

Belgium: New regulatory regime for virtual currency service providers

In brief

On 23 February 2022, the Belgian Royal Decree of 8 February 2022 on the status and supervision of service providers for the exchange of virtual currency and fiat currency and custodian wallet providers ("**Virtual Currency Royal Decree**") was published in the Belgian State Gazette. The Virtual Currency Royal Decree introduces registration requirements and operating conditions for virtual currency service providers into Belgian law. The Virtual Currency Royal Decree will enter into force on 1 May 2022, with a grandfathering regime for existing service providers.

Contents

[Key takeaways](#)

[In more detail](#)

Key takeaways

The Virtual Currency Royal Decree introduces a new regulatory regime for (i) providers of virtual currency and fiat currency exchange services (also referred to as crypto exchange service providers) and (ii) custodian wallet providers. The key takeaways are as follows:

1. **Mandatory registration with the FSMA:** As of 1 May 2022, persons established in Belgium whose regular professional activity consists of providing crypto exchange services and offering custodian wallets on Belgian territory will be required to register with the Belgian Financial Services and Markets Authority (FSMA).
2. **Strict territorial scope of application:** The registration requirement only applies to virtual currency service providers with a physical presence or permanent establishment in Belgium. Automated teller machines (ATMs) located on Belgian territory allowing for the exchange between virtual currency and fiat currency will be considered an establishment in Belgium and will trigger the requirement to register with the FSMA.
3. **Ban on third-country service providers:** It is prohibited for natural or legal persons governed by the law of a third country (non-EEA) to provide or offer on Belgian territory, as an ordinary professional activity or even as an additional or complementary activity, services for the exchange between virtual currencies and fiat currencies, or to offer custodian wallet services. EEA virtual currency providers can, on the other hand, freely provide their services in Belgium on a cross-border basis without being required to register with the FSMA (provided that they do not have a physical presence in Belgium).
4. **New registration conditions:** To obtain registration with the FSMA, virtual currency service providers must comply with various registration conditions, such as the requirement to possess professional reliability and appropriate expertise. In addition, minimum capital and anti-money laundering (AML) requirements apply. Shareholders must also be fit to ensure sound and prudent management of the company.
5. **"Light" registration regime for regulated entities:** The obligation to register with the FSMA also applies to regulated financial institutions (e.g., credit institutions, payment institutions, investment firms, etc.) that provide or offer, in addition to their core services, crypto exchange services and/or custodian wallet services. However, they will be exempt from those registration conditions that already apply to them as a result of their other regulated status.
6. **Grandfathering regime:** Existing virtual currency service providers may continue to exercise their activity on a temporary basis after 1 May 2022 under certain conditions.



In more detail

1. Background

The EU's fifth anti-money laundering directive¹ (5AMLD) was implemented into Belgian law by amending the Belgian Act of 18 September 2017 on the prevention of money laundering and terrorist financing and on the restriction of the use of cash ("**AML Act**"). One of the novelties introduced by 5AMLD is that virtual currency service providers are now required to register with the FSMA for AML purposes. However, after the implementation of 5AMLD into Belgian law, the registration requirements for virtual currency service providers were still to be adopted by a separate royal decree.

On 23 February 2022, the Virtual Currency Royal Decree was published in the Belgian State Gazette. The Virtual Currency Royal Decree now sets out the conditions for registration with the FSMA and the operating conditions for (i) providers of virtual currency and fiat currency exchange services (also referred to as crypto exchange service providers) and (ii) custodian wallet providers. The Virtual Currency Royal Decree will enter into force on 1 May 2022, with a grandfathering regime for existing service providers. The key takeaways are as follows:

