 2014 (hereafter "Royal Decree No. 1"); Royal Decree of 21 February 2014 relating to rules of conduct and the rules relating to conflicts of interest management, set out by the law, in connection with the insurance sector, *Belgian State Gazette* 7 March 2014 (hereafter "Royal Decree No. 2"); Royal Decree of 21 February 2014 modifying the law of 27 March 1995 relating to insurance and reinsurance intermediation and insurance distribution, *Belgian State Gazette* 7 March 2014.

[3] *MiFID* is the abbreviation of the *Markets in Financial Instruments Directive*, Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC, *Pb.L.* 30 April 2004, issue 145, 1 (hereafter: "*MiFID*"). The *MiFID* has been implemented in Belgian law through: Act of 2 August 2002 relating to the supervision of the financial sector and to financial services, *Belgian State Gazette* 4 September 2002 (hereafter: "Financial Supervision Act" or "FSA"), as amended by: Royal Decree of 27 April 2007 relating to the implementation of the Markets in Financial Instruments Directive, *Belgian State Gazette* 31 May 2005; Royal Decree of 3 June 2007 relating to the rules and specificities for the implementation of the Markets in Financial Instruments Directive, *Belgian State Gazette* 18 June 2007 (hereafter: "*MiFID* Royal Decree"). It has to be remarked that, in the meantime, *MiFID II* has entered into force, whereof most provisions should be complied with by the Member States as from 3 July 2016: 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, *Pb.L.* 12 June 2014, issue 173, 349 (hereafter: "*MiFID* II"). *MiFID* II has to be read together with: Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012, *Pb.L.* 12 June 2014, issue 173, 84 (hereafter: "MiFIR").

[4] E.g. the opinions expressed in: M. SERNEELS, "La "mifidisation" de l'assurance ou l'art du trompe-l'oeil", *For.ass.* 2014, issue 145, 110-113; C. VERDURE, "Quelques réflexions – critiques – sur la réforme Twin Peaks II", *For.ass.* 2014, issue 145, 114-119; C.-A. VAN OLDENEEL (ed.), *Application des règles MiFID en assurances: modalités et consequences*, *T.Verz.* file no. 20, Mechelen, Kluwer, 2015, 179 p.

[5] *Cf.* art. 45 FSA.

damage *caused by* the transaction, and unless the contrary has been proven (article 30*ter* of the Financial Supervision Act or "article 30*ter* FSA"). In this way, the Belgian legislator has explicitly acknowledged the fact that the conduct of business rules – which are of public financial law – can also have implications for private law claims. Yet, several questions arise as to the precise conditions of the legal presumption and its impact on a civil liability claim. For example, the scope of the causal link that the presumption intends to prescribe confuses the legal doctrine. At the same time, this leads to further ambiguities related to the burden of proof of the customer. This contribution wishes to bring some clarity to these matters.

2. The research will be limited to the application of the legal presumption to the Belgian insurance industry. In that sense, special features of conduct of business rules related to insurance can be taken into account. Furthermore, the focus will be on extra-contractual liability claims for damages.

First of all, the scope of article 30*ter* FSA should be addressed (II). In that connection it will be made clear regarding which conduct of business rules the presumption is applicable (A); who can invoke the presumption when submitting a claim (B); against whom (C); for which transactions (D); and during which period of time (E).

Subsequently, the true meaning of article 30*ter* FSA will be discussed (III). Only then can, the consequences for the burden of proof concerning liability claims, that invoke article 30*ter*, be examined (IV). It will be argued that, in that sense, an infringement to a conduct of business rule needs to be proven (A). Furthermore, there are requirements of transaction causation (B) and loss causation (C).

As a concluding remark, the impact of the legal presumption will be assessed (V). Will the new legal presumption 'open the floodgates' for more civil liability claims related to conduct of business rules? Or is the legal presumption designed in such a manner that it will be rather a trap than a trump for disadvantaged customers?

II. Scope of article 30*ter* FSA

A. Regarding which conduct of business rules?

3. First of all, it can be remarked that article 30*ter* FSA is a provision of imperative law.[6] Consequently, insurance companies and insurance intermediaries cannot stipulate deviating (or exoneration) clauses in, for example, their insurance contracts. Yet, even though the provision is a matter of imperative law, the legal presumption lacks a definite structure. To put it mildly, a single reading of the article will not be sufficient to clarify its precise meaning.[7] This is already reflected in the manner in which the relevant conduct of business rules have been appointed.

---

[6] *Cf.* the wording of art. 30*ter*, § 1 FSA: *"notwithstanding any other stipulation"*. See also: X. DIEUX, "Twin Peaks II – Sanctions Civiles" in V. COLAERT and A. LECOCQ (eds.), *De levenscyclus van bank-, beleggings-, en verzekeringsproducten / Le cycle de vie des produits bancaires, d'investissement et d'assurance*, Brussels, Larcier, 2014, 191; F. SWEERTS, "Aspects civils et de procedure: une réponse" in V. COLAERT and A. LECOCQ (eds.), *De levenscyclus van bank-, beleggings-, en verzekeringsproducten / Le cycle de vie des produits bancaires, d'investissement et d'assurance*, Brussels, Larcier, 2014, 245; D. WILLERMAIN, "Perspectives de droit financier: L'information des investisseurs – Principes et sanctions" in M. FYON (ed.), *Les récentes réformes de droit bancaire et financier: quel impact pour les établissements de credit, leurs clients et leurs responsables?*, Brussels, Larcier, 2015, 217-218.

[7] That is why art. 30*ter* FSA is not cited in full in this contribution. However, every interested reader should look up and read this very long legal provision. Furthermore, the Dutch speaking reader will notice an unfortunate slip of the legislator's pen: *"schade leidt" instead of "schade lijdt"* (§ 1, 1st section). Art. 30*ter*, § 1 can be literally translated as follows: *"Without prejudice to the common law and notwithstanding any other stipulation to the detriment of the customer of financial products or services, if a person referred to in the second section, in connection with a financial transaction as defined in paragraph 2, commits an infringement to one or more provisions in paragraph 3 and the customer in question of financial products or services suffers damages caused by this transaction, then the transaction in question, unless proven otherwise, is deemed to be the result of the infringement."*

Firstly, in article 30*ter*, § 3, 1° FSA, the legislator has explicitly designated those conduct of business rules that are stated in article 27, § 2 and 3 until 7 of that same law. Secondly, through article 30*ter*, § 4, the Crown was entitled to bring some extra provisions under the scope of the legal presumption. This has to be seen in the light of the very general nature of the conduct of business rules in article 27. Hence, article 27, § 11 gave the Crown the power to further specify these rules by royal decree.[8] Therefore, the Crown equally had the power to bring, *inter alia*, those decrees and regulations under the scope of the legal presumption.[9]

4. Insofar as the Crown had not yet used its power to extend the scope of the legal presumption to the royal decrees, several interpretational issues emerged. For instance, WILLERMAIN stated that the royal decrees that further implemented article 27 were automatically included in the scope of article 30*ter*.[10] This was deduced from the wording of article 30*ter* that the Crown could appoint those decrees *"of which the infringement…also leads to the application* (own emphasis)" of the legal presumption. In that sense, only those (provisions of) royal decrees that implemented conduct of business rules other than the ones in article 27 were not immediately included in the scope of the legal presumption.

However, this was – rightly – questioned by VAN DYCK and DENTURCK, referring to the Explanatory Memorandum, that considered that one could not use the general character of article 27 to include those provisions of the *MiFIDMiFID* Royal Decree in the scope of article *30ter* that were not appointed by the Crown.[11]

In the same light, DIEUX remarked that – according to the Explanatory Memorandum[12] – in general, an infringement of article 27 probably could not give rise to the protection of the legal presumption as long as the more detailed provisions of the *MiFID* Royal Decree had not yet been appointed by the Crown.[13]

5. These interpretational issues became largely irrelevant because of the clear wording of the Royal Decree of 20 February 2014 that further implemented article 30*ter*, § 4 FSA.[14] In article 1, the relevant provisions of the *MiFID* Royal Decree were designated, which were not limited to provisions *solely* implementing article 27 FSA.[15] However, the *MiFID* Royal Decree is traditionally limited to the banking and investment sectors. Therefore, Royal Decree No. 2[16] inserted article 2/1 in the *MiFID* infringements Royal Decree, precisely with the aim of bringing the specific insurance conduct of business rules under the scope of the legal presumption. Indirectly, article 2/1 equally brings Royal Decree No. 1 and Royal Decree No. 2[17] under the scope of the legal presumption, to the extent that they 'translate' the conduct of business rules developed in the FSA and the *MiFID* Royal Decree to the

[8] For the banking and investment sector. For the insurance sector, *cf.* the delegated power in: art. 26, 2nd until 4th section FSA (for insurance companies) and art. 277 Act of 4 April 2014 relating to insurance, *Belgian State Gazette* 30 April 2014 (hereafter: "Insurance Act 2014") (for insurance intermediaries).

[9] See also: Draft act seeking to reinforce the protection of users of financial products and services, as well as the competences of the FSMA, and containing various provisions (I), Explanatory Memorandum, *Parl.St. Kamer* 2012-13, no. 28720/001, 59-63 (hereafter: "Explanatory Memorandum Twin Peaks II").

[10] WILLERMAIN (6) 220-221.

[11] T. VAN DYCK and L. DENTURCK, "De burgerlijke sanctie van artikel 30*ter* van Twin Peaks II. De tanden van een papieren tijger?", *Bank Fin.R.* 2013, issue 5, 278. *Cf.* Explanatory Memorandum Twin Peaks II, 62-63.

[12] Explanatory Memorandum Twin Peaks II, 59 and 62.

[13] DIEUX (6) 193, where he immediately remarks, though, that this wording limits the scope of art. 30*ter* too much.

[14] Royal Decree of 20 February 2014 seeking to implement art. 30*ter* of the act of 2 August 2002 relating to the supervision of the financial sector and to financial services, *Belgian State Gazette* 28 February 2014 (hereafter: "*MiFID* infringements Royal Decree").

[15] Gave rise to the application of the legal presumption: art. 8, §1, § 2, 2nd and 4th section, § 3 until 6 and § 8 until 9, art. 9 and 10, § 1, 2, 4, 6 and 7, art. 11, § 3, *d)*, art. 12, § 1, 2, 4 and 5, art. 13, 1st section, *a)* and 2nd section, art. 15, § 1, 3 and 4, art. 16, 17, 19 and 20, § 1 and 2, 2° until 5°, 8° and 9°, 11° and 12°, 14° until 16°, art. 80, 81 and 83 of the *MiFID* Royal Decree.

[16] See above, footnote 2.

[17] See above, footnote 2.

specific needs of the insurance industry.[18]

6. Summarized, the foregoing analysis allows the following insurance conduct of business rules to be brought under the scope of the legal presumption[19]:

(i) The rule that information – including publicity – should be correct, clear and non-misleading (article 27, § 2 FSA);
(ii) The rule that the information prescribed by law should be communicated to clients in a timely and comprehensible manner, so that clients can make an informed decision whether or not to sign an insurance contract (article 27, § 3 FSA);
(iii) For savings insurances and insurance-based investments: the general rules concerning the appropriateness and suitability tests (article 27, § 4 and 5 FSA);
(iv) The obligation to prepare a client file (article 27, § 7 FSA);[20]
(v) The rules related to the information of the client in case of specific conflicts of interest (articles 18, 19 and 21 Royal Decree No. 2)[21];
(vi) For all types of insurance contracts: the provisions concerning information about the costs and expenses (article 13 *MiFID* Royal Decree)[22];
(vii) For insurance contracts, other than savings insurances and insurance-based investments: the specific rules concerning information to clients and publicity (article 8, § 1, 2, 2nd and 4th section and § 3 and 8 and article 10, § 1, 2, 4, 6 and 7 *MiFID* Royal Decree)[23]; and
(viii) For savings insurances and insurance-based investments: the specific rules concerning information to clients and publicity and the detailed rules concerning the appropriateness and suitability tests (article 8, § 1, 2, 2nd and 4th section, 3, 4, 5, 6 and 8, article 10, § 1, 2, 4, 6 and 7, article 12, § 1, 2, 4 and 5, article 15, § 1, 3 and 4 and articles 16 and 17 *MiFID* Royal Decree)[24].

