

# New FSMA regulation on the marketing of virtual currencies to consumers in Belgium

On 17 March 2023, the new FSMA Regulation on the marketing of virtual currencies to consumers (the **FSMA Regulation**) was published in the Belgian Official Gazette. The FSMA Regulation renders the marketing of virtual currencies to consumers in Belgium subject to conditions regarding the format and content of marketing materials and requires that a prior notification to the FSMA is made for so-called “mass media campaigns”. The FSMA Regulation will enter into force on 17 May 2023. Existing marketing campaigns will have time to comply until 17 June 2023.





## 1\_Background

Already in late 2013, the European Banking Authority (**EBA**) warned consumers about the risks they may face when buying, holding or trading virtual currencies such as Bitcoin.<sup>1</sup> This statement was shortly followed by a joint statement by the Belgian Financial Services and Markets Authority (the **FSMA**) and the National Bank of Belgium (the **NBB**) issued in January 2014, warning consumers about the risks of “virtual money”.<sup>2</sup> Since then, these warnings have been repeated at regular intervals by both the Belgian and European supervisory authorities.

Nearly a decade after the EBA’s initial warning, the FSMA Regulation was passed into law.<sup>3</sup> The FSMA Regulation was prompted by a resolution of Belgian Parliament adopted on 2 February of this year, which called for the introduction of specific rules on the marketing of speculative investments such as crypto-assets.<sup>4</sup> It sets out a number of requirements that have to be observed whenever virtual currencies are marketed, on a professional basis or on an occasional basis against remuneration, to consumers in Belgium.

In the following sections, we will briefly consider the objectives of the FSMA Regulation, before looking at its scope and the substantive requirements applicable to marketing materials.

## 2\_Objective: Transparent communication on the risks

The FSMA Regulation does not prohibit the marketing of virtual currencies to consumers. Fundamentally, the FSMA is not opposed to consumers investing in virtual currencies. However, the FSMA has found that, although virtual currencies are a popular means of investment among Belgian consumers, Belgian consumers are often not sufficiently aware of the risks such investments may pose.

To list a few:

- virtual currencies have no underlying assets, which means that their value depends exclusively on supply and demand dynamics and can be subject to severe price fluctuations;
- virtual currencies are not legal tender and are not covered by existing deposit guarantee and investor compensation schemes;

- virtual currencies are not subject to any rules regarding insider trading and market manipulation;
- virtual currencies are particularly vulnerable to certain illicit activities such as hacking, fraud, money laundering and financing of illegal activities; and
- virtual currencies are subject to specific risks stemming from their underlying ICT technology and infrastructure, including the risk of discontinuation or failure of the ICT systems or the risk of loss of access codes, which may render the investor’s assets irrecoverable.

Hence, the key objective of the FSMA Regulation is to ensure that consumers who are seeking to invest in virtual currencies are adequately informed of the risks involved in such an investment.

01\_EBA, *Warning to consumers on virtual currencies*, <https://www.eba.europa.eu/eba-warns-consumers-on-virtual-currencies#:~:text=The%20EBA%20also%20reminded%20that,criminal%20activities%2C%20including%20money%20laundering>.

02\_FSMA, *Be careful with virtual money, such as Bitcoin*, <https://www.fsma.be/en/news/be-careful-virtual-money-such-bitcoin>.

03\_Available in [French](#) and [Dutch](#). Press release is available in [English](#).

04\_Resolution on the regulation of the use of cryptocurrencies and their social, fiscal and environmental impact, *Parl.St. Kamer 55-3115/004*, <https://www.dekamer.be/kvocr/showpage.cfm?section=flwb&language=nl&cfm=/site/www.cfm/flwb/flwb.cfm?dossierID=3115&legislat=55&inst=K>.

## 3\_Scope

The FSMA Regulation sets out the conditions applicable to marketing materials that are disseminated when marketing virtual currencies to consumers in Belgium on a professional basis or on an occasional basis against remuneration.

### 3.1\_Virtual currencies

The FSMA Regulation applies to “virtual currencies”, which are defined in the act of 2 August 2002 on the supervision of the financial sector (the **Financial Supervision Law**) as “*a digital representation of value that is not issued or guaranteed by a central bank or a public authority, is not necessarily attached 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*”.

The Financial Supervision Law definition implements the AMLD5 definition of virtual currencies, and should hence be construed accordingly. Below are a couple of points to note on this definition.

- The concept of virtual currencies is broader than that of crypto-currencies: whereas the latter only covers digital representations of value that are transferred and stored using DLT (hence the prefix “crypto”), virtual currencies cover all digital representations of value that are transferred and stored *electronically*, irrespective of the features of the underlying technology.

