



ADVISORY
Industry Information

Ireland update - Fifth Anti-Money Laundering Directive implementation – committee stage amendments on virtual asset service providers November 2020

In our [September 2020 advisory](#), we commented on the publication of the [Criminal Justice \(Money Laundering and Terrorist Financing\) \(Amendment\) Bill 2020](#) (the “Bill”), which will amend the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 (the “CJA 2010”) to transpose elements of the Fifth Anti-Money Laundering Directive (“5AMLD”).

On 19 November 2020 an [updated version of the Bill](#) was published which includes the amendments of the Select Committee on Justice (the “Amended Bill”).¹ Under the Amended Bill, the CJA 2010 will be updated to impose anti-money laundering and counter-financing of terrorism (“AML/CFT”) obligations on a wider range of virtual asset service providers (“VASPs”) than those which were captured under the Bill as initiated. The Amended Bill will amend the CJA 2010 to meet latest international standards and go further than the 5AMLD requirements in this area.

Bill as initiated

The Bill as initiated in September focused on amendments required to bring Irish law into line with the 5AMLD. In relation to crypto assets, the changes would expand the existing list of ‘designated persons’ for the purposes of the CJA 2010 to include providers engaged in exchange services between virtual currencies and fiat currencies.

However, there were a number of gaps in the Bill as initiated. The Bill omitted custodian wallet providers from designation and did not include a registration requirement for custodian wallet providers or virtual currency to fiat exchange service providers, both measures that are required under 5AMLD.

It was clear, then, that the Bill would be substantially amended before enactment.

Amended Bill

The Amended Bill will transpose the virtual currency provisions of 5AMLD with additional gold-plating. The additions will capture the more recent international standards set out in the Financial Action Task Force Recommendations (the “FATF Recommendations”) in relation to VASPs.

Changes under the Amended Bill include:

1. Virtual Assets, not Currencies: A change in terminology from ‘virtual currency’ to ‘virtual assets’ and, with it, preferring the definitions adopted under the FATF Recommendations to those provided under 5AMLD:

“virtual asset” means a digital representation of value that can be digitally traded or transferred and can be used for payment or investment purposes but does not include digital representations of fiat currencies, securities or other financial assets”

In the UK, HM Treasury conducted a consultation exercise in relation to the transposition of 5AMLD. In the final legal text, different terminology and definitions are used (‘cryptoasset exchange provider’ and ‘cryptoasset’) from those in the 5AMLD and the FATF Recommendations. The UK’s approach was to align the terminology and definitions with the concepts set out in the framework developed by the HM Treasury, Financial Conduct Authority and Bank of England Cryptoassets Taskforce. Specifically, to ensure exchange, security and utility tokens are captured.

1. The amendments were first published on 9 November 2020.



The terms 'securities' and 'financial assets' are defined under company and tax legislation in Ireland. However, it will be interesting to see if this definition is tailored further as has been the case in the UK where a bespoke definition was adopted.

2. **Virtual Asset Service Providers:** The introduction of a new type of designated person known as a 'virtual asset service provider', which will also be a 'financial institution' for the purposes of the CJA 2010 under the proposed text. The VASP definition follows that set out in the FATF Recommendations closely.

This means that the AML obligations under the CJA 2010 would be applicable to persons who by way of business carry out the following activities for, or on behalf of, another person:

- a. exchange between virtual assets and fiat currencies;
- b. exchange between one or more forms of virtual assets ('crypto-to-crypto');
- c. transfers of virtual assets;
- d. custodian wallet provider (see text box); and
- e. participation in, and provision of, financial services related to an issuer's offer or sale of a virtual asset or both.

'custodian wallet provider' is included as a VASP activity. The definition provided in the Bill as initiated, which tracks 5AML, has not been updated. The definition reads:

"an entity that provides services to safeguard private cryptographic keys on behalf of its customers, to hold, store and transfer virtual currencies"

A change will be required before enactment to track through the use of 'virtual assets' as the new defined term rather than 'virtual currencies'.

In addition, the current definition of custodian wallet provider does not capture the corresponding VASP activity under the FATF Recommendations. This is described as *"safekeeping and/or administration of virtual assets or instruments enabling control over virtual assets"* (emphasis added).

Therefore, it may be that a further amendment to include administration will be proposed in due course.

Certain persons will fall outside this definition where they provide virtual asset services in an incidental manner and meet certain other criteria. We anticipate that this exemption is aimed at professional services providers such as accountants or lawyers.

3. **Registration requirement for VASPs:** A requirement for VASPs to register with the Central Bank of Ireland (the "Central Bank"). The registration regime will be housed in a new Chapter 9A to be inserted into the CJA 2010.

Registration requirement

The proposed new Chapter 9A of the CJA 2010, to be inserted by the Amended Bill, sets out a detailed registration regime for VASPs for AML/CFT compliance purposes. As drafted, holders of a VASP registration will not be subject to the type of conduct of business rules or consumer or investor protection obligations that are applicable to regulated financial service providers.