Finally, article 333 Insurance Act 2014 inserted an extra paragraph to article 30*ter* FSA, allowing the application of the legal presumption in case of an infringement of the insurance intermediaries' and insurance companies' duty to identify the demands and customer needs.[25] It should be remarked that this duty – as such – already existed in insurance before the *MiFID* conduct of business rules were introduced.[26] Moreover, it was installed by the so-called *Insurance Mediation Directive* (hereafter: "IMD").[27] Also, this duty does not apply to the insurance of large risks.[28] Yet, the *MiFID* added extra

[18] Since art. 2/1 appoints the relevant provisions of the FSA and the *MiFID* Royal Decree, *"as it applies to the insurance companies and the insurance intermediaries"*. In that respect, it seems a little bit oversimplified to consider that the legal presumption does not apply for the provisions of Royal Decree No. 2, a point of view that was stated in: V. SCHREURS, "Informatieverstrekking was het modewoord van 2014", *T.Verz.* 2014, issue 20, 163. Note that Royal Decree No. 1 translates art. 27 FSA, whereas Royal Decree No. 2 translates the *MiFID* Royal Decree.
[19] For a detailed description of the legal presumption's scope concerning the insurance sector, see also: FSMA Circular Letter FSMA_2015_14 dd. 1/09/2015, "Aanpassing van de circulaire FSMA_2014_02 d.d. 16/04/2014 met betrekking tot de wijziging van de wet van 27 maart 1995 en de uitbreiding van de *MiFID*-gedragsregels tot de verzekeringssector", 62-63, www.fsma.be (hereafter: "FSMA Circular Letter 2015"); J. DANDOY, "Rémunérations, conflits d'intérêts, rapports aux clients, dossiers clients, connaissances requises et sanctions civiles", *For.ass.* 2014, issue 145, 142.
[20] *Cf.* art. 4 Royal Decree No.1 for the *translation* of art. 27 FSA to the insurance sector.
[21] Note that, in this case, Royal Decree No. 2 even *explicitly* comes within the scope of art. 30*ter* FSA, *cf.* art. 2/1, *e) MiFID* infringements Royal Decree.
[22] Translated to the insurance sector by: art. 9 Royal Decree No. 2.
[23] Translated to the insurance sector by: art. 10-11 Royal Decree No. 2.
[24] Translated to the insurance sector by: art. 12-15 Royal Decree No. 2.
[25] This duty is expressed in: art. 273, § 3 Insurance Act 2014 (insurance intermediaries), see also art. 276 Insurance Act 2014 for its application to insurance companies.
[26] In former art. 12*bis*, § 3 and 12*quinquies* Act concerning insurance and reinsurance mediation and insurance distribution, *Belgian State Gazette* 14 June 1995, 17029 (this act has been lifted by art. 347 Insurance Act 2014).
[27] *Cf.* art. 12, § 4 Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation, *Pb.L.* 15 January 2003, issue 9, 3 (hereafter: "IMD"). IMD will be repealed (with effect from 23 February 2018) by: Directive 2016/97 of the European Parliament and of the Council of 20 January

features to this duty, such as the obligation to make sure that the provided insurance contract also responds to these demands and needs.[29]

7. It can already be mentioned that the nature of the conduct of business rules that do fall within the scope of article 30*ter* FSA is very diverse. Some rules will be rather detailed in their description, e.g. the obligation to prepare a client file. Other rules remain fairly vague, e.g. the general rule that information should be correct, clear and non-misleading. Obviously, the precise description of these rules will have some implications for liability claims based on these rules.[30]

Although the scope of article 30*ter* FSA is broad, several conduct of business rules cannot give rise to the application of the legal presumption. For example, one cannot invoke the presumption for an infringement of the *fundamental MiFID duty of care*, expressed in article 27, § 1 FSA.[31] This duty of care has to be understood as a general principle, *underlying* the more specific conduct of business rules in article 27, § 2 until 12 FSA.[32] One could consider this a translation of the general duty of care in Belgian civil law (article 1382 Civil Law Code).[33] Yet, as a consequence, the infringement of the conduct of business rules concerning inducements – that are based on article 27, § 1 FSA itself – equally remain outside the range of the legal presumption.[34] Finally, the rules concerning a proper reporting of the provided services towards the client are not included either in the scope of the legal presumption.[35]

B. Who can invoke the legal presumption?

8. Article 30*ter* FSA introduces the legal presumption of causation to the advantage of the *'afnemer'* or *'utilisateur'* of financial products or services. The FSA does not provide a definition of this concept. However, the most accurate English translation seems to be the *customer* of the financial product or service. Indeed, the protection of article 30*ter* is not limited to consumers in the sense of the specific legislation concerning consumer protection.[36] This follows from the use of the notion *'client'* in article 27 FSA, a provision whereto article 30*ter* explicitly refers in its third paragraph.[37] A client is legally defined as *"every natural or legal person who is the customer* (*'afnemer'* or *'utilisateur'*) *of other financial services or financial products as meant in the relevant provision of the law"* (own emphasis).[38] Therefore, also professional clients can invoke the legal presumption of causation.[39]

2016 on insurance distribution, *Pb.L.* 2 February 2016, issue 26, 19 (hereafter "Insurance Distribution Directive" or "IDD"). The IDD will enter into force on 22 February 2016.

[28] *Cf.* art. 12, § 5 IMD; art. 273, § 4 Insurance Act 2014. Thus, in that situation, the policyholder himself is required to be more attentive, whereas the service provider bears a smaller responsibility. The notion 'large risks' is defined in, *inter alia*: art. 13, (27) Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II), *Pb.L.* 17 December 2009, issue 335, 1; art. 5, 39° Insurance Act 2014.

[29] *Cf.*: M. THIRION and T. GILLIS, "Zorgplicht", *T.Verz.* 2014, issue 20, 70-71.70-71.

[30] See below, paragraph 28 *et seq*.

[31] *"When offering or providing financial products or services, the regulated firms will act honestly, fairly and professionally in the best interests of their clients"*. *Cf.*: VAN DYCK and DENTURCK (11) 278; DIEUX (6) 192.

[32] *Cf.* art. 27, § 1, *in fine* FSA.

[33] E.g.: M. KRUITHOF, "Privaatrechtelijke remedies tegen inbreuken op reglementaire gedragsregels inzake beleggingsdiensten: zorgplicht, *know your customer* en *best execution*" in R. FELTKAMP, C. HOUSSA and R. STEENNOT (eds.), *Bescherming van de consument in het financieel recht – La protection du consommateur en droit financier*, Antwerp, Intersentia, 2012, 162 with further references.

[34] The detailed rules concerning *inducements* are to be found in: art. 7 *MiFID* Royal Decree; art. 7 Royal Decree No. 2.

[35] These rules are to be found in: art. 27, § 8 FSA; art. 11 *MiFID* Royal Decree; art. 8 Royal Decree No. 2.

[36] E.g. Book VI "Market Practices and Consumer Protection" Code Economic Law. A consumer is every natural person who acts for purposes outside of his professional activities, *cf.* art. I.1 Code Economic Law.

[37] See above, paragraph 3. The notion *client* is also frequently used in the Explanatory Memorandum of the FSA, together with the notion *investor* (e.g. pages 58 and 60). See also: DIEUX (6) 193-194, who suggests to use the notion of *actual or future counterparty*.

[38] Art. 2, 27° FSA.

[39] See also: VAN DYCK and DENTURCK (11) 276.

9. As for the definition of *customer* itself, some inspiration could be found throughout various provisions in the Code Economic Law that all define the notion customer in a specific context.[40] Taken all together, one could state that – in general terms – the legislator wishes to define a customer as every natural or legal person who makes use of a service or wants to make use of a service. More specifically in the context of article *30ter* FSA, the customer is the one who *directly purchased* the financial product or *made use* of the financial service, whereon some specific conduct of business rules were applicable. It is necessary to add the notion of directness, to clarify that any subsequent owners[41] of the financial product cannot invoke article 30*ter* against the original provider of the product.[42]

In my opinion, the customer in the insurance sector should be interpreted as the *policyholder* of the insurance contract. Furthermore, according to the Explanatory Memorandum, the policyholder can only rely on the legal presumption for infringements committed against himself, and not for infringements against other persons.[43]

C. Against whom can the legal presumption be invoked?

10. Whereas article 30*ter* FSA remains silent about the notion customer, the legal provision is more clear when it concerns the actors against whom a customer can invoke the legal presumption. As for the insurance industry, article 30*ter*, § 1, 4° FSA grants the Crown the power to appoint insurance companies and insurance intermediaries as accountable actors. This technique of delegating power to the Crown fits in with the tendency of introducing and adapting the conduct of business rules to the insurance sector by royal decree.[44] Hence, Royal Decree No. 1 and Royal Decree No. 2 determine the accountable insurance actors.

11. Both Royal Decrees allow the conclusion that the policyholder should invoke the legal presumption against a *service provider*, who is defined as *"an insurance company sensu lato or an insurance intermediary, other than a tied insurance agent"*.[45] Indeed, these service providers are the ones who should obey the conduct of business rules. Analogously, they are liable in case of infringements.

12. An *insurance company sensu lato* should be interpreted as an insurance company, as well as its tied insurance agents and the insurance subagents that act under the responsibility of the tied insurance agents.[46]

A *tied insurance agent* acts in the name and on behalf of solely one insurance company *or* in the name and on behalf of several insurance companies insofar as their insurance contracts are not mutually competitive. Moreover, the tied insurance agent acts under the full responsibility of these insurance companies for the insurance contracts that affect the latter.[47] Conversely, it is the insurance company that is fully and unconditionally responsible (and liable) for every act or omission – conducted by the tied agent in the name and on behalf of the insurance company – insofar as these concern the conduct of business rules described in the Insurance Act 2014, Royal Decree No. 1 and Royal Decree No. 2. The tied insurance agent remains personally responsible (and liable) for manifest shortcomings.[48]

13. Hence, the policyholder should (bring a claim and) invoke the legal presumption against the

[40] *Inter alia*: art. I.2, 7° and I.18, 5° Code Economic Law.
[41] In case the original owner has sold or transferred the financial product. This occurs more frequently in investment products than in insurance products.
[42] In the same sense: VAN DYCK and DENTURCK (11) 276-277.
[43] Explanatory Memorandum Twin Peaks II, 58; VAN DYCK and DENTURCK (11) 276-277.
[44] *Cf.* Explanatory Memorandum, 59; VAN DYCK and DENTURCK (11) 280.
[45] Art. 1, 11° Royal Decree No. 1; art. 2, § 1 Royal Decree No. 2.
[46] Art. 1, 10° Royal Decree No. 1; art. 1, 12° Royal Decree No. 2.
[47] Art. 1, 8° Royal Decree No. 1; art. 1, 9° Royal Decree No. 2. See also: T. GILLIS, "Toepassing van de MiFID gedragsregels in de verzekeringssector", *T.Verz.* 2014, issue 2, 238.
[48] Art. 279, § 1 Insurance Act 2014. *Cf.* J.-C. ANDRÉ-DUMONT, "AssurMiFID: Champ d'application, notions et règles de base", *T.Verz.* 2014, issue 20, 31-32. About the tied insurance agent, see also: G. REGOUT, "L'agent d'assurances liés", *RGAR* 2015, issue 6, 15196.

insurance company itself in two situations:

(i) When the insurance company acts as a direct seller for the insurance contract;
(ii) When the policyholder concludes the insurance contract through the mediation of a tied insurance agent acting in name and on behalf of the insurance company.[49]

Furthermore, the policyholder can invoke the legal presumption against the tied insurance agent insofar as the agent has committed a manifest shortcoming.[50]

In other situations, the policyholder should invoke article 30*ter* FSA against the insurance intermediary, other than a tied insurance agent, e.g. the insurance broker or the non-tied agent.[51]

In short, one could consider that every service provider is responsible for his own acts, unless someone else covers up for him.[52]

14. Logically, several conduct of business rules rest on the insurance company and on the insurance broker or non-tied insurance agent at the same time, depending on the situation.[53] However, the one who is responsible for complying with the conduct of business rules, is the one who is in contact with the customer for that specific matter.[54] Consequently, the policyholder should bring his claim and invoke the presumption against this actor.