- The recitals to the AMLD5 confirm that the concept of “virtual currency” does not cover e-money, “funds” as defined in PSD2, or in-game currencies that can only be used within a specific game environment (i.e. non-convertible virtual currencies).
- The Belgian legislator has further clarified that the AMLD5 concept of virtual currencies (as implemented in Belgian law) does not cover virtual assets that purely have an investment purpose (i.e. security tokens) or a utility function (i.e. utility tokens).<sup>5</sup>
- Lastly, the explanatory notes to the FSMA Regulation confirm that it does not apply to (i) financial products whose return is determined directly or indirectly by reference to virtual money<sup>6</sup>, or (ii) virtual currencies qualifying as investment instruments<sup>7</sup>. This latter category is broad, and covers securities, certain types of financial instruments, and generally any instrument allowing its holder to carry out a financial investment. According to the explanatory notes to the FSMA Regulation, virtual currencies that grant their holder a financial claim that is incorporated in an “instrument” and is exercisable against the issuer and/or another person, are thus investment instruments. This may include certain stablecoins.

05\_Explanatory notes to the Royal Decree of 8 February 2022 on the status and supervision of providers of exchange services between virtual currencies and fiat currencies, and custodian wallet providers.

06\_These are already covered by the FSMA regulation prohibiting the marketing of certain financial products to non-professional clients, approved by the Royal Decree of 24 April 2014.

07\_These are in scope of the Belgian law of 11 July 2018 on the offer to the public and the admission to trading on a regulated market of investment instruments (the **Belgian Prospectus Law**). The Belgian Prospectus Law provides for specific rules on advertisements relating to investment instruments.

Belgian law concept of virtual currencies*	
In scope	Not in scope
<ul style="list-style-type: none"> <li>– Cryptocurrencies</li> <li>– Convertible virtual currencies</li> <li>– Certain stablecoins</li> </ul>	<ul style="list-style-type: none"> <li>– Utility Tokens</li> <li>– Security Tokens</li> <li>– Certain stablecoins</li> <li>– E-money Tokens</li> <li>– Central Bank Digital Currencies (CBDCs)</li> <li>– Non-Fungible Tokens (NFTs)</li> <li>– Tokenised assets or commodities</li> <li>– Non-convertible virtual currencies</li> <li>– Non-transferable virtual assets</li> </ul>

\* Note that this overview is not exhaustive

It is clear from the foregoing that the FSMA Regulation does not introduce a catch-all legal regime for the marketing of virtual and crypto-assets. Instead, it will have to be assessed on a case-by-case basis whether the relevant virtual assets could be in scope.

### 3.2\_Marketing of virtual currencies

The concept of marketing (“commercialising”/ “commercialisation”) is a broad one, and covers all forms of presenting a virtual currency, with the aim of inducing a client or potential client to purchase or subscribe to the relevant virtual currency. According to the explanatory notes to the FSMA Regulation, the publication by a trading platform of lists of virtual currencies than can be traded via the platform will constitute marketing as defined above.

However, marketing campaigns which do not relate to one or more virtual currencies but merely promote the overall brand notoriety of an undertaking (so-called “notoriety advertising campaigns”) are not in scope of the FSMA Regulation.

### 3.3\_On a professional or occasional basis

The FSMA Regulation will only apply when the marketing of virtual currencies is carried out:

- on a professional basis (as main activity or as an ancillary activity); or
- on an occasional basis against remuneration. Such remuneration can consist of cash, virtual currencies or any other benefit, regardless of by whom it is awarded (the issuer, the offeror, a third party, etc.).

The FSMA Regulation will not apply to the direct marketing of virtual currencies between consumers.

According to the explanatory notes, the FSMA Regulation is expected to apply to (without limitation): (i) issuers or offerors marketing virtual currencies which they hold themselves, (ii) service providers operating a trading platform through which consumers can invest in the virtual currencies, and (iii) third parties who are marketing virtual currencies on behalf of an issuer or offeror in exchange for some form of compensation, such as agents, intermediaries or even social influencers.

### 3.4\_To consumers in Belgium

The FSMA Regulation only applies to marketing of virtual currencies carried out towards consumers in Belgium. Consumers are defined as “natural persons acting for purposes falling outside of their commercial, professional or business activities”. Note that there is no exception for so-called “high net-worth individuals” (unless they would be acting on a professional basis). Companies and legal entities will not be in scope of the consumer concept.

In order to be carried out towards consumers in Belgium, marketing activities will need to be “specifically aimed at” (consumers in) Belgium. Marketing materials that are available on the internet to Belgian consumers without being specifically aimed at Belgian consumers will not be in scope of the FSMA Regulation. Determining whether marketing activities are “specifically aimed at” consumers in Belgium requires a factual assessment, which the FSMA will make on the basis of all relevant facts surrounding the marketing activities. According to the explanatory notes, the following may for example serve as indication that the marketing activities are specifically aimed at Belgium:

- reference is made to contact persons in Belgium;
- the marketing materials do not contain a disclaimer stating that they are not intended for the Belgian public;
- the marketing materials are disseminated in one or more of the official Belgian language(s);
- Belgian investors are able to subscribe to the offer online;
- the person marketing the virtual currencies uses a website with a “.be” domain name;
- the person marketing the virtual currencies is active on the Belgian territory through an establishment or provides cross-border services into Belgium;
- the use of images of persons who are popular especially with the Belgian public (such as sportspeople, artists or other public figures); and
- the use of intermediaries or other professionals established in Belgium.

