

## Belgium: Financial watchdog tightens rules on crypto advertising

### In brief

The Belgian Financial Services and Markets Authority (FSMA) has introduced stricter rules for commercializing virtual currencies, such as Bitcoin or Ether, among consumers in Belgium. Among others, advertisements must contain the disclaimer "Virtual currencies, real risks. The only guarantee in crypto is risk." In addition, mass advertising campaigns to more than 25,000 people must be notified to the regulator 10 days in advance.

### Key takeaways

On 17 March 2023, the Belgian royal decree of 5 January 2023 approving the regulation of the FSMA that imposes restrictive conditions on the commercialization of virtual currencies among consumers ("**FSMA regulation**") was published in the Belgian State Gazette.

The FSMA regulation tightens the rules around the commercialization of virtual currencies, such as Bitcoin or Ether, among consumers in Belgium. As a rule of thumb, information contained in virtual currencies advertising may not be misleading or inaccurate. In addition, advertisements must contain the disclaimer "Virtual currencies, real risks. The only guarantee in crypto is risk." Mass advertising campaigns addressed to more than 25,000 people must also be notified to the regulator 10 days in advance. The FSMA regulation enters into force as from 17 May 2023.

### Why the new rules?

Over the past years, there has been a steep rise in popularity of virtual currencies among consumers. Virtual currencies have been strongly promoted to the general public and numerous consumers buy or sell virtual currencies for speculative purposes. In doing so, they often hope to realize a large price gain. Virtual currencies are not only promoted through traditional marketing channels, but also via social networks or applications, such as Tik Tok or Instagram. This sometimes involves the use of personalities (influencers) known to the general public, who are paid to promote virtual currencies to their followers.

Virtual currencies are all the rage at the moment, but they involve considerable risk. There is no legal framework yet governing these products, and they have no underlying assets in the real world. They are often subject to wild price fluctuations and are vulnerable to fraud and IT-related risks.

For these reasons, the FSMA requested and was granted a new power by the government to regulate advertisements for virtual currencies. The FSMA issued a regulation to this end that was published on 17 March 2023 in the Belgian State Gazette and which will enter into force on 17 May 2023.

The FSMA considers that, at the very least, it is essential that the advertising of virtual currencies distributed to consumers be subject to the obligation that it contains warnings that explicitly mention the risks involved, and that the information in that advertising is not inaccurate or misleading. That framing will not reduce the high risk associated with investing in virtual currencies, but it will at least ensure that consumers are correctly informed of the risks they face should they decide to make such an investment.

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## What are the new rules?

### Scope

#### Virtual currencies

The term 'virtual currency' is defined in Article 2, 40° /1, of the Act of 2 August 2002 on the supervision of the financial sector and on financial services. It is "a digital representation of value that is not issued or guaranteed by a central bank or a public authority, is not necessarily linked to a legally established currency and does not possess a legal status of currency or money, but is accepted by natural or legal persons as a means of exchange and which can be transferred, stored and traded electronically." This definition stems from the EU's 5th anti-money laundering Directive (EU) 2018/843 and is therefore a well-known concept that is applied throughout the EU.

The FSMA regulation applies only to the commercialization of virtual currencies. The regulation does not apply to the commercialization of financial products whose returns depend directly or indirectly on virtual currencies. The commercialization of that type of product is already prohibited by the FSMA regulation of 3 April 2014 on the prohibition of commercialization of certain financial products to non-professional clients.

The FSMA regulation also does not apply to virtual currencies that qualify as investment instruments within the meaning of the Act of 11 July 2018 on the offer of investment instruments to the public and the admission of investment instruments to trading on a regulated market. Virtual currencies that give their holder a financial claim incorporated in an 'instrument,' exercisable against an issuer and/or another person, are thus investment instruments and are not covered by the FSMA regulation. The same goes for crypto assets that are also financial instruments and, as such, subject to MiFID legislation.