D. Which transactions come within the scope of the legal presumption?

15. The legal presumption states that, in case of an infringement to the conduct of business rules, the *transaction* is deemed to be the result of the infringement. Thus, a transaction between the customer and the service provider is a *condicio sine qua non* for invoking article 30*ter* FSA. Yet, the notion transaction is very broadly defined in article 30*ter*, § 2: *"depending on the case, in the broadest sense, the purchase of, the sale of, the subscription of, the loan of, the performance of, the placement of, the exchange of, the repayment of, the possession of, the offering or providing of a certain financial product or a certain financial service"* (own emphasis). Obviously, such a wide definition covers all activities to which the conduct of business rules apply.[55]

Moreover, in the FSA, a financial product could be a savings product, an investment product or an insurance product.[56] In the same sense, a financial service could be related to one or more of these financial products.[57] Therefore, all insurance branches are included in the scope of article 30*ter*, both the life and non-life branches.[58] Furthermore, the transaction in insurance, in general, should be understood as the subscription of an insurance contract.[59]

16. Due to the very recent nature of the legal presumption, so far no (published) jurisprudence is available, both in banking and investment as in insurance. Thus, case law, that could further clarify the relevance of article 30*ter*, is still missing. In addition, the Explanatory Memorandum of article 30*ter* focuses on investors and investor losses.[60] Therefore, the question regarding in which insurance-

[49] This does not prevent the insurance company from setting a liability claim against the tied agent, based on the common principles of Belgian liability law. *Cf.* THIRION and GILLIS (29) 91.
[50] In the same sense: P. MOREAU, "L'information précontractuelle du client depuis l'application des règles MiFID au secteur de l'assurance", *T.Verz.* 2014, issue 20, 54-55. See also: FSMA Circular Letter 2015, 15-16.
[51] For a definition of this notion, see: art. 1, 9° Royal Decree No. 1; art. 1, 11° Royal Decree No. 2.
[52] ANDRÉ-DUMONT (48) 31.
[53] E.g. the requirements concerning information and publicity.
[54] In the same sense: ANDRÉ-DUMONT (48) 33-34; MOREAU (50) 54.
[55] This was the legislator's explicit intent, *cf.* Explanatory Memorandum Twin Peaks II, 58-59; VAN DYCK and DENTURCK (11) 277.
[56] Art. 2, 39° FSA.
[57] Art. 2, 40° FSA.
[58] DANDOY (19) 142.
[59] GILLIS (47) 242.
[60] And so does most of the legal doctrine, e.g. the comments in: VAN DYCK and DENTURCK (11) 274-283; DIEUX (6) 189-198; G. SCHAEKEN WILLEMAERS, "Client Protection Under Belgian Financial Law: Recent

related cases the presumption will be of a particular relevance and, if so, to which extent, is still unanswered.

Nevertheless, the legal doctrine mostly tends to describe infringements related to conduct of business rules for savings insurances and/or insurance-based investments as a trigger for invoking the legal presumption of causation, e.g.:

(i) When the service provider did not obey the rules related to identifying the customer's needs and demands or the rules concerning the suitability and appropriateness tests (know your customer);[61] or

(ii) When the service provider did not perform his duty to correctly inform the customer about the possible risks inherent in the product *(*inform your customer).[62]

It should be repeated though that the conduct of business rules are also applicable to other branches of insurance, whether or not in a less strict or detailed version. For instance, the provider of liability insurance should equally identify the needs and demands of the customer.[63]

E. Scope *ratione tempori*

17. The legal presumption is available to the customer insofar as *"the transaction has been adopted after the entry into force of the law"*.[64] In that respect, the relevant date should be the date of *Twin Peaks II*'s entry into force, since this law inserted article 30*ter* in the FSA. Twin Peaks II entered into force on 9 September 2013.[65]

However, article *30ter* could not be invoked against the insurance industry as long as the conduct of business rules were not yet applicable to this financial sector. To that extent, the date of entry into force of Twin Peaks II's extending provisions[66] was of particular importance. Originally, the date of entry into force of the conduct of business rules in insurance was set at 30 April 2014.[67] However, the Belgian Constitutional Court postponed this moment until 1 May 2015, allowing the insurance industry to adapt to the new legislation.[68] It is noteworthy that the Court based its reasoning for postponement, *inter alia*, on the fact that the conduct of business rules could clearly provoke liability of insurance intermediaries, through the legal presumption of article 30*ter*.[69] Thus, even though the legal presumption as such entered into force on 9 September 2013, as for the insurance industry, it is only applicable to transactions adopted after 1 May 2015.

Developments in Information Duties, Product Intervention and Beyond", 2014, 21 p., http://ssrn.com/abstract=2503369; E. VANDENDRIESSCHE, *Investor losses. A comparative legal analysis of causation and assessment of damages in investor litigation*, Cambridge, Intersentia, 2015, 198-200; WILLERMAIN (6) 189-232.

[61] E.g.: DANDOY (19) 142.

[62] GILLIS (47) 241.

[63] Also, see above, paragraph 6 about the fact that this duty already existed before the *MiFID* conduct of business rules were applicable to the insurance industry. See also: THIRION and GILLIS (29) 70-73.

[64] Art. 30*ter*, § 5, 1st section FSA.

[65] Art. 69, 1st section Twin Peaks II. See also: P. MOREAUX, "Twin Peaks II – Quelques échos de la loi du 30 juillet 2013", *T.Verz.* 2013, vol. 4, issue 385, 431.

[66] Art. 7 and 19 Twin Peaks II inserted the basic principles of the conduct of business rules for insurance companies and insurance intermediaries and delegated the Crown to further implement them. These provisions obtained a specific date of entry into force in art. 69, 3rd section Twin Peaks II.

[67] *Cf.* art. 9 Act of 21 December 2013 on the inserting of book VI "Market Practices and consumer protection" in the Code Economic Law and on the inserting of the definitions specific to book VI, and of the law enforcement provisions, specific to book VI, in the books I and XV of the Code Economic Law, *Belgian State Gazette* 30 December 2013 (hereafter: "Act 21 December 2013"), that amended art. 69, 3rd section Twin Peaks II which previously set the date of entry into force on 1 January 2014.

[68] Constitutional Court no. 86/2015, 11 June 2015 (beroepsvereniging "Fédération des Courtiers d'assurances & Intermédiaires Financiers de Belgique" en de nv "A. Van Ingelgem et Fils"), *Belgian State Gazette* 11 August 2015; *RW* 2015-16, issue 1, 38 (summary); *TBH* 2015, issue 7, 753 (summary M. HOSTENS) and *TVW* 2015, issue 3, 257 (hereafter: Constitutional Court 11 June 2015). See also: FSMA Circular Letter 2015, 5.

[69] *Cf.* Constitutional Court 11 June 2015, paragraph B.4.7.

18. Article 30*ter*, § 5, 2nd section FSA contains a prescription rule as well. In order to enjoy the legal presumption's protection, the infringement can only be invoked during a period of five years as from the time the customer became aware of the damage or its aggravation *and* can no longer be invoked after twenty years from the day following the day it occurred.[70] It was a deliberate choice of the legislator to set a regime similar to the general rules for the prescribing of (extra-contractual) liability claims.[71]

Yet, article 30*ter* FSA does not affect the general civil law principles.[72] Therefore, customers still have the free choice of – solely – invoking the provisions of the Civil Law Code instead. To that extent, the prescription rule of the Civil Law Code will apply.[73] Those are the same for extra-contractual claims, but different for contractual claims (one absolute term of ten years).[74] One could argue that, when the legal presumption has already prescribed according to article 30*ter*, § 5, customers can still bring an action without enjoying the presumption's protection, as long as the claim has not yet prescribed in accordance with the Civil Law Code's statutes of limitations.

III. The true meaning of article 30*ter* FSA

A. Introduction

19. The analysis of article 30*ter*'s scope shows that the legal presumption of causation is applicable to a wide range of conduct of business rules, transactions and insurance products. Furthermore, where the *MiFID* rules were originally intended to protect *investors* while purchasing investment products, it is clear that today the legal presumption of causation equally applies to insurance products that do not show any characteristics of investment products.

Such a reasoning allows the description of two possible – yet hypothetical – examples of cases, that will be used to illustrate the true meaning of article 30*ter* and its burden of proof:

Case 1: a customer is interested in subscribing to an insurance-based investment. However, the advising insurance broker did not carry out the suitability test required by the "know your customer" principle.[75] Hence, he was not aware of the customer's limited knowledge of insurance-based investments and of his rather delicate financial situation. After a big stock market crash, the value of the investment is reduced to 10 % of the value before the crash. This is a big loss for the customer, who invested 80 % of his savings through the insurance. The customer states that he would never have subscribed to the product if the broker had carried out the suitability test. Therefore, he invokes the legal presumption of article 30*ter* FSA to obtain redress.

Case 2: a customer wants to obtain car insurance for his brand-new car. Given the car's condition, the customer prefers 'full Omnium Insurance' that also covers any damage to the car itself, regardless of the damage's cause. However, the insurance broker neglects to identify the customer's demands and needs.[76] Consequently, basic insurance is provided, that only covers the liability towards third parties. A few months later, the policyholder crashes his car into a bridge. When the insurance company refuses to cover the damage to the car, the policyholder brings a claim against the broker, invoking the

[70] See also: FSMA Circular Letter 2015, 63; VAN DYCK and DENTURCK 276.
[71] Explanatory Memorandum Twin Peaks II, 63. *Cf.* the wording of art. 2262*bis* Civil Law Code. See also: MOREAUX (65) 431.
[72] *Cf.* the wording of art. 30*ter*, § 1 FSA: *"Without prejudice to the general law principles…"*.
[73] Explanatory Memorandum Twin Peaks II, 63.
[74] Art. 2262*bis*, 1st section Civil Law Code.
[75] The suitability test requires the – advising – insurance broker to obtain information about, *inter alia*, the knowledge and experience of the customer concerning that specific insurance product, his financial situation and his investment objectives. *Cf.* art. 27, § 4 FSA and art. 4 Royal Decree No. 1. About the notion 'advice' concerning savings insurances or insurance-based investments, *cf.* art. 1, 12° and 13° Royal Decree No. 1. It should be remarked that the duty to advise is not limited to insurance brokers, since the Royal Decree refers to 'service providers' in general. About service providers in insurance, see above, paragraphs 10 *et seq*, also insurance companies or insurance agents might have a duty to advise.
[76] About this duty, also, see above, paragraphs 6 and 16.

legal presumption of article 30*ter* FSA.

B. General principles of liability

20. When a service provider does not comply with the conduct of business rules, the aggrieved policyholder can bring several claims, according to the general principles of Belgian contract law and extra-contractual liability. If the infringement appears in the *pre-contractual phase*, the customer can possibly claim the *nullification* of the insurance contract, based on a vitiated consent, such as *mistake of facts* (*'dwaling'* or *'erreur'*).[77] Furthermore, if the nullification does not suffice[78], the customer can also bring a *claim for damages*, based on extra-contractual liability (article 1382 Civil Law Code).[79] Even so, a policyholder can combine both claims at the same time as well. In that respect, damages are claimed insofar as the mere nullification does not compensate for all damages suffered.[80] Since the infringement of most conduct of business rules can be interpreted as a *culpa in contrahendo*, giving rise to extra-contractual liability and, therefore, damages, the burden of proof will be analyzed with a view to the latter.[81] Cases 1 and 2 equally refer to infringements in the pre-contractual phase, since both involve *pre-contractual information duties*.[82]

21. According to the general rules concerning article 1382 Civil Law Code, the one who suffered a loss, should prove the presence of a *fault*, a *damage* and a *causal link* between the fault and the damage. The burden of proof principally rests on the *claimant*. It should be examined how both legal provisions can be reconciled, since it should be repeated that article 30*ter* does not affect the common law principles.[83] Yet, at least in regards two elements, article 30*ter* seems to be directly compatible with the requirements of article 1382 Civil Law Code. Equally, the policyholder needs to prove the infringement to a conduct of business rule, thus, an extra-contractual (or pre-contractual) fault. Secondly, article 30*ter* requires evidence of damage.[84] If such a burden of proof has been fulfilled, a *rebuttable presumption of causation* between the infringement and the transaction is provided. It is the latter that will cause more difficulties.