Marketing will in any event be deemed to be carried out in Belgium when the marketing materials are disseminated via the Belgian media or are physically distributed in Belgium.

### Will the FSMA Regulation apply?

**1**\_Do the activities relate to virtual currencies?

**2**\_Do the activities constitute marketing activities?

**3**\_Are the marketing activities aimed at consumers?

**4**\_Are the marketing activities specifically aimed at Belgium?

**5**\_Are the marketing activities carried out on a professional basis, or on an occasional basis against remuneration?

## 4\_Substantive requirements

### 4.1\_Scope: marketing materials

The substantive requirements set out in the FSMA Regulation apply to marketing materials (“reclame”/ “publicité”), which are defined as “any communication that is specifically aimed at promoting the purchase of, or subscription to, one or more virtual currencies, regardless of the medium or method employed”.

This definition is broad, and covers all types of promotional materials, such as publications in the press, flyers, teasers, periodic or one-off brochures, posters on boards in bank branches, hoardings on public roads and in public buildings, letters to investors, product fact sheets, TV spots, radio spots, internet banking messages, emails, e-magazines, banners and other publications on websites, advertisements shared through social media, SMS ads sent to mobile phones, slides used during roadshows, in-person presentations, etc. However, it may also cover materials that are not exclusively promotional in nature. This includes, for example, the content of the website of an issuer or trading platform.

### 4.2\_Substantive requirements for all marketing materials

Marketing materials that are disseminated when marketing virtual currencies to consumers in Belgium must meet the following conditions:

- the marketing materials must be clearly identifiable as such;
- the marketing materials must be consistent with the warning statement (see below) and must not dilute or obscure it;
- the marketing materials must give a correct, clear and balanced overview of the risks, restrictions or conditions applicable to the virtual currency concerned;
- the marketing materials may not emphasize characteristics and/or make comparisons that are of little or no relevance for the proper understanding of the nature and risks of the virtual currency concerned;
- the marketing materials may not contain any statement about the future value or yield of the virtual currency concerned; and
- the information set out therein must be accurate and not misleading and be presented in non-technical and comprehensible terms.

In addition, marketing materials must:

- contain the following statement: “Virtual currencies, real risks. In crypto, only the risk is guaranteed”; and
- include the following long-form warning statement, zooming in on some of the risks involved:

#### Warning

- *the value of your virtual currencies can fluctuate strongly, and you may lose the full amount of your investment;*
- *the virtual coins are not covered by deposit guarantee schemes;*
- *on the market for virtual currencies, there are no legal mechanisms to prevent market manipulation or insider trading;*
- *virtual currencies are entirely dependent on a specific IT technology and infrastructure, which in some cases may only be very recently developed and insufficiently tested;*
- *loss of the identification codes or password granting giving to a virtual wallet where virtual currencies are stored will cause the virtual currencies stored therein to be permanently lost;*
- *virtual currencies are currently accepted as a means of payment only to a limited extent, and in most countries there is no legal obligation to accept virtual currencies as means of payment;*
- *for more information on the risks associated with an investment in virtual currencies, please consult the Wikifin page “What is a cryptocurrency? | Wikifin”;*

If this long-form warning is not suited to the format of the advertising materials, it can be replaced with a weblink to a page where the full warning is available; and

- if the identity or image of a legal or natural person is used in the marketing materials and the legal or natural persons concerned receives some form of compensation, include a statement that this is the case.

These statements must be included at the beginning of each marketing communication and be presented in a readable, visible and understandable manner, in the same language and format as the rest of the marketing communication.





### 4.3 Prior notification requirement for mass media campaigns

Mass media campaigns are defined as marketing campaigns in the context of which marketing materials will be disseminated to at least 25,000 consumers. When the marketing materials are visible from a public highway or a piece of public infrastructure, or are published on a publicly accessible website or on a social network by a person who has at least 25,000 followers, the marketing campaign is automatically qualified as a mass media campaign.

All marketing materials that are intended to be disseminated in the context of a mass media campaign, must be notified to the FSMA at least 10 calendar days prior to their dissemination. Note that the obligation is one of notification only – the marketing materials must not be approved prior to their use.

In addition, the persons disseminating these marketing materials must keep a register of the following information for up to one year after the start of the mass media campaign:

- a copy of the marketing materials, in the form in which they were disseminated;
- a list of the media through which the advertisement has been disseminated; and
- a copy of any agreements concluded in the context thereof.

## 5 Entry into force and application

The FSMA Regulation will enter into force on 17 May 2023. Marketing materials that have been disseminated prior to the entry into force of the FSMA Regulation and whose

dissemination is continuing, must be brought into compliance with the FSMA Regulation by 17 June 2023.

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