#### Advertising distributed to consumers

The FSMA regulation targets advertising distributed to consumers within the meaning of Article 1.1 of Belgium's Economic Law Code. According to that provision, a consumer is "any natural person acting for purposes which are outside their trade, business, craft or profession." Consumers are non-professional customers. Advertising distributed to consumers includes advertising done on a medium accessible to the general public or broadly to consumers, e.g., through physical billboards, a website, social networks, etc.

#### Commercialization as an ordinary professional activity or on an occasional basis for remuneration

The FSMA regulation applies to the commercialization of virtual currencies, regardless of whether this is done as an ordinary professional activity or on an occasional basis for remuneration. Accordingly, the regulation will apply not only to those persons for whom the commercialization of virtual currencies is the ordinary professional activity, either as their main or ancillary activity, but also to those who distribute advertising on an occasional basis, to the extent that they are remunerated for doing so. The nature of the remuneration matters little: any economic benefit, whatever it may be, is targeted. The person paying the remuneration also matters little.

The term 'commercialization' is defined very broadly. The FSMA regulation will apply to those persons who commercialize the virtual currencies they hold to consumers, and who advertise them. It also applies to advertising distributed by service providers whose activity involves making available to consumers an infrastructure that allows them to invest in virtual currencies (e.g., virtual currency exchange platforms). The application of the FSMA regulation is independent of the relationship between the person distributing the advertising and the consumers concerned. Therefore, it also targets persons acting as intermediaries, agents or business introducers. Even more broadly, it also targets persons who, like the aforementioned influencers, confine themselves to promoting (in exchange for a fee or any other benefit) virtual currencies that they themselves do not issue or transfer. The identity of the person paying the fee matters little. What is decisive is the fact that the person distributing the advertising receives a fee or benefit. Economic models in which a person is remunerated by a social network or distribution platform for the advertising messages they distribute may also potentially fall within the scope of the new rules, provided, of course, that the other elements of the scope are also met.

#### Commercialization of one or more virtual currencies

The FSMA regulation applies to advertising distributed in the course of commercializing one or more virtual currencies. In contrast, it does not apply to the notoriety advertising that a service provider would distribute on virtual currencies. For example, the fact that a virtual asset service provider's name or logo appears on the jerseys of players of a sports club (e.g., Blox on the jerseys of Club Bruges) will constitute notoriety advertising and will not fall within the scope of the regulation.

A virtual currency exchange platform that would present on its website the subscription of (a list of) virtual currencies (which it may or may not hold) will, for example, have to comply with the requirements of the FSMA regulation. The warnings and mandatory disclosures imposed by the regulation will have to be included on all pages of its website.

### **Commercialization activity directed at Belgium**

The FSMA regulation will only apply if the commercialization activity is directed at Belgium. To determine whether there is commercialization in Belgium, it must be determined whether or not the commercialization is directed specifically at Belgian consumers. That assessment looks at certain indications, such as the following: the reference to contacts in Belgium; the absence of a 'disclaimer' indicating that the commercialization is not aimed at the Belgian public; the language(s) used; the possibility for Belgian clients to register online; the use of a website with a domain name ending in '.be'; the presence of an establishment or the exercise of the activity within the framework of the freedom to provide services in Belgium; the use of the image of people who are particularly well-known to the Belgian public (such as athletes, artists or other personalities) or other elements that could constitute a commercialization argument specifically toward the Belgian public; the fact that intermediaries or other professionals established in Belgium are used for commercialization, etc. It is also considered commercialization in Belgium if the advertising for the currencies in question is distributed through the Belgian media, or if the advertising is distributed in Belgium on a physical information medium. With regard to this point, reference is also made to the case law of the Court of Justice of the EU regarding the criteria used to determine whether a commercial activity is 'targeted' at the member state of residence of a given consumer.

Each case will have to be assessed on the basis of an overall analysis of the file, taking into account the various factual elements and by examining whether, using the combination of the various indicators, it can be established that the commercialization is directed toward Belgium. It is not always possible to provide that proof if only one of the aforementioned indicators is present. For example, the language(s) used is not sufficient in itself to establish whether the commercialization is targeted at Belgium; after all, Dutch, French and German are also spoken in other countries. In addition, if there is merely a disclaimer clarifying that the commercial is not aimed at Belgium, this is not sufficient per se to say that the advertising is not targeted at Belgium.