1. **Mandatory registration with the FSMA:** As of 1 May 2022, persons established in Belgium whose regular professional activity consists of providing crypto exchange services and of offering custodian wallets on Belgian territory will be required to register with the FSMA.
2. **Strict territorial scope of application:** The registration requirement only applies to virtual currency service providers with a physical presence or permanent establishment in Belgium. ATMs located on Belgian territory allowing for the exchange between virtual currency and fiat currency will be considered an establishment in Belgium and will trigger the registration requirement with the FSMA.
3. **Ban on third-country service providers:** It is prohibited for natural or legal persons governed by the law of a third country (non-EEA) to provide or offer on Belgian territory, as an ordinary professional activity or even as an additional or complementary activity, services for the exchange between virtual currencies and fiat currencies, or to offer custodian wallet services. EEA virtual currency providers can, on the other hand, freely provide their services in Belgium on a cross-border basis without being required to register with the FSMA (provided that they do not have a physical presence in Belgium).
4. **New registration conditions:** To obtain registration with the FSMA, virtual currency service providers must comply with various registration conditions, such as the requirement to possess professional reliability and appropriate expertise. In addition, minimum capital and AML requirements apply. Shareholders must also be fit to ensure sound and prudent management of the company.
5. **"Light" registration regime for regulated entities:** The obligation to register with the FSMA also applies to regulated financial institutions (e.g., credit institutions, payment institutions, investment firms, etc.) that provide or offer, in addition to their core services, crypto exchange services and/or custodian wallet services. However, they will be exempt from those registration conditions that already apply to them as a result of their other regulated status.
6. **Grandfathering regime:** Existing virtual currency service providers may continue to exercise their activity on a temporary basis after 1 May 2022 under certain conditions.

2. What are the key novelties under the new regulatory regime?

In the sections below, we will consider the key novelties of the new Belgian regulatory regime for virtual currency service providers in more detail.

2.1 Mandatory registration with the FSMA:

As of 1 May 2022, persons established in Belgium whose regular professional activity, even as an ancillary or complementary activity, consists of providing or offering to provide exchange services between virtual currencies and fiat currencies ("crypto exchange services") and offering custodian wallets on Belgian territory will be required to register with the FSMA.

¹ Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU.



The relevant definitions are as follows:

- **Providers of virtual currency services** means (i) providers of virtual currency and fiat currency exchange services, and (ii) custodian wallet providers.
- **Virtual currency and fiat currency exchange services** means services consisting of purchase and sale transactions, with own funds, exchanging virtual currency for fiat currency or fiat currency for virtual currency. This definition is in line with the definition proposed by the European Commission in its proposal for a Regulation of the European Parliament and of the Council on cryptoasset markets ("**MiCA**").² It implies that the service provider acts as a counterparty to the purchase or sale transaction, by analogy, for example, with the activities of a foreign exchange office. Intermediary activities where a customer is put in contact with a third-party counterparty, or has to carry out their transaction on a multilateral trading platform for virtual currencies, are therefore not targeted.
- **Custodian wallet provider** means an entity that offers services to secure private cryptographic keys on behalf of its clients in order to hold, store and transfer virtual currency.
- **Virtual currency** means a digital representation of value that is not issued or guaranteed by a central bank or government, is not necessarily linked to a legally determined currency and does not have the legal status of currency or money, but which is accepted by natural or legal persons as a means of exchange and can be electronically transmitted, stored and traded.

Hence, the registration requirements do not apply for virtual assets that do not have a function as "means of exchange" or "payment." For example, the AML Act and the Virtual Currency Royal Decree do not apply to assets that only have an investment function (such as security tokens, which entitle the holder to a form of participation in a company) or a utilization function (such as "utility tokens," which grant access rights to future products or services).

Furthermore, the notion of "regular professional activity" implies that the registration requirement only applies if the activity is carried out in exchange for remuneration, regardless of whether this remuneration comes directly or indirectly from those to whom the cryptoasset services are offered.

Crypto-to-crypto conversion services are not subject to the AML Act or the Virtual Currency Royal Decree, since the AML Act only applies to providers of services for exchanges between virtual currencies and fiat currencies.

The FSMA will maintain separate, publicly available registers for authorized cryptoasset exchange providers and authorized custodian wallet providers. A special section in these registers will be foreseen for those persons relying on a provisional authorization as explained under Section 2.6 below, indicating the provisional nature of their authorization.

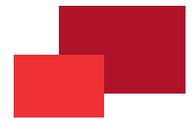
Virtual currency service providers that offer their services in Belgium without being registered with the FSMA may be punished with criminal sanctions, i.e., imprisonment ranging between one month and one year and/or criminal fines between EUR 400 and EUR 80,000.³ The same criminal sanctions may be imposed upon virtual currency service providers that continue to provide their services after their registration has been revoked or withdrawn by the FSMA.

2.2 Strict territorial scope of application

The Belgian AML Act generally adheres to the principle of territorial application, which means that an establishment or "physical presence" on Belgian territory is required to be subject to the Belgian AML Act. The same principle applies *mutatis mutandis* to the registration requirement for virtual currency service providers under the AML Act and the Virtual Currency Royal Decree. Hence, the registration requirement applies to service providers governed by Belgian law, but also to service providers governed by the law of another member state of the European Economic Area (EEA) that have a branch or another form of permanent establishment in Belgium within the meaning of the case law of the Court of Justice of the European Union (e.g., an agent or a distributor), that is also deemed to be established in Belgium.

