

Digital Finance: Somethings (are) new under the sun



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Once again, last year, digital finance has evolved at breakneck speed. Despite a health crisis that has put our legislators – both Belgian and European - under pressure, some new regulations and legislative proposals were published on anti-money laundering, crypto-currencies, cloud services for insurance companies, and crowdfunding. Here are the handful of topics that we would like to highlight.

I. Anti-money laundering

The Law of 18 September 2017 on the prevention of money laundering and terrorist financing and on the limitation of the use of cash was adapted in summer 2020 and provides, among other things, for an extended scope of application to service providers (i) exchanging virtual currencies against legal tender or (ii) offering digital wallets.

This development constitutes a direct transposition of the Fifth Anti-Money Laundering Directive of 30 May 2018 and aims to bring the legislation up to speed with new practices developed by terrorist groups to finance and conduct their operations. Practice has demonstrated that, virtual currency exchange platforms, which were until now not subject to AML obligations, are often misused by terrorist groups to transfer money while benefiting from a certain degree of anonymity.

By extending the scope of the Directive and Belgian law to these service providers, the legislator aims to monitor the use of virtual currencies and eliminate anonymity by adopting a balanced approach that preserves the technical progress of alternative/digital finance.

The Law grants the King – upon the advice of the Financial Services and Markets Authority (“FSMA”) - the power to further determine by decree the rules and conditions for the registration with the FSMA of providers of exchange services between virtual currencies and legal tender, as well as the conditions for the exercise of those activities and the supervision to which they are subject. Such Royal decree has not yet been adopted.

II. Crypto-currencies and “MiCa”

In September 2020, the European Commission published a proposal for a regulation on Markets in crypto-assets (“MiCa”). The proposal’s aim is to support a sustainable crypto-asset ecosystem by offering issuers of crypto-currencies and crypto-currency services providers, one single legal framework throughout the European Union. Although the proposal might face further amendments, as it still needs to pass through the European legislative ‘machinery’, it is interesting to note that MiCa will introduce several interesting new legal concepts and requirements which includes:

- An overall legal definition of crypto-assets. MiCa categorizes crypto-assets in three different and specific categories: asset-referenced tokens, e-money tokens, and utility tokens.
- MiCa also provides for a clearer legal framework for “stablecoins” – a type of cryptocurrency whose value is tied to an asset (like gold or USD) - which by their nature present a potential financial systemic risk.
- Licensing requirements (implying among others capital and organizational requirements) for issuers and crypto-currencies services providers. The details still need to be further developed, but the licensing requirements will likely be very similar to, or inspired by, those currently applicable to other financial service providers under European legislation (such as credit, investment, or payment service institutions).
- A legal regime regarding the public offering of crypto-currencies and market abuse, whereby for instance a white paper comprising more information shall be published and shared with investors as a condition to the offering.

Important to note is that MiCa only applies to crypto-assets or activities that are not currently already governed by existing European legislation. For example, crypto-assets that qualify as financial instruments under MiFID 2 are not covered by MiCa.

Also interesting is that some entities might be excluded or exempted from MiCa’s scope of application. Existing financial institutions, currently already benefiting from a license, will likely be able to extend the scope of their services to crypto activities/assets without needing to obtain an additional MiCa license. Also, the ECB and some other governmental institutions will not fall within MiCa’s scope of application.

A definitive regulation is not expected before 2023-2024 but the regulatory framework will surely have a great impact on the actors in the digital world hopefully further increasing innovation,

albeit under a stricter legal framework.

III. A crowdfunding license at the EU level

In Belgium, platforms for alternative financing or “crowdfunding” already fall within the scope of the Law of 18 December 2016 on the recognition and supervision of crowdfunding and on various financial provisions. Pursuant to this law they must comply with certain requirements and obtain prior approval from the FSMA to operate as such a platform in Belgium.

On 9 November 2020, the European parliament adopted a new regulation on European Crowdfunding Service Providers (“ECSP”), which will apply across the Member States from October 2021.

With this new regulation, the European Union aims to provide a harmonized legal framework for crowdfunding across the Member States, instead of having local laws that significantly differ from Member State to Member State. This aim will be achieved by organizing a European crowdfunding license, requiring such platforms to comply with specific organizational requirements.

Belgian platforms will be able obtain their European license with the FSMA. Strangely enough, the new regulation is based on an exclusion regime in which crowdfunding platforms complying with national law and benefiting from national approval will not be allowed to apply for a European license. The question remains whether such an exclusion regime will drive crowdfunding platforms to abandon their national approval and choose a European license instead.

IV. Insurance and Cloud services

Two new Royal Decrees regarding the place of storage and safekeeping of insurance documents were adopted on 31 July 2020.

These Royal decrees subject Belgian insurance companies, as well as Belgian branches of EEA insurance companies, to a prior approval procedure with the National Bank of Belgium (“NBB”) and/or the FSMA whenever they wish to store insurance documents in a datacenter, or a cloud located outside of their head office. The obligation applies regardless of whether the datacenter or cloud is located in Belgium or in another EEA member state.

Three types of approval procedures were introduced: (i) a simplified procedure for electronic storage, (ii) a simplified procedure for paper storage and (iii) a classic procedure.

The two simplified procedures, can be followed whenever the relevant insurance company can guarantee certain conditions are met regarding for instance the permanent access to the documents, the capacity for the service provider to quickly respond to requests by the NBB, the FSMA and/or the judicial authorities, the confidentiality and intangibility of the documents, etc. A

request for approval is made by submitting to the NBB a file containing (i) a description of how the documents will be kept and (ii) a statement by the chairman of the insurance company's executive committee that the above conditions above are being met. The statement templates can be found on the NBB's website.

The classic procedure will have to be followed if the conditions for a simplified procedure laid down in the Royal Decrees are not met.

"Insurance documents" should be understood to include the insurance contracts and policy documents, emails and letters sent to customers, but also prudential reports, etc.