Advertising that is distributed worldwide on the internet, without a specific link to Belgium, is not targeted.

### **Concept of 'advertising'**

The FSMA regulation uses a broad definition of the concept of 'advertising', similar to the definition in Article 2, 11°, of the royal decree of 25 April 2014 on certain information obligations in the marketing of financial products to non-professional clients: "any communication whose specific purpose is to promote the purchase of, subscription to, accession to, acceptance of, subscription to or opening of a financial product, irrespective of the channel through which or the manner in which this is done."

This definition therefore applies regardless of the means by which the advertising is distributed. It targets not only advertising distributed through a physical information medium, radio or television, but also advertising published on a website or distributed through the sending of messages or the publication of written, audio or video messages on social networks or on an app. The medium of information used, whether it is a written medium, a video or an audio message (or any other means of communication), is also irrelevant.

Because the definition is so broad, it does not only target advertising messages in the strict sense of the word, but also, for example, the content of a service provider's website set up to encourage investors to buy virtual currencies.

### **The new commercialization regime**

The new regime is based on three elements: (i) compliance with minimum rules aimed at ensuring that the information contained in the advertising is correct and not misleading; (ii) the mandatory insertion of specific warnings in the advertising; and (iii) the obligation, in the case of mass campaigns, to notify the advertising in advance to the FSMA.

#### **Minimum rules to ensure that information in advertising is correct and not misleading**

The FSMA regulation clarifies that the information provided to consumers through advertising must not be misleading or inaccurate.

It should be noted that this general principle implies, among other things, that advertising must not contain subjective assessments and not be supported by an independent external source that aim to create, directly or indirectly, a positive feeling about a specific product being marketed. Advertising may also not overemphasize a positive or perceived positive characteristic in an exaggerated manner.

From the aforementioned general rule, a number of implementing rules follow:

- The first of these rules is that advertising must be clearly recognizable as such to the consumer. The consumer's attention must be drawn to the fact that they are dealing with an advertising message whose specific purpose is to encourage them to buy a virtual currency.
- The advertising message must also be coherent with the warnings referred to in Article 4 of the FSMA regulation (see below).
- Advertising must be balanced and address both the benefits and risks of the virtual currency in question.
- Advertising must not emphasize features or make comparisons that are irrelevant or of little relevance to an understanding of the nature and risks of the virtual currency concerned. For example, it is not permissible to make a parallel between the performance of a professional athlete (or other activities that seem remarkable in the eyes of the ordinary consumer) and investment in virtual currencies. Indeed, such a comparison is certainly not pertinent to enable a consumer to make an informed investment decision.
- Finally, the information in the advertising must be presented in such a way that it can be understood by the consumer. Thus, advertisements should be drafted in clear and understandable terms, avoiding technical jargon.

### Mandatory disclosures

Given the very specific nature of investments in virtual currencies, the FSMA considered it appropriate that every advertisement distributed to consumers when marketing virtual currencies should contain a standard warning. This approach allows specific categories of persons to be reached when virtual currencies are promoted, such as minors.

The aim of the FSMA regulation is therefore to impose that advertising contain mandatory indications that guarantee that advertising can be identified as such, and draw investors' attention to the fact that investing in virtual currencies is very risky.

For these reasons, all advertising must contain the following message: **"Virtual currencies, real risks. The only guarantee in crypto is risk"** (in Dutch: "Virtuele munten, reële risico's. De enige garantie in crypto is het risico.").

As clarified earlier, it happens that virtual currencies are promoted by personalities known to the general public, whose name recognition is used as a commercialization argument. These personalities are remunerated for doing so. Advertising must therefore also state whether the natural or legal person featured in the advertising, or whose image is otherwise used in that advertising, is remunerated or receives any other benefit. This obligation aims to ensure that contacted consumers are aware of the potentially biased nature of the message they receive.