C. A matter of transaction causation and loss causation

1. Confusion in the legal doctrine

22. Article 30*ter* FSA clearly confuses the legal doctrine as to the necessity of proving a causal link, and if so, in which sense. This should be considered in the light of the Belgian equivalence theory of causation, that requires the *fault* to be a *condicio sine qua non* for the *loss*.[85] However, the legal presumption does not provide a causal link between the fault and the *loss*, but between the fault and the *transaction*. Yet, several authors believe that – once the legal presumption is applicable – no

[77] About the application of art. 30*ter* FSA in claims of nullification, e.g.: DIEUX (6) 194-195; WILLERMAIN (6) 222-224. The value of art. 30*ter* concerning *nullification* further supersedes the scope of this contribution.
[78] E.g.: when there is no signed contract yet; when the nullification does not recover all damages; or when the nullification is not desirable.
[79] *Cf.* Explanatory Memorandum Twin Peaks II, 57.
[80] E.g.: SWEERTS (6) 245-246.
[81] E.g.: DIEUX (6) 192. In more general terms: R. STEENNOT and S. DEJONGHE, *Handboek Consumentenbescherming en Handelspraktijken*, Antwerp, Intersentia, 2007, 473.
[82] It has to be remarked that infringements can also occur during the *execution* of the contract. In that respect, the customer can ask for the execution in kind or the dissolution of the contract. In addition, he can bring a claim for damages as well, based on *contractual* liability. E.g.: Explanatory Memorandum Twin Peaks II, 57-58. Contractual claims remain outside the scope of this contribution.
[83] See above, paragraph 18.
[84] See also: VAN DYCK and DENTURCK (11) 281-282; WILLERMAIN (6) 224.
[85] About causation and the Belgian equivalence theory, e.g.: M. VAN QUICKENBORNE, *Oorzakelijk verband tussen onrechtmatige daad en schade*, Mechelen, Kluwer, 2007, 160 p. See also: T. VANSWEEVELT and B. WEYTS, *Handboek Buitencontractueel Aansprakelijkheidsrecht*, Antwerp, Intersentia, 2009, 775-799, with further references.

further proof of causation between the fault and the loss itself is needed.[86] However, most of them still require the customer to show a causal link between the loss and the transaction. From their point of view, if the loss results from the transaction and the transaction results from the infringement, the loss equally results from the infringement.[87] This point of view will be called the *protectionist* theory, since it implies a rather flexible burden of proof. Therefore, it protects customers in the most extensive way.

However, article 30*ter* explicitly states that it does not affect the common law principles.[88] Therefore, a minority of authors argue that the damage cannot be deemed to result from the infringement as well, by the single meaning of the legal presumption.[89] Thus, from a *legalist*[90] point of view, the customer still needs to prove a separate and direct causal link between the infringement and the damage.[91] To that end, the added value of article 30*ter* in extra-contractual claims for damages seems rather limited.

2. Assessment

23. It should be acknowledged that both viewpoints are based upon valid arguments. As stated above, there is no case law available yet to further clarify article 30*ter*'s true meaning.[92] However, it would not be very surprising if future case law applied the protectionist theory. Obviously, this theory is the most beneficial one for customers. Furthermore, the legislator explicitly expressed the aim to reinforce the legal status of aggrieved investors.[93] Judges might consider this a reason to require a less demanding burden of proof.

24. Moreover, it is sometimes stated that article 30*ter* FSA should be read in a similar way to article 61, § 2, 2nd section Prospectus Act[94], which provides a rebuttable legal presumption of causation between the investor's losses and the misleading, incorrect or inconsistent nature of the information in the prospectus, if this information could create a positive climate on the market or if it could positively influence the purchase price of the financial instruments. In that sense, it is said that also article 30*ter* should be read as establishing causation between the *damage* and the *infringement* itself (which frequently consists of incorrect, incomplete or misleading information). This reasoning is essentially based on the fact that the Explanatory Memorandum of article 30*ter* explicitly refers to

---

[86] DANDOY (19) 141-142; DIEUX (6) 195-196; GILLIS (47) 241-242; H. LANNOY, "Naar een veralgemeend zorgplichtmodel" in V. COLAERT and A. LECOCQ (eds.), *De levenscyclus van bank-, beleggings- en verzekeringsproducten. Le cycle de vie des produits bancaires, d'investissement et d'assurance*, Brussels, Larcier, 2014, 120-121; MOREAUX (65) 430-431; SCHAEKEN WILLEMAERS (60) 8; SWEERTS (6) 245-246; L. SCHUERMANS and C. VAN SCHOUBROECK, *Grondslagen van het Belgische verzekeringsrecht*, Antwerp, Intersentia, 2015, 201-202. It should the remarked that this also seems to be the view of the Belgian FSMA, which is the financial supervisory authority for, *inter alia*, conduct of business rules in the banking-, investment- and insurance industries. *Cf.* FSMA Circular Letter 2015, 62-63.

[87] In that sense: MOREAUX (65) 430-431; DIEUX (6) 195-196; GILLIS (47) 241-242; SCHAEKEN WILLEMAERS (60) 8; WILLERMAIN (6) 225, who argues that art. 30*ter* should be interpreted in such a way, in order to give the legal presumption some practical relevance.

[88] See above, paragraph 18.

[89] Note that WILLERMAIN acknowledges this fact as well. *Cf.* WILLERMAIN (6) 224. Yet, he chooses a more pragmatic interpretation, *cf.* footnote 87, *in fine*.

[90] Thus, based on the strict wording of the legal provision itself.

[91] In that sense: VAN DYCK and DENTURCK (11) 281-282, who still remain in doubt though about the consequences of such a thesis, and who remark on the possibility that judges would be satisfied with the mere causal link between the transaction and the loss. M. TISON, "Beleggersbescherming door informatieverstrekking: post-crisistendensen in de regulering en de (civiele) handhaving" in V. COLAERT and A. LECOCQ (eds.), *De levenscyclus van bank-, beleggings- en verzekeringsproducten. Le cycle de vie des produits bancaires, d'investissement et d'assurance*, Brussels, Larcier, 2014, 63-64; VANDENDRIESSCHE (60) 199-200.

[92] *Cf.* paragraph 16.

[93] E.g.: Explanatory Memorandum Twin Peaks II, 58.

[94] Act of 16 June 2006 on public offers of investment instruments and the admission of investment instruments to trading on a regulated market, *Belgian State Gazette* 21 June 2006 (hereafter: "Prospectus Act). For a more detailed analysis of this legal presumption, e.g.: J.-M. GOLLIER, "Information financière et lien de causalité" in S. BOGAERTS, B. CLERCKX, P. D'HONDT, J.-M. GOLLIER and L. VAN BEVER (eds.), *Openbare aanbiedingen en prospectus: de wet van 16 juni 2006 – Les offres publiques et le prospectus: la loi du 16 juin 2006*, Bruges, Vandenbroele, 2007, 279-282; WILLERMAIN (6) 215-217.

article 61 Prospectus Act.[95]

However, in my opinion, such a reference is made concerning the similar *rebuttable* nature of article 61's legal presumption, which results in a reverse of the burden of proof.[96] To the contrary, no inferences related to the scope of the burden of proof itself can be made. In short, if the legislator had wanted to introduce a likewise legal presumption, he would – and should – have used other terms. In addition, article 61 Prospectus Act has a slightly different aim than article 30*ter* FSA. The main difficulty for individual investors bringing a claim concerning faulty information in a prospectus, is to prove that they *individually* took note of the prospectus and that this information was a determining influence on their investment decision against a certain *price*. That is why article 61 Prospectus Act aimes at creating a presumption concerning these two matters, thus referring to the influence on the market in general.[97] Conversely, *MiFID* conduct of business rules are more individually oriented anyways. Consequently, the main evidential difficulty for a customer is not to prove that he took note of the information – since that is obvious – but that his investment decision was based on a conduct of business rule's infringement.[98]

25. This brings us to the true meaning of article 30*ter*'s legal presumption. In order to correctly understand the presumption, in my opinion, one should realize that the matter of causation in investor losses is *twofold*.[99] The same applies to insurance-based investments. This can be illustrated through case 1:

In case 1, the value of the policyholder's insurance-based investment was reduced to 10 % of its previous value, due to a big stock market crash. Frequently, in such situations, the investor (or, thus, the policyholder) argues that he would have made a different investment decision if the suitability test had been carried out. Thus, a first step towards compensation consists of proving causation between the infringement and the decision to subscribe to the insurance-based investment. This is the so-called *transaction causation*. However, as already stated, this is a very demanding burden of proof. In particular, it is difficult to determine – *a posteriori* – whether the policyholder would have acted differently, if no infringement had been committed against him.[100] It is precisely this matter in which article 30*ter* aimes at intervening. That is why this provision installs a presumption between the infringement and the transaction/the decision to subscribe to the insurance product. Hence, article 30*ter* FSA can be defined as a rebuttable legal presumption of *transaction causation*.[101]

So, if the policyholder shows evidence of the infringement[102] and of damage resulting from the transaction[103], the transaction will be deemed to result from the infringement. However, it is not definite yet that the policyholder will be compensated. Firstly, the legal presumption is rebuttable. Secondly, the policyholder is still obliged to prove the causation between the infringement and the arising of compensable damages. Hence, he needs to prove that he would not have suffered any loss or would have suffered smaller losses, in absence of the infringement. In other words, *loss causation* is required. Such evidence should be brought through the theory of the hypothetic alternative.[104] More concretely, would the policyholder not have faced any decrease in value at all, if he had subscribed to

---

[95] *Cf.* WILLERMAIN (6) 225.

[96] *Cf.* Explanatory Memorandum Twin Peaks II, 58. About the rebuttable nature of art. 30*ter*, see below, paragraph 36 *et seq*.

[97] E.g.: S. DELAEY, "Barrack Mines: het vervolg" (note under Court of Appeal Brussels 3 October 2006), *DAOR* 2007, issue 83, 237-238, with further references.

[98] See also: Explanatory Memorandum Twin Peaks II, 58.

[99] For a detailed analysis of twofold causation in investment services throughout several jurisdictions (and its origine), *cf.*: E. VANDENDRIESSCHE, "Causaliteit en bewijslast in het Belgische financiële aansprakelijkheidsrecht bij beleggingsdienstverlening" in D. BUSCH, C.J.M. KLAASSEN and T.M.C. ARONS (eds.), *Aansprakelijkheid in de financiële sector*, Deventer, Kluwer, 2013, 190-215; VANDENDRIESSCHE (60) 158-164 and 185-307.

[100] As for investment products, e.g.: VANDENDRIESSCHE (99) 191-193, with further references; VANDENDRIESSCHE (60) 189-192.

[101] The same qualification appears in: VANDENDRIESSCHE (60) 198-200.

[102] See below, paragraph 28 *et seq*.

[103] See below, paragraph 33 *et seq*.

[104] VANDENDRIESSCHE (99) 191; VANDENDRIESSCHE (60) 199-200.

another insurance product? Would he rather have faced a decrease as well, yet less dramatically? Or would he not have subscribed to any insurance-based investment at all?[105]

26. From that point of view, the *legalist* theory seems to be more appropriate. Indeed, the customer's burden of proof is not fulfilled yet, by the mere non-rebutted application of the legal presumption. Moreover, a causal link between the infringement and the concrete damage itself is still necessary, since, in principle, the damage cannot be considered being equal to the transaction itself. Thus, causation between the infringement and the transaction is a *condicio sine qua non* and a very useful asset, yet not sufficient to award damages.

IV. Consequences for the burden of proof

27. The burden of proof related to article 30*ter* will be further analysed with reference to the *legalist* theory. Moreover, it will be examined how the policyholder can bring evidence of an infringement to a conduct of business rule. Furthermore, it will be discussed which proof of loss is required in order to invoke the legal presumption of transaction causation. To that extent, also the rebuttable nature of article 30*ter* needs a closer look. Only then, the matter of loss causation will be discussed. When all this is analysed, it will be concluded that a claim based on conduct of business rules remains difficult, even with the help of the legal presumption.