² Proposal for a Regulation of the European Parliament and of the Council on Markets in Crypto-assets, and amending Directive (EU) 2019/1937.

³ Note that this criminal sanction is in addition to the administrative sanctions (i.e., fines of up to EUR 2.5 million) as provided for in Article 86bis of the Belgian Act of 2 August 2002 on the supervision of the financial sector and on financial services for exercising regulated activities without having the required license or registration.



Importantly, virtual currency exchange service providers and custodian wallet providers that have established "electronic infrastructures" in Belgium through which they offer these services will be deemed to be established in Belgium. This includes, among others, ATMs that can be used to convert virtual currency into fiat currency and vice versa. For such ATMs, the registration requirement does not necessarily lie with the operators of places where ATMs are installed, but rather with the persons who manage such installations and are responsible for the services provided using these installations.

2.3 Ban on third-country service providers

In accordance with Article 5, §1 of the AML Act, it is prohibited for natural or legal persons governed by the law of a third country to provide or offer on Belgian territory, as an ordinary professional activity, even as an additional or complementary activity, services for the exchange between virtual currencies and fiat currencies, or to offer custodian wallet services. This prohibition was introduced separately in the AML Act by the Act of 1 February 2022⁴ and entered into force on 21 February 2022.

Remarkably, the Belgian legislator did not follow up on the observation of the Council of State that the prohibition on third-country virtual currency service providers providing services on Belgian territory would be disproportionate. The Belgian legislator is clearly of the view that the absence of a company established in Belgium, or at least in the EEA, risks compromising the effectiveness of its supervision over such third-country entities (notably in the context of the exercise of the FSMA's investigative powers) and the coercive measures that may result from it. Admitting third-country entities that may not be subject to any anti-money laundering and anti-terrorist financing regulations in their country of origin, and thus without being able to rely on similar control in the third country, would increase the risk of money laundering and terrorist financing for Belgium, in a sector that is already particularly sensitive to this. For these reasons, the Belgian legislator considers the ban for third-country service providers to be proportionate. Note that the same reasoning is being followed at an EU level, as such a ban is being considered as part of the discussions on the MiCA proposal. Indeed, the current draft form of the MiCA proposal requires that a legal entity be established in one of the member states of the EEA. Such a ban is also already in place in the Netherlands.

Noncompliance with this prohibition may give rise to criminal sanctions, i.e., imprisonment for between one month and one year and/or criminal fines between EUR 400 and EUR 80,000.

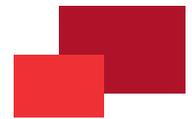
EEA virtual currency providers can, on the other hand, freely provide their services in Belgium on a cross-border basis without being required to register with the FSMA (provided that they do not have a physical presence in Belgium, in which case a registration requirement would nonetheless be triggered).

2.4 New registration conditions

In order to obtain registration with the FSMA, virtual currency service providers must comply with the following registration conditions:

- The service provider must be established in the form of a company or a cooperative company (coöperatieve vennootschap/société coopérative), a limited liability company (naamloze vennootschap/société anonyme), a European company (Europese vennootschap/société européenne) or a European cooperative company (Europese coöperatieve vennootschap/société coopérative européenne). Natural persons cannot obtain registration.
- The central administration and the registered office of the service provider must be established in Belgium. EEA service providers that exercise their activity as a virtual currency service provider in Belgium under the freedom of establishment must establish their main administration in Belgium for the operations they carry out on Belgian territory.
- The registration is subject to a minimum capital requirement of EUR 50,000, which must be fully paid up.
- The senior managers of the service provider are exclusively natural persons, who must possess the appropriate expertise and required professional reliability for the exercise of their function.
- The FSMA must be informed of the identity of the service provider's shareholders that hold a shareholding of at least 5% in the service provider, or of those controlling the service provider. The FSMA must be convinced of the suitability of these persons, with regard to the need for sound and prudent management of the service provider.

⁴ The Belgian Act of 1 February 2022 amending the act of 18 September 2017 on the prevention of money laundering and terrorist financing and on the restriction of the use of cash to introduce provisions on the status and supervision of providers of services for the exchange between virtual currency and fiat currency and custodian wallet providers.