Finally, the advertising must also warn of the risks. That warning should draw attention to the various risks faced by consumers investing in virtual currencies. This warning must be mentioned in full in the advertisement, except if the form of the advertisement does not allow it from a technical point of view. In such case, the warning must still be accessible via a click on a link or other similar reference, such as a QR code.

These mandatory indications must be clearly visible and understandable, and included at the beginning of the advertisement in the same form as the rest of the advertising message. They must be reproduced verbatim, without any alteration. Mandatory disclosures must be included — where appropriate, via a link to the risk warning — in all advertising, even in advertising of limited size or short duration (e.g., banner or short video) or in advertising that quickly disappears by itself.

### Supervision by the FSMA

A distinction is made between advertising distributed as part of a mass campaign and that distributed on a smaller scale.

The term 'mass campaign' targets the distribution of advertising to at least 25,000 consumers. The following are irrefutably considered mass campaigns: advertising visible from a public road or infrastructure accessible to the public (stadium, train station or metro, for example); advertising distributed on a website accessible to the public, by the operator of the site itself or by another person; advertising distributed through a social network by a person who has at least 25,000 followers on that social network at the start of the distribution, or if that person pays the social network for the distribution of the advertising. In the situations not covered by that presumption, the issue will be one of fact, to be decided on the basis of concrete elements. For example, in the case of a television advertisement, the audience figures can be used to determine whether that threshold has been reached.

The supervisory regime for mass campaigns is based on the mandatory prior notification to the FSMA. The notification obligation rests on the person who determines the content of the advertising. It does not therefore rest, for example, on the press body or the medium used to distribute the advertising. This notification must be made at least 10 days before the distribution of the

advertisement. That deadline allows the FSMA to check whether the advertising meets the requirements of the FSMA regulation. No mechanism of prior approval is provided. Thus, the distribution of the advertisement does not require an explicit approval decision by the FSMA and, if the FSMA does not respond within the 10-day period between the notification and the start of the distribution, it does not count as an approval.

The advertisement must be notified to the FSMA in the form in which it will be distributed to consumers. In the case of an audio or video message, that message must be submitted to the FSMA.

The notification must clarify how the advertising will be distributed. This means that the name of the medium used (social network or app, for example) must be communicated to the FSMA. The starting date of the distribution must also be communicated.

If the FSMA considers that the project submitted to it raises objections in light of these regulations, it informs the person who submitted the advertisement and asks them to correct the shortcomings identified.

From a practical point of view, it is clarified that the FSMA determines the notification modalities (address to which notifications should be sent, (IT) format in which the file should be submitted, etc.). In the case of standardized or recurrent documents, the FSMA will also be able to work out modalities for the notification obligation.

For advertising distributed outside the context of a mass campaign, the FSMA exercises a posteriori supervision.

Any intervention by the FSMA relates only to the advertising and not to the quality of the proposed investment. Moreover, it is not allowed to mention the FSMA's intervention in the advertising.

A document retention obligation of one year applies to persons distributing advertising to which the FSMA regulation is provided for. This obligation enables the FSMA to exercise its supervision in practice.

If advertising that does not comply with the FSMA regulation is distributed, the FSMA will be able to take the measures and impose the sanctions referred to in Article 36 of the aforementioned Act of 2 August 2002. For example, it will be able to order the person distributing advertising that does not comply with the regulation to stop or refrain from distributing such advertising on pain of a penalty payment (dwangsom/astreinte). Administrative fines may also be imposed for breach of the FSMA regulation.

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## What's next?

The FSMA regulation enters into force as from 17 May 2023. Advertising distributed from such date of entry into force must therefore meet the requirements of the regulation. Advertisements whose distribution began before this date must be brought in line with the regulation within three months of the publication of the royal decree approving the FSMA regulation, i.e. by 17 June 2023.

Belgian and foreign virtual asset service providers that sell or provide exchange services in relation to virtual currencies may need to revisit their website and other marketing materials to bring them in line with the new rules under the FSMA regulation.

If you require further assistance or guidance on the matter, please reach out to one of our Financial Services Regulatory lawyers of our Banking & Finance team, Michael Van Acker, Olivier Van den broeke or Steffi Illegems.

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