A. The infringement to a conduct of business rule

1. Introduction

28. The policyholder has to prove an *infringement* of the service provider of one or more of the specific conduct of business rules, falling under the scope of article 30*ter* FSA. In principle[106], such an infringement is automatically a fault in the sense of article 1382 Civil Law Code, since it is a violation of a command or prohibition, which is prescribed by law.[107] Indeed, contrary to, *inter alia*, the Netherlands and Germany, Belgian extra-contractual liability does not adhere to the *relativity requirement* (or *the Schutznorm-requirement*), stating that a violated rule should have as (one of) its aim(s) the protection of the person who is invoking the violation.[108] Therefore, whereas some authors[109] question the public law character of the *MiFID* conduct of business rules, this discussion is irrelevant for Belgian civil liability claims.[110] As long as the public law rules are sufficiently clearly prescribed by law, their single breach can lead to civil liability, irrespective of their purpose.[111]

---

[105] See below, paragraph 40 *et seq*.

[106] Since, further below, it will be argued that in most cases the general duty of care is at stake.

[107] *Cf.* H. COUSY, "Les "régles de conduite" et le droit des assurances" in C. BRUYNEEL, J.-P. BUYLE and M. DELIERNEUX (eds.), *Synthèses de droit bancaire et financier*. *Liber Amicorum André Bruyneel*, Brussels, Bruylant, 2008, 507. In general, see also: VANSWEEVELT and WEYTS (85) 137-139, with further references.

[108] E.g.: D. BUSCH, "De invloed van MiFID op aansprakelijkheid in de Europese financiële sector" in D. BUSCH, C.J.M. KLAASSEN and T.M.C. ARONS (eds.), *Aansprakelijkheid in de financiële sector*, Deventer, Kluwer, 2013, 39-42.

[109] E.g. the reasoning in: P. VAN CLEYNENBREUGHEL, "Gedragsregels in het financieel recht. Enkele beschouwingen over gedragsregels als rechtsbron naar aanleiding van de implementatie van MiFID in het Belgisch recht", *Jura Falconis* 2008-09, issue 1, 77-118; V. COLAERT, *De rechtsverhouding financiële dienstverlener - belegger*, Bruges, die Keure, 2011, 136-147.

[110] COUSY (107) 507. See also: VANSWEEVELT and WEYTS (85) 137-138, with further references.

[111] E.g. in general: VANSWEEVELT and WEYTS (85) 137-138. See also: M. KRUITHOF, "De privaatrechtelijke werking van de MiFID 2004-gedragsregels: een analyse van de mate waarin zij de wederzijdse rechten en plichten van dienstverlener kunnen aanvullen en beperken" in INSTITUUT FINANCIEEL RECHT (ed.), *Financiële regulering in de kering. IFR-dagen 2011*, Antwerp, Intersentia, 2012, 310-311. All the more, as for *MiFID* rules, it is widely acknowledged that one of their aims is to *protect customers*. E.g.: M. TISON, "The civil law effects of MiFID in a comparative law perspective", *Financial Law Institute Working Paper Series* 2010, WP 2010-05, http://ssrn.com/abstract=1596782, 2-4; COLAERT (109) 128-130.
Yet, even in jurisdictions with a relativity requirement, the *MiFID* rules can most likely lead to civil liability.

Moreover, it is said that conduct of business rules tend to complement the general *pre-contractual information duties* and to define them in a sharper and more detailed manner.[112] It is clear that most insurance conduct of business rules in the scope of article 30*ter* are duties to provide policyholders with information, before any contract is concluded. For example: the required information concerning the costs and expenses[113] and the obligatory information that should help the customer in making an informed decision[114].[115] All of these need to be qualified as duties to provide information or *active* information duties.[116] However, the know your customer principle and the obligation to identify the demands and needs – as illustrated in cases 1 and 2 – rather require the insurance broker to obtain *information*. In that respect, these obligations can be qualified as *passive* pre-contractual information duties.[117]

29. As stated above, the infringement of the conduct of business rule must be committed against the policyholder himself.[118] Furthermore, the burden of proof of not complying with an information duty principally rests on the aggrieved party, thus on the policyholder.[119] Yet, recently, the Belgian Court of Cassation argued that it is for the lawyer to prove that he fulfilled his information duty against his client.[120] However, in my opinion, it is still unclear whether this reasoning will be valid for all service providers and for all kind of information duties. for example, the lawyer's information duty in the latter case may be qualified as an obligation of result, whereas it will be argued below that most conduct of business rules contain obligations of means. Furthermore, also GLANSDORFF seems to state that the Court of Cassation's decision does not automatically impose a presumption of fault on the service provider. The burden of fault evidence principally rests on the aggrieved party.[121] Therefore, the previous jurisprudence and legal doctrine will be applied. Finally, it should be reminded that, even if this jurisprudence would reverse the burden of proof concerning the infringement to an information duty in the future, it would not free the aggrieved party from proving damages and a causal link. To that extent, the legal presumption of causation in article 30*ter* still remains relevant..

To determine the burden of proof's precise extent, one should examine the content of the information duty itself. Most information duties qualify as *obligations of means*, and not as *obligations of result*.[122]

---

[112] E.g.: A. VAN OEVELEN, "De contractuele en buitencontractuele aansprakelijkheid van de particuliere belegger in rechtsinstrumenten", *Bank Fin.R.* 2003, issue 2-3, 122-127 and 135, with further references.
[113] Art. 9 Royal Decree No. 2.
[114] Art. 27, § 3 FSA and art. 4 Royal Decree No. 1.
[115] See above, paragraph 6.
[116] *Cf.* J.-F. ROMAIN, "L'obligation d'information et de conseil pesant, dans certains cas, sur les intermédiaires financiers" in F. GLANSDORFF (ed.), *Les obligations d'information, de renseignement, de mise en garde et de conseil*, Brussels, Larcier, 2006, 226-227.
[117] In the same sense as for the know your customer principle: ROMAIN (116) 226.
[118] See above, paragraph 9.
[119] For a detailed analysis of information duties and the related burden of proof, *cf.*: A. DE BOECK, *Informatierechten en –plichten bij de totstandkoming en uitvoering van overeenkomsten: grondslagen, draagwijdte en sancties*, Antwerp, Intersentia Rechtswetenschappen, 2000, 461-473. See also, *inter alia*: Cass. 10 December 2004, *NjW* 2005, issue 121, 951 and *RCJB* 2005, 680, annotation J.-P. BUYLE (from which it is considered a general principle that the burden of proof for infringing an information duty should rest on the consumer); Court of Appeal Liège 22 November 2007, *Bank Fin.R.* 2009, issue 5, 290 (concerning the information duty of the insurance broker pre-*MiFID*); Court of 1st instance Brussels 30 January 2009, *TBH* 2011, issue 4, 315 (insurance broker pre-*MiFID*); Court of Commerce Brussels 6 April 2013, *Bank Fin.R.* 2013, issue 4, 224 (*MiFID* rules in investment services); Court of Commerce Brussels 8 April 2014, *Bank Fin.R.* 2014, issue 5, 283, annotation J. SAD (*MiFID* rules in investment services); F. DE PATOUL, "MiFID dans la pratique. Quelques réflexions au départ des decisions du Service de Médiation Banques-Crédit-Placements", *Bank Fin.R.* 2010, issue 5, 315.
[120] Cass. 25 June 2015, AR C140382F, www.juridat.be (summary) and *RGAR* 2015, issue 8, 15219, annotation F. GLANSDORFF.
[121] *Cf.* F. GLANSDORFF, "Note" (annotation under Cass. 25 June 2015), *RGAR* 2015, issue 88, 15219.
[122] E.g.: Court of Appeal Liège 22 November 2007, *Bank Fin.R.* 2009, issue 5, 290 (concerning the information duty of the insurance broker pre-*MiFID*); V. DE SCHRYVER, "Prospectusaansprakelijkheid" in E. WYMEERSCH (ed.), *Financieel recht tussen oud en nieuw*, Antwerp, Maklu, 1996, 347; DE BOECK (119) 461-473.; J.-P. BUYLE, "Les obligations d'information, de renseignement, de mise en garde et de conseil des professionnels de la finance" in F. GLANSDORFF (ed.), *Les obligations d'information, de renseignement, de mise en garde et de*

The same applies to the *MiFID* conduct of business rules.[123]

2. Obligation of result vs obligation of means

30. Hence, the conduct of business rule's content is the criterion for defining the nature of the rule, which will rarely result in an *obligation of result*. For example, in case 1, the policyholder argued that the insurance broker did not carry out a suitability test.[124] Consequently, the policyholder subscribed to unsuitable insurance-based investment. The legal provisions only impose an explicit duty to obtain information, in order to be able to give suitable advice. Hence, the policyholder can only easily claim an infringement of the know your customer principle in so far as he proves that the insurance broker did not obtain any information at all. In that respect, article 27, §4 *MiFID* and its implementing royal decrees sufficiently clearly prescribe a rule by law, therefore immediately causing a fault in the sense of article 1382 Civil Law Code.[125] In other words, this duty must indeed be considered an obligation of result. It should be remarked though, that the insurance broker can still disprove the negligent character of his behaviour, by proving his awareness of the relevant information through another channel than the suitability test, e.g. based on the prolonged professional relationship with the same customer.[126]

On the contrary, the legal provisions do not contain the specific duty to give suitable advice, nor do they prohibit unsuitable advice. Nevertheless, in order to obtain redress, the policyholder also needs to prove the unsuitability of the advice. This will lead to an assessment in concrete of the insurance broker's behaviour. Therefore, the *general duty of care* of article 1382 Civil Law Code is at stake, examining whether a normal diligent professional service provider, under the same circumstances, would have provided such advice.[127]

Thus, in case 1, the policyholder probably will not have much difficulty in proving the infringement when it comes to not obtaining the information for the suitability test, unless the policyholder and the insurance broker had a long-standing professional relationship. However, as to the unsuitability of the advice, the policyholder faces the burden of proof concerning the general duty of care or, to put it differently, an *obligation of means*.

31. The burden of proof would be even more demanding if the insurance broker in case 1 did query the policyholder, yet in an insufficient manner. The suitability test surely contains an obligation of means – and thus, an illustration of the general duty of care – when it comes to the precise information needed to correctly perform the suitability test.[128] Which information needs to be obtained, and how, will depend on the circumstances of every case.[129] From this point of view, the

---

conseil, Brussels, Larcier, 2006, 168-169; T.-L. EEMAN, J.-P. FOLLET and A. RONDAO ALFACE, "La responsabilité des courtiers d'assurances et l'assurance de cette responsabilité", *T.Verz.* 2012, issue 1, 74 (regarding information duties of insurance brokers pre-*MiFID*). Conversely, a bigger scope for the obligation of result is argued in: F. GLANSDORFF, "Introduction générale" in F. GLANSDORFF (ed.), *Les obligations d'information, de renseignement, de mise en garde et de conseil*, Brussels, Larcier, 2006, 34-37.

[123] *Cf.*: Court of Appeal Brussels 30 September 2013, *TBH* 2015, issue 2, 213, annotation A. HAMANN (defining the conduct of business rules in art. 27, § 2 and 3 FSA as obligations of means); DIEUX(6) 195.

[124] Art. 27, § 4 FSA; art. 4, § 4 Royal Decree No. 1.

[125] In the same sense: KRUITHOF (33) 173-177, with further references.

[126] E.g. Court of Commerce Brussels 9 February 2011, *JT* 2011, issue 6438, 400, annotation X.

[127] E.g.: KRUITHOF (33) 176-177, who argues that in this respect, the value of the *MiFID* rules – compared to the general pre-contractual information duties – is mainly in the fact that, under the *MiFID*, it is no longer required for the customer to communicate his special needs or financial situation to the service provider. Indeed, this is deduced from the fact that the know your customer principle installs a duty to query the customer. However, in my opinion, the *MiFID* rules cannot exempt the customer from obeying the general duty of care himself, which is still applicable to information that supersedes the scope of the *MiFID* rules, but that is relevant for the service provider's assessment. See also, from the same author: KRUITHOF (111) 311-312.

[128] KRUITHOF (33) 177, with further references.

[129] E.g.: V. COLAERT, "Informatie aan de belegger: last of lust voor de financiële instelling?" in M.-D. WEINBERGER (ed.), *MiFID: bijzondere vraagstukken / MiFID: Questions spéciales*, Brussels, Larcier, 2010, 176-177.