- The service provider must comply with the AML Act, including the implementation of an independent audit function as referred to in Article 8, §2, 2° of the AML Act.
- The service provider must have an organization that enables it to continue to comply with the legal and regulatory obligations applicable to it pursuant to the Virtual Currency Royal Decree and to manage all of its operational risks.
- The service provider must contribute to the FSMA's operating expenses (annual fee to be paid).

Furthermore, Article 5, §2 of the Virtual Currency Royal Decree requires that EEA virtual currency service providers established on Belgian territory in a form other than that of a branch (e.g., an ATM or an agent) must designate a single point of contact established in Belgium. The FSMA is authorized to adopt regulations to further specify the conditions under which such contact point is to be designated and the functions to be performed by this point of contact. However, no such regulations have been adopted so far.

Once registered, virtual currency service providers must comply with the registration conditions set forth above on a permanent basis.

2.5 "Light" registration regime for regulated entities

The obligation to register with the FSMA also applies to regulated financial institutions (e.g., credit institutions, payment institutions, investment firms, etc.) that wish to provide or offer, in addition to their core services, services for the exchange of virtual currency and fiat currency, and/or custodian wallet services. They will be subject to all registration conditions referred to under Section 2.4 above, except for those conditions that already apply to them in a similar vein as a result of their regulated status (e.g., minimum capital requirements, expertise and professional reliability of senior managers, and suitability of shareholders). The requirement to comply with the AML Act and to implement an independent audit function will nonetheless always apply.

Furthermore, the FSMA will consult with the National Bank of Belgium (NBB) on the registration of regulated financial institutions that are under supervision of the NBB (e.g., credit institutions, payment institutions, etc.). When deciding on applications from EEA regulated undertakings, the FSMA will also obtain the opinion of the prudential supervisory authority of the undertaking in the member state concerned. This relates in particular to the compliance of the intended activities with the applicable local prudential requirements.

2.6 Grandfathering regime for existing service providers

The registration requirement applies as of 1 May 2022, i.e., the date of entry into force of the Virtual Currency Royal Decree. Legal persons who, on 1 May 2022, are already exercising the activity of a crypto exchange service provider or custodian wallet provider may continue to exercise their activity on a temporary basis after such date, until the FSMA has taken a decision on their registration application.

Existing virtual currency service providers must notify the FSMA within two months after the entry into force of the Virtual Currency Royal Decree, i.e., before 1 July 2022, that they are exercising a regulated activity as a virtual currency service provider. A complete registration file must then be submitted with the FSMA within four months after the entry into force of the Virtual Currency Royal Decree, i.e., before 1 September 2022. During this period of time, applicants will thus be temporarily allowed to continue their activities. If no registration application is submitted with the FSMA within such four-month period, the provisional authorization will expire by operation of law.

3. What's next?

The introduction into Belgian law of a regulatory regime for AML purposes for virtual currency service providers is an important next step in the fight against money laundering and the financing of terrorism. Virtual currency service providers registered in accordance with the Virtual Currency Royal Decree will now be required to register with the FSMA and comply with all provisions of the AML Act. Currently existing virtual currency service providers established in Belgium should already make the necessary preparations to get in line with the new regime once it enters into force and they could consider already notifying the FSMA of their current activities.

An important element in the new regulatory regime is the ban on third-country virtual currency service providers. Such service providers may have to rethink the way they currently do business and offer their services in Belgium, for example through an EEA entity of the group or by establishing a Belgian registered entity.

That being said, the new regulatory regime will only enter into force as of 1 May 2022. So far, the FSMA has published a press release on the matter, accompanied by a Q&A on the registration requirements. The FSMA may publish further guidance on the registration requirements and operating conditions in the forthcoming months, among others in relation to the single point of contact requirement for EEA virtual currency service providers that provide their services in Belgium under the freedom of establishment in a form other than that of a branch (e.g., through an agent or ATM).



Finally, once MiCA is adopted and enters into force, it is likely that the current Belgian regulatory regime for virtual currency providers may require various amendments or that it may even become superfluous. As more and more individual member states are looking at regulating virtual currency service providers, a legislative initiative at EEA level (such as MiCA) would be a welcome measure to avoid further market fragmentation.

4. Want to know more?

If you want to read more, the Virtual Currency Royal Decree can be found [here](#). The related press release of the FSMA on the matter can be found [here](#) and is accompanied by a [Q&A](#) in this regard.

If you require further assistance or guidance on the matter, please consult your regular contact at Baker McKenzie.

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