MiFID know your customer principle does not offer much help for the burden of proof.[130]

One could argue that the same principles apply to the lack of identifying the policyholder's demands and needs in case 2. The legal provisions[131] express the need to identify the latter, yet without providing clear guidelines on how such an examination should be carried out. Also the other duties concerning the demands and needs[132] remain rather vaguely described. Therefore, only the duty *as such* to identify the demands and needs can be qualified as an obligation of result/a rule prescribed by law, immediately causing a violation of article 1382 Civil Law Code. By contrast, all the duty's particularities need to be analysed as an obligation of means and thus only violating article 1382 Civil Law code, when the general duty of care has not been fulfilled.

32. It should be remarked that the active information duties (*inter alia*, article 27, § 2 and 3 FSA) qualify as *obligations of means* as well.[133] Consequently, even within the scope of the *MiFID* rules, the nature of the information duty depends on, *inter alia*, the complexity of the (insurance) contract and the experience, the expertise and the education of the customer.[134] At the same time, the customer must inform himself of the nature, the object, the scope and the risks of a contract that he intends to subscribe to. If he does not understand everything, it is his responsibility to ask for further explanation.[135] Thus, customers should give proof of a critical mind, even when being protected by the *MiFID* conduct of business rules.[136]

33. The analysis allows one to conclude that the policyholder should not take the proof of an infringement for granted. Indeed, most conduct of business rules do not prescribe a clear command or prohibition (or obligation of result), thus immediately causing a violation of article 1382 Civil Law Code. The conduct of business rules are rather formulated as *obligations of means*. To that extent, they further specify the general duty of care of article 1382 Civil Law Code.[137] Therefore, their difference in relation to the fundamental *MiFID* duty of care in article 27, § 1 FSA is rather subtle.[138] The infringement of a specific conduct of business rule equally presumes an examination in concrete, based on the behaviour of a normal diligent service provider, in the same circumstances. From that point of view, it can be considered discriminatory to explicitly keep the fundamental *MiFID* duty of care outside the scope of article 30*ter* FSA. This is all the more true for those provisions that further elaborate on article 27, § 1 FSA.[139] It is desirable that, at least, these would be included in the scope of the legal presumption of causation.

Furthermore, it is obvious that many claims will already become stalled at the requirement of an *infringement* to the conduct of business rules. Firstly, the burden of proof is demanding as such, since

---

[130] *Cf.* S. DELAEY, *De contractuele verhouding inzake portefeuillebeheer: op de wip tussen MiFID en privaatrecht: vergelijking met verwante financiële figuren, juridische kwalificatie en plichtenpakket van de portefeuillebeheerder*, Antwerp, Intersentia, 2010, 193-194.

[131] Art. 273, § 3 and 276 Insurance Act 2014.

[132] Such as the duty to make sure that the provided insurance contract corresponds with the demands and needs and – in case of advice – the duty to motivate his advice, which varies depending on the complexity of the provided insurance contract.

[133] E.g.: R. STEENNOT, "Precontractuele informatieverplichtingen als beschermingstechniek bij de bescherming van de zwakkere partij in het financieel recht" in R. FELTKAMP, C. HOUSSA and R. STEENNOT (eds.), *Bescherming van de consument in het financieel recht – La protection du consommateur en droit financier*, Antwerp, Intersentia, 2012, 120.

[134] Court of Appeal Brussels 30 September 2013, *TBH* 2015, issue 2, 213, annotation A. HAMANN; Court of Commerce Brussels 26 April 2013, *Bank Fin.R.* 2013, issue 4, 224. About the experience and knowledge of the client as a way to *disprove* the infringement to the information duties, see also: VAN DYCK and DENTURCK (11) 281, with further references.

[135] Court of Appeal Brussels 30 September 2013, *TBH* 2015, issue 2, 213, annotation A. HAMANN; DE PATOUL (119) 311-312.

[136] A. HAMANN, "L'obligation d'information dans MiFID: un devoir du banquier vis-à-vis de son client…et vice-versa" (annotation under Court of Appeal Brussels 30 September 2013), *TBH* 2015, issue 2, 223.

[137] E.g.: DE PATOUL (119) 311. More implicitly in: VAN DYCK and DENTURCK (11) 281-281.

[138] See above, paragraph 7.

[139] Art. 7 *MiFID* Royal Decree; art. 7 Royal Decree No. 2. See above, paragraph 7.

the general duty of care is at stake.[140] Secondly, the scarce jurisprudence related to *MiFID*[141] does not seem to be too keen on accepting an infringement. In fact, none of them did and, to that extent, they were frequently referring to the customer's own behaviour and his own duty of care.[142] Hence, the legal doctrine arguing that the legal presumption of causation will make it far more easy to successfully bring a claim[143], already overlooks the difficulties concerning the proof of the infringement itself. In that sense, the first prerequisite for activating the legal presumption of causation might not even be fulfilled.

B. Transaction causation

1. Loss resulting from the transaction

34. If the policyholder successfully proves an infringement to the conduct of business rules, one extra step is needed to activate the legal presumption of transaction causation. Article 30*ter* itself requires the policyholder to prove *damage resulting from – or relating to – the transaction*.[144] Thus, as for the insurance sector, the damage should arise from the subscription to the insurance contract.[145] It is regrettable that article 30*ter* does not further clarify the meaning of *"resulting from the transaction"*.[146] Most likely, it should be interpreted in such a way that – at this point of the burden of proof – it is not necessary yet to prove the damage's causal link with the infringement itself.[147] Moreover, the evidence of the damage's *extent*[148] is not required either at this stage of the burden of proof. Thus, the policyholder only needs to show that the transaction was a *condicio sine qua non* for the damage.

35. The latter can be illustrated through cases 1 and 2:

In case 1, the value of the policyholder's insurance-based investmentinsurance-based investment was reduced to 10 % of its previous value, due to a big stock market crash. Thus, the policyholder could argue that he suffered losses resulting from subscribing to the insurance-based investmentinsurance-based investment. However, markets tend to fluctuate over time. Therefore, in principle, the policyholder first needs to *buy off* the insurance-based investment. Otherwise, nothing can guarantee that the decreases will be maintained and, if so, to what extent. From that point of view, the damage has not yet materialized (thus, been realized) until the insurance's buy-off.[149] Furthermore, regardless of the precise scope of the damage and its causal link with the infringement[150], in case 1 it is obvious that the damage is related to the insurance subscription. In short: no subscription, no damage. Hence, if

---

[140] However, note that the Belgian Court of Cassation's jurisprudence might bring changes to that in the future. See above, paragraph 29.

[141] Before art. 30*ter* FSA entered into force. As already stated, so far no jurisprudence has been published related to the application of the legal presumption, *cf.* paragraph 16.

[142] E.g.: Court of Appeal Brussels 30 September 2013, *TBH* 2015, issue 2, 213, annotation A. HAMANN (no proof of the advice's unsuitability, no infringement because of the customer's own knowledge); Court of Commerce Brussels 9 February 2011, *JT* 2011, issue 6438, 400, annotation X (no infringements because of, *inter alia*, the long term relationship with the customer); Court of Commerce Brussels 26 April 2013, *Bank Fin.R.* 2013, issue 4, 224 (no infringement because of the customer's own knowledge); Court of Commerce Brussels 8 April 2014, *Bank Fin.R.* 2014, issue 5, 283, annotation J. SAD (no timely response of the customer himself and, therefore, no infringement).

[143] E.g.: DANDOY (19) 141-142; GILLIS (47) 241-242.

[144] The legal provision itself requires *"damage resulting from the transaction"*. Hence, the Explanatory Memorandum rather seems to be satisfied with *"damage related to the transaction"*, which seems less strict. *Cf.* Explanatory Memorandum Twin Peaks II, 58.

[145] E.g.: GILLIS (47) 242. Also, see above, paragraph 15.

[146] All the more, art. 30*ter* does not provide *any* further details concerning the damage at all. *Cf.*: SCHAEKEN WILLEMAERS (60) 8, footnote 50.

[147] About the causal link between the damages and the infringement itself, see below, paragraph 40 *et seq*.

[148] VAN DYCK and DENTURCK (11) 282; TISON (91) 63-64.

[149] In the same sense, as for investment services: DE PATOUL (119) 318. Also, see below for a more detailed analysis, paragraph 41.

[150] Which is a matter of *loss causation*, see below, paragraph 40 *et seq*.

the policyholder manages to prove an infringement to the conduct of business rules[151], the damage can be deemed to result from the insurance subscription as well. Therefore, the legal presumption of transaction causation could possibly apply.

However, more doubts arise concerning case 2. In my opinion, this also follows from the fact that article 30*ter* – and the *MiFID* conduct of business rules in general – principally aims at investor losses, due to defected investment services.[152] However, the scope of article 30*ter* is much wider and could even affect car insurances, like in case 2. In case 2, the policyholder will possibly claim that the damages consist of the non-covered damage to his car. It is to be expected that the proof of causation between these concrete car damages and the insurance subscription will be more difficult. The same applies, *a fortiori*, to the required causation between these damages and the infringement itself.[153] From that point of view, in my opinion, if the policyholder wishes to successfully invoke the legal presumption, he may redefine the suffered loss. For example, he could argue that he suffered the loss of a chance of being covered by his car insurance and/or he could claim moral damages resulting from the inability to make an informed insurance decision.[154] Such damages will necessarily be more limited in scope, yet it might be easier to prove their relatedness with the insurance subscription (and the infringement).[155]

2. The presumption and its rebuttal

36. If the policyholder succeeds in proving an infringement and losses resulting related to the insurance subscription, the legal presumption will apply. Thus, the transaction will be deemed to result from the infringement. It is noteworthy that the requirement of transaction causation is not only peculiar to conduct of business-related claims. In general, a likewise burden of proof is required from the moment the fault committed by a service provider consists of a lack of information.[156] For example, the same applies to a patient who was not duly informed by the physician about a surgery's relevant risks.[157] Thus, the patient needs to prove that he would have refused the surgery, if he had been aware of all relevant risks.[158]

As for faulty information related to investment services, in the past, the strict burden of proof of transaction causation was sometimes mitigated by referring to the expertise, the experience and knowledge of the investor himself. Hence, the lesser the investor's knowledge and expertise, the lesser the threshold for causation seemed to be.[159] As already stated above, the customer's characteristics could also influence the proof of the infringement itself.[160] However, through article 30*ter* FSA, the legislator has now clearly opted for a legal presumption of transaction causation. Thus, one would expect a less severe burden of proof and more legal certainty. This contribution shows that both objectives were not – entirely – achieved. Firstly, the analysis of the legal doctrine shows that authors cannot agree on the precise meaning of the legal presumption.[161] Consequently, legal uncertainty might arise. More importantly, the biggest limitation of the legal presumption of transaction causation is in its rebuttable nature.

37. Similar to article 61, § 2 Prospectus Act[162], the legal presumption only applies as long as the

[151] See above, paragraph 27 *et seq*.
[152] E.g. the wording in: Explanatory Memorandum Twin Peaks II, 57-58.
[153] Also, see below, paragraphs 47 and 48.
[154] Some authors argue that the loss of a chance or moral damages seem to be the only recoverable losses in defective investment services as well, e.g.: DIEUX (6) 195-196; SCHAEKEN WILLEMAERS (60) 8, footnote 50. Also, see below, paragraphs 46 and 48.
[155] However, see below, paragraph 48 for the policyholder's own duty of care, as a consequence whereof probably lesser damages will be rewarded anyways in case 2.
[156] E.g. VANSWEEVELT and WEYTS (85) 807-811.
[157] An information duty which is prescribed by law. *Cf.* art. 8 Act of 22 August 2002 concerning the rights of the patient, *Belgian State Gazette* 26 September 2002.
[158] E.g. VANSWEEVELT and WEYTS (85) 807-811, with further references.
[159] E.g.: VANDENDRIESSCHE (99) 195-198, with further references.
[160] See above, paragraph 32.
[161] See above, paragraph 22.
[162] See above, paragraph 24.

contrary has not been proven. Hence, the service provider still has the opportunity to prove that the policyholder would still have subscribed to the same insurance, if no infringement had been committed. From that point of view, the legal presumption *solely* wishes to reverse the burden of proof.[163] Moreover, the 'transaction causation debate' will take place in full from the moment the service provider tries to disprove the presumption.[164] DIEUX rightly concludes that the single value of the legal presumption consists of the fact that, if doubt remains concerning the causation, such a doubt would be to the customer's advantage.[165]

38. Contrary evidence can be provided by all legal means. VAN DYCK and DENTURCK give some non-exhaustive examples of such evidence.[166] Firstly, factual data can show that the transaction had a cause that had no relation to the infringement at all. For example, in case 1, the insurance broker might claim that the policyholder explicitly stated not to follow the insurance broker's advice. He could do so by showing previous correspondence with the policyholder. The same contrary evidence may be provided in case 2.

Furthermore, the authors remind us of the service provider's possibility to prove the insignificant nature of the infringement, so that it did not have a decisive impact on the transaction. Nevertheless, in my opinion, such reasoning could be in conflict with the equivalence theory, which includes *every* fault that truly affected the damage, no matter how futile this fault was.[167] All the more, whether or not the infringement has significance is a discussion that should rather take place at the level of the infringement's proof itself, especially since most conduct of business rules are formulated as obligations of means.[168]

Thirdly, the customer's experience and knowledge could not only be used to facilitate the evidence of transaction causation. Indeed, these characteristics could also be used in the opposite way.[169] For instance, if we assume that the policyholder in case 1 was a professional client, the insurance broker might argue that, given his extensive experience and knowledge, the transaction could not have been caused by the infringement. To that extent, it may be concluded that certain infringements would show a causal link to transactions of non-professional clients, while, at the same time, this would not be the case concerning professional clients. The latter could be illustrated by some case law – pre-*MiFID* – wherein causation between the defective information and the investment decisions was accepted regarding a non-professional married couple, yet, was rejected regarding the second claimant, who was a financial director.[170] This possible rebuttal of the legal presumption shows that customers also have to comply with their own duty of care.[171]

39. These examples all show that it is far from impossible to disprove the presumption of causation. To that extent, the customer might still try to claim compensation for the *loss of a chance* to avoid a disadvantageous investment and/or the *loss of a chance* to achieve a less deficit, neutral or more profitable investment *or* for the *moral damages* resulting from the inability to make an informed decision.[172] By claiming the loss of a chance, awarded damages tend to be much smaller. Hence, those authors stating that loss of a chance (or moral damages) seem to be the only recoverable loss under the

[163] Explanatory Memorandum Twin Peaks II, 58. See also, e.g.: SCHUERMANS and VAN SCHOUBROECK (86) 202.
[164] SWEERTS (6) 246.
[165] DIEUX (6) 196.
[166] VAN DYCK and DENTURCK (11) 281.
[167] E.g.: VAN QUICKENBORNE (85) no. 341 *et seq*; VANSWEEVELT and WEYTS (85) 775.
[168] See above, paragraph 27 *et seq*.
[169] *Cf.* Court of Appeal Brussels 23 March 2006, *TBH* 2008, issue 1, 80, annotation B. CAULIER, where the causal link could not be adopted, since the customer was aware of the nature of the transaction and its risks.
[170] Court of Commerce Brussels 27 April 1995 and 3 May 1996, *TBH* 1996, 1107. The court was of the opinion that correct advice would not have affected the investment decision. *Cf.* the comments in: VANDENDRIESSCHE (99) 197-198.
[171] E.g.: Court of 1st instance Brussels 24 February 2012, *Bank Fin.R.* 2012, issue 2, 128, where a highly educated investor was deemed to be able to understand the general terms of the insurance product. Therefore, causation was accepted, yet the damages were not fully awarded. Also, see below, paragraph 47.
[172] DIEUX (6) 195-196; SCHAEKEN WILLEMAERS (60) 8, footnote 50.

application of article 30ter may not be completely accurate.[174] Indeed, when the presumption is not disproved and, thus, the transaction results from the infringement, there is no immediate reason to claim fewer damages. Yet, it is true that the customer is still required to fulfil the demanding burden of loss causation.

C. Loss causation

1. Introduction

40. Successfully invoking article 30*ter* FSA implies that the policyholder would not have subscribed to the insurance product, if no infringement to the conduct of business rules had been committed. However, the policyholder still needs to prove the scope of the suffered losses and their causal link with the infringement (*loss causation* or *causal losses*).[175] The twofold evidence of causation does not imply a different concept of damage itself. Indeed, the Explanatory Memorandum reminds us about the fact that the legal presumption does not affect the common law principles concerning the proof of damage.[176] From that point of view, the question arises as to the *lawful alternative* that the policyholder would have chosen if he had not subscribed to the respective insurance product. Subsequently, the difference between the actual result and the hypothetical result of the lawful alternative should be determined.[177] The result of this calculation will indicate the compensable damage.

Thus, the matter of compensable damage is inseparable from the matter of causation between the infringement and the damage. This is all the more true for disadvantageous investments based on deficient – or absent – information.[178] The same applies to insurance-based investments. Therefore, the proof of recoverable loss and loss causation will be further illustrated in the light of case 1. At the same time, inspiration will be found in a decision of the Court of first instance in Brussels on 24 February 2012, where, equally, unsuitable advice concerning an insurance-based investment was provided, thus, causing loss to the policyholder.[179]

2. Defining causal damages and their extent

41. In case 1, the value of the policyholder's insurance-based investment was reduced to 10 % of its previous value, due to a big stock market crash. It is assumed that the policyholder successfully invoked article 30*ter* FSA. So, the subscription to the insurance-based investment is caused by the infringement of the suitability test. Yet, the policyholder still needs to bring evidence of the suffered losses and their causal link with the infringement. Firstly, it should be recalled that, principally, the policyholder should *buy off* the insurance contract, in the absence whereof the damage will not be realized.[180]

Nevertheless, it is sometimes argued that *panic selling*, right after a strong decrease in value, could be considered a fault of the customer himself, hence, preventing from a causal link between the decreased value and the infringement itself.[181] Such reasoning rather seems applicable in cases of major financial crisis and an investment horizon of more than five years.[182] Conversely, an investor can be blamed for

---

[174] This is argued in, e.g.: DIEUX (6) 195-196; SCHAEKEN WILLEMAERS (60) 8, footnote 50.
[175] E.g.: TISON (91) 63-64; VANDENDRIESSCHE (60) 199-200.
[176] Explanatory Memorandum Twin Peaks II, 58. Also, see above, paragraph 18, where it is remarked that art. 30*ter* itself equally states that it does not affect the general principles of law.
[177] VANDENDRIESSCHE (99) 203-204.
[178] DIEUX (6) 195-196.
[179] Court of 1st instance Brussels 24 February 2012, *Bank Fin.R.* 2012, issue 2, 128. Note that, by that time, the *MiFID* conduct of business rules were not applicable yet to the insurance industry. However, the analysis will show a very similar examination of the claim. All the more, art. 30*ter* does not bring changes to the common law rules concerning loss (causation).
[180] See above, paragraph 35.
[181] E.g.: DE PATOUL (119) 318.
[182] *Cf.*: Court of Commerce Brussels 2 March 2011, *TBH* 2012, issue 4, 378.

not reacting, once the fault and the risks have been realized.[183] Likewise, in its decision of 24 February 2012, the Court decided that the policyholder did not commit a fault through the buy-off of the insurance-based investment.[184] Therefore, as a guideline, it seems more appropriate for the policyholder to opt for a buy-off. If the infringement of the service provider is obvious and decreases in value have already occurred, such a decision does not seem to be negligent.[185] If the policyholder in case 1 bought off the insurance-based investment, he would recover 10 % of his initial investment, minus the costs of the buy-off. From that point of view, it could be argued that, at first sight, the losses consist of the difference between the initial investment and the recovered capital.

42. However, one cannot consider such losses as recoverable causal damages straight away. Indeed, the policyholder should provide evidence concerning the lawful alternative that he would have chosen, if no infringement had been committed. After all, the precise lawful alternative is not established yet through the mere application of the legal presumption of transaction causation in article 30*ter*. Thus, in other words, it is still possible that, even though the insurance subscription is caused by the infringement, however, the concrete damages are not caused by the infringement. From that point of view, two lawful alternatives seem particularly relevant:

(i) The policyholder proves that he would not have subscribed to any insurance-based investment or any other investment product at all;
(ii) The policyholder proves that he would have subscribed to a more suitable – thus less risky – insurance-based investment or product.

43. As stated above, the compensable damages should be considered as the difference between the actual result and the hypothetical lawful alternative.[186] Hence, the recoverable damages can only be defined as the difference between the initial investment and the recovered capital through the buy off (10 % minus costs), if the policyholder successfully proves that he would not have subscribed to any product at all, without the infringement.[187] Conversely, such damages cannot automatically be awarded when it is more likely that the policyholder would have subscribed to another, more suitable, insurance-based investment or investment product. Then, the damages consist of the hypothetical – better – result of the alternative product *minus* the recovered capital through the buy-off.

In the latter calculation, one should take into account possible decreases in value that equally would have happened to alternative investment products, because of the negative climate on the financial markets. Such decreases cannot be considered compensable damages in causation with the infringement, since they are an inherent risk to every investment.[188] Indeed, such damages only show a causal link with the infringement itself, if the policyholder would not have invested at all in absence of the infringement.[189]

Again, this matter is illustrated in the judgement of 24 February 2012. In that case, the policyholder did not prove that she would only have subscribed to investments with capital guarantee, in absence of the infringement. Neither is there sufficient certainty concerning the returns of alternative investments, given the general financial climate in that period of time (2007-2009).[190] Therefore, the Court rightly rejects the calculations based on the difference between the initial investment and the recovered capital.[191]

44. It is likely that, in most cases, the policyholder will not succeed in proving that he would have abstained from any insurance-based investment or product. Thus, this is a strong, but correct, limitation to the awardable damages. However, it should be remarked that, also at this point, legal

[183] E.g.: Court of Appeal Brussels 23 January 2004, *TBH* 2006, issue 1, 112, annotation X; Court of Appeal Brussels 27 April 2012, *JLMB* 2012, issue 25, 1203.
[184] Court of 1st instance Brussels 24 February 2012, *Bank Fin.R.* 2012, issue 2, 128, consideration 21.
[185] In the same sense: VANDENDRIESSCHE (99) 213-215.
[186] See above, paragraph 40.
[187] VANDENDRIESSCHE (99) 205.
[188] In the same sense: VANDENDRIESSCHE (99) 205-206.
[189] Or if he would have subscribed to an investment product/insurance with capital guarantee.
[190] Court of 1st instance Brussels 24 February 2012, *Bank Fin.R.* 2012, issue 2, 128, consideration 20.
[191] In the same sense: VANDENDRIESSCHE (99) 206-207.

uncertainty might appear. Firstly, in multiple decisions concerning investor losses[192], the matter of damages itself is not even discussed, since the claim already does not pass the requirements of an infringement and/or causation.[193] Furthermore, in some court decisions where the matter of damages is actually examined, no true comparison between the actual result and the hypothetic lawful alternative is made. To that extent, such decisions seem to automatically mark the initial investment (minus the recovered capital through the selling or the buy-off of the product) as recoverable damages.[194] Nevertheless, in my opinion, it is more desirable to award damages based on a comparison between the actual and hypothetical result, since the latter is more closely linked to the common law principles of damages assessment and causation.[195]

3. Calculations of damages

45. As to the concrete calculations of the damages, in the decision of 24 February 2012, the Court appraised the damages *ex aequo et bono*.[196] Indeed, whereas the difference between the actual result and the hypothetical result is closer to reality than the initial investment, its calculation is more demanding. Therefore, courts would rather decide *ex aequo et bono*, which might arouse feelings of 'guesswork' in both parties. Once again, it is shown that claims based on the *MiFID* conduct of business rules – and on investor losses in general – are demanding and may not completely satisfy the customer.

46. It should be recalled that, if the policyholder claims the loss of a chance, such calculation will necessarily be *ex aequo et bono* as well.[197] It is important to note that the loss of a chance regarding investor losses is usually formulated as the loss of a chance to obtain a better result, thus, to better invest one's capital.[198] However, it sometimes stated that, in fact, such claims should be read as claims for the loss of a chance to avoid the risk of suffering losses. Such risk is in fact inherent to every investment transaction. Therefore, it is argued that such damages cannot be compensated.[199]

One can agree on the fact that compensation for the risk of suffering losses due to market crashes is not desirable. To that extent, one can refer to the calculation of damages when the customer would have subscribed to a more suitable investment product, in absence of an infringement. Indeed, the comparison between the actual result and the hypothetical – suitable – result requires that abstraction is made of those losses that follow from the general market evolutions.[200] However, damages following from the loss of chance should be compensated insofar as the chance was permanently lost[201] and was serious or real.[202] Therefore, nothing seems to principally prevent the compensation of

---

[192] Whether or not based on the *MiFID* conduct of business rules.

[193] E.g.: Court of Appeal Liège 22 November 2007, *Bank Fin.R.* 2009, issue 5, 290; Court of Appeal Brussels 30 September 2013, *TBH* 2015, issue 2, 213, annotation A. HAMANN; Court of 1st instance Brussels 30 January 2009, *TBH* 2011, issue 4, 315, annotation B. CAULIER; Court of 1st instance Antwerp 27 May 2009, *TBH* 2011, issue 4, 322, annotation B. FRIN; Court of Commerce Brussels 26 April 2013, *Bank Fin.R*. 2013, issue 4, 224.

[194] E.g.: Court of Appeal Brussels 3 October 2006, *DAOR* 2007, issue 82, 227, annotation S. DELAEY; Court of Commerce Brussels 26 March 1997, *Bank Fin.R.* 1997, issue 5, 334; Court of Commerce Brussels 30 June 2003, *Bank Fin.R.* 2004, issue 3, 175, annotation V. DE VUYST. See also the analysis in: E. VANDENDRIESSCHE, " '*Fraud-on-the market'*: een causaliteitstheorie inzake beleggersverliezen", *TPR* 2011, issue 2, 277-347.

[195] For the common law principles, *cf.* VANSWEEVELT and WEYTS (85) 778-779, with further references. For another example of a court decision with a comparison between the actual and the hypothetical result, see: Court of Appeal Brussels 27 April 2012, *JLMB* 2012, issue 25, 1203.

[196] Court of 1st instance Brussels 24 February 2012, *Bank Fin.R.* 2012, issue 2, 128, consideration 20. See also: VANDENDRIESSCHE (99) 207-208.

[197] E.g.: W. VAN GERVEN and A. VAN OEVELEN, *Verbintenissenrecht*, Leuven, Acco, 2015, 429; VANDENDRIESSCHE (99) 208-209.

[198] *Cf.*: Court of 1st instance Mechelen 3 April 2001, *RW* 2005-06, issue 3, 11; Court of Appeal Mons 7 October 2004, *Bank Fin.R.* 2006, issue 2, 94, annotation S. DELAEY.

[199] N. VANDERSTAPPEN, "Le dommage boursier par désinformation et les conditions de sa réparation: morceaux choisis sur la question du lien causal et de la perte de chance", *Bank Fin.R.* 2013, issue 5, 270-271.

[200] See above, paragraph 43.

[201] E.g. (concerning cases about liability in healthcare): S. LIERMAN, "Het verlies van een kans bij medische ongevallen", *NjW* 2005, issue 112, 614-615; Q. DE RAEDT, "Het verlies van een kans op het verlies van een kans", *T.Gez./Rev.dr.santé* 2012-13, issue 3, 230.

damages that are not linked to the general market conditions, but to, for example, the unsuitability of the product. These damages apply for compensation, irrespective of their formulation (loss of a chance or not). The strict requirements of evidence already seem to constitute a sufficient buffer against abuses on this matter.

47. While assessing the compensable damages in its decision of 24 February 2012, the Court mentions one final element that should be taken into account. More concretely, the Court assessed the policyholder's own wrongful conduct.[203] Indeed, as already stated above, the customer protected by the *MiFID* conduct of business rules should equally comply with the general duty of care. Conversely, the policyholder's own wrongful behaviour might free the service provider from liability. In other words, the service provider did not commit a fault in a causal link with the damages. Therefore, the policyholder's own wrongful conduct is the only cause of the damages.[204] For example, it could be esteemed that a financial director would have taken the same investment decision in absence of the infringement, based on his own knowledge and experience.[205] Furthermore, panic selling straight after a strong decrease in value might be considered wrongful behaviour.[206]

Wrongful behaviour does not always lead to no liability of the service provider at all. Rather, it is sometimes used to *reduce* the compensation.[207] Thus, both the policyholder and the service provider are liable for the policyholder's damages.[208] The same is shown in the decision of 24 February 2012. In concrete, the Court finds that a normal diligent policyholder should inform himself before making an investment decision. Therefore, the policyholder should have taken note of, *inter alia*, the general terms of the contracts, especially concerning the risks. Thus, when assessing the damages *ex aequo et bono*, a court might also take into account the policyholder's wrongful behaviour. In that sense, this might again limit the amount of awarded damages.

4. The matter of -insurance-based investments

48. It should be remarked that, so far, the analysis of loss causation was carried out on the basis of case 1 or likewise examples. As stated above, those contain the 'standardised case' aimed at by the legislator: infringements to *MiFID* pre-contractual information duties concerning *investment* products (or, thus, insurance-based investments). Yet, as for insurances, the scope of article 30*ter* FSA is much wider. From that point of view, case 2 involved car insurance and the obligation to identify the customer's demands and needs, the latter being a duty that, in fact, already existed in insurance before the *MiFID* was introduced.[209]

As for invoking the legal presumption of transaction causation in case 2, it was already noted above that the policyholder may better redefine the suffered losses into, for example, loss of a chance or moral damages in order to prove relatedness between the damages and the insurance subscription.[210] In the same sense, the damages to the car itself might not be considered compensable damages with a causal link to the infringement either. Therefore, the policyholder could rather claim the loss of a chance or moral damages, the latter, by its nature already being more limited. All the more, such damages will equally be calculated *ex aequo et bono*. Finally, in this context, special attention will probably be paid to the policyholder's own duty of care. Indeed, car insurance is more commonly known and less complex than e.g., insurance-based investment of branch 23. From that point of view,

---

[202] T. VANSWEEVELT, *De civielrechtelijke aansprakelijkheid van de geneesheer en het ziekenhuis*, Antwerp, Maklu, 1997, 371.

[203] Court of 1st instance Brussels 24 February 2012, *Bank Fin.R.* 2012, issue 2, 128, consideration 20. For a detailed analysis on this matter, see also: VANDENDRIESSCHE (99) 209-215.

[204] For a detailed analysis on this matter and on the theory of the aggrieved party's fault in general, see: B. WEYTS, *De fout van het slachtoffer in het buitencontractueel aansprakelijkheidsrecht*, Antwerp, Intersentia, 2003, 565 p.

[205] See above, paragraph 38.

[206] See above, paragraph 41.

[207] See above, footnote 171.

[208] About the division of liability between the aggrieved party and the wrongdoer, e.g.: WEYTS (204) 341-425, with further references.

[209] See above, paragraph 6.

[210] See above, paragraph 35.

the diligent policyholder can be deemed to take note of the insurance policy. If he would have done so, he could have easily taken note of the insurance's limited coverage. Consequently, even *if* the policyholder would succeed in proving the required causation, then it is likely that the policyholder's own negligence would lead to shared liability of both the insurance broker and the policyholder.[211] Thus, the latter would be translated into lower damages for the policyholder.

Regardless of these precise facts of case 2, it could be expected that article 30*ter*'s design is not optimal for non-life insurance branches in any case. In short, policyholders of these insurance products will most likely not successfully fulfil the challenging burden of proof. In my opinion, questions will particularly arise concerning the presence of damages and their causation. However, it is for the future jurisprudence to give a meaningful interpretation of article 30*ter* FSA concerning these common, yet important insurance products.

V. Assessment of article 30*ter*'s impact

49. The aim of this contribution was to assess the meaning and importance of article 30*ter* FSA. This legal provision has been introduced by the Twin Peaks II-reform. Consequently, the *MiFID* conduct of business rules not only became applicable to the insurance industry, but, a *rebuttable legal presumption of transaction causation* was provided for their impact on the civil liability of insurance companies and insurance intermediaries. Thus, the infringement of a conduct of business rule is deemed to result from the transaction/the subscription of the insurance, if there are losses related to the transaction, and unless the contrary has been proven.

To that extent, the analysis of article 30*ter*'s scope showed a very *broad* field of application. Not only savings insurances and insurance-based investments, but also regular non-life insurances come into the scope of article 30*ter*, and this is the case for a wide range of conduct of business rules. The latter was illustrated by case 1 (concerning insurance-based investment and the know your customer principle) and case 2 (concerning car insurance and the duty to identify the customer's demands and needs). On the basis of these cases, article 30*ter*'s impact on extra-contractual claims for damages was examined.

50. Despite the broad scope of article 30*ter* FSA, it is clear that its *added value* for civil liability claims is limited, or even *non-existent*. First of all, the presumption has a rebuttable nature. Disproving the transaction causation could particularly succeed through the policyholder's own – wrongful – behaviour. Indeed, the policyholder should equally comply with the general duty of care. Hence, the only 'certainty' that the legal presumption provides, is that doubt related to the transaction causation should be in the policyholder's advantage.

Furthermore, as stated above, article 30*ter* FSA provides a presumption of transaction causation. However, according to the Belgian equivalence theory, compensation is possible for those losses that would not have occurred or not to the same extent, in absence of the infringement. Thus, it is not sufficient for the policyholder to successfully invoke article 30*ter*, only implying that he would not have subscribed to that *particular* insurance, in absence of the infringement. Indeed, the policyholder still needs to prove the precise scope of his causal losses. Therefore, the hypothetical lawful alternative needs to be defined, which has a direct impact on the scope of the awardable damages. Moreover, it is important to note that decreases in value (of insurance-based investments), due to a negative market climate, can only be compensated if the policyholder succeeds in proving that, without the infringement, he would not have subscribed to any investment-related product at all.

In short, the burden of proof for policyholders related to compensation for violated conduct of business rules remains demanding and contains several pitfalls. Article 30*ter*'s help is very limited, to that extent. Therefore, if the legislator really wishes to thoroughly protect policyholders (and investors) in civil liability claims concerning the *MiFID*[212], he might have done a better job by making the legal presumption *irrebuttable*, or by installing a presumption of *loss causation* instead of transaction causation. For irrebuttable presumptions of (loss) causation, the legislator could feel

[211] See above, paragraph 47.

[212] The question whether such extensive protection should be the case for *MiFID* conduct of business rules is a matter of *policy* and supersedes the scope of this contribution.

inspired by articles 65, 66 and 67 of the same Twin Peaks II Act, which foresee in irrebuttable presumptions of causation between losses and the providing of certain financial services without the required permissions.[213] Furthermore, these are presumptions of *loss* causation. The same applies to the – rebuttable – legal presumption of causation in article 61, § 2 Prospectus Act.[214]

51. Over-all, it is to be expected that article 30*ter* in its actual wording will not cause a 'floodgates'-effect of civil liability claims for violated conduct of business rules. This precisely follows from the presumption's limited value and from the remaining and demanding burden of proof. It should be reminded that, apart from the discussion of transaction and/or loss causation, also the proof of an infringement to a conduct of business rule should not be taken for granted. Therefore, to sum up this situation, conduct of business rules still rather seem to be a matter of *financial supervision* by the FSMA, than a matter of *civil liability* to the advantage of individual customers.

Furthermore, despite article 30*ter*'s wide scope in theory, in reality it seems to be more suitable for insurance-based investments, thus, in general, for these insurances that are similar to true investment products. Conversely, claims related to regular non-life insurances, such as the car insurance in case 2, will more likely not pass the requirements of transaction and/or loss causation.

Finally, the devious and complicated wording of article 30*ter* and the related discussions in the legal doctrine concerning the precise meaning of the legal presumption, may give rise to legal uncertainty. Hence, future jurisprudence might bring greater clarity. Yet, it can be concluded that, at least for now, the legal presumption of causation in article 30*ter* FSA might rather be a *trap* than a *trump* for aggrieved policyholders.

[213] For a more detailed analysis of these presumptions, e.g.: DIEUX (6) 196-197.
[214] See above, paragraph 24.