In a [January 2020 speech](#), Derville Rowland, who is the Director General of Financial Conduct at the Central Bank, commented that once VASPs are within scope, the Central Bank plans to "...subject VASPs to intense supervision...as we increase our understanding of their business models and service." Owing to the proposed requirements for registration, Chapter 9A will place the Central Bank in a gatekeeper and ongoing role in relation to the VASP industry in Ireland.

Notable aspects of the Chapter 9A regime include:

1. **Registration:** A requirement for persons carrying on a business as a VASP to register with the Central Bank. It will be a criminal offence to carry on business as a VASP or claim or represent as one without being the holder of a registration.
2. **Transitional provisions:** There are transitional provisions for persons already carrying on a VASP business, who will be obliged to apply for registration within three months. However, as currently drafted, there is no carve out for firms that are already regulated by the Central Bank in the Amended Bill.
3. **Fitness and probity:** There are a number of grounds under which the Central Bank may refuse registration, including where the Central Bank has reasonable grounds to be satisfied that: (i) the applicant; (ii) any 'principal officer'; or (iii) any beneficial owner of the applicant, is not a fit and proper person.



On request of the Central Bank, the Garda Síochána (the Irish police) must supply information required to assist it in determining the fitness and probity of the persons listed above.

Holders of a registration will be required to take reasonable steps to ascertain that beneficial owners of the VASP are fit and proper and will have a duty to report to the Central Bank where they suspect on reasonable grounds that a beneficial owner is not a fit and proper person.

4. **Other grounds for refusal:** The Central Bank may also refuse registration where, for example, the Central Bank is not satisfied:
 - i. the applicant would comply with its AML/CFT obligations;
 - ii. as to the applicant's business risk assessment, policies and procedures or resources, procedures and arrangements for the provision of the business of a VASP and the performance of activities; or
 - iii. the applicant fails to demonstrate, where applicable, that it can manage and mitigate the risks of engaging in activities that involve the use of anonymity-enhancing technologies.

Other typical grounds for refusal are included, for example:

- iv. where the Central Bank has objective grounds to believe the management body may pose a threat to sound and prudent management;
 - v. the applicant is not capable of regulated under the Chapter or as a designated person due to structure / organisation;
 - vi. the applicant is being wound up; or
 - vii. the applicant, principal officer or beneficial owner has been authorised in another EU Member State and has had that permission terminated.
5. **Acquisition of beneficial interest:** A direct or indirect acquisition of a beneficial interest in the holder of a VASP registration will require the prior approval of the Central Bank. An acquisition without prior approval will be of no effect to pass title to any share or any other interest.
6. **Beneficial ownership – prejudicial influence:** Where the Central Bank has reason to believe that a beneficial owner of the business of a VASP registration holder is exercising an influence on the direction of its affairs which is, or is likely to be, prejudicial to the compliance by the holder with any obligations the CJA 2010, the Central Bank shall notify the person of this belief, and direct the beneficial owner to take specified measures to bring that influence to an end within a specified period.
7. **Conditions:** The Central Bank may impose conditions that it considers necessary for the proper and orderly regulation of the holder of a VASP registration's business and to prevent the business being used for money laundering or terrorist financing. Conditions may be varied, replaced or revoked.
8. **Regulatory disclosure statement:** Once registered, VASPs will be required to include a prescribed form regulatory disclosure statement in all advertisements stating that the holder is registered and supervised by the Central Bank for AML/CFT purposes only.
9. **Record-keeping:** Registered VASPs will be required to hold records as may be specified by the Central Bank for a period of not less than six years after: (i) in the case of a record made in relation to a customer, the last dealing with the customer; or (ii) in any other case, the record is made.
10. **Application of certain Acts:** The Central Bank is empowered to perform certain of its powers under Central Bank legislation for the purposes of ensuring compliance with the Fourth Money Laundering Directive, 5AMLD and the FATF Recommendations. The functions listed include those in relation to the fitness and probity regime, administrative sanctions procedure and certain other supervisory powers.

Territorial scope

The Amended Bill is silent on what connection to Ireland the VASP or its activities must have in order to trigger a registration requirement. For example it is unclear at this stage if registration will be required where services are provided to Irish customers from an establishment outside Ireland.



By contrast, the AML/CFT obligations applicable to ‘designated persons’ (which would include VASPs) under Part 4 of the CJA 2010 are expressly stated to apply only to those acting in Ireland in the course of business carried on by the person in Ireland. It remains to be seen if this territorial scope will also be adopted for the registration requirement in further iterations of the Amended Bill.

The FATF Recommendations provide that at a minimum, VASPs should be required to be licensed or registered in the jurisdiction(s) where they are created (i.e. incorporated). This is what the Amended Bill will achieve.

The FATF Recommendations state that jurisdictions may also require VASPs that offer products and/or services to customers in, or conduct operations from, their jurisdiction to be licensed or registered in this jurisdiction. It is not clear if the Amended Bill will go this far based on the current drafting.

The AML/CFT registration for VASPs will be jurisdiction specific – i.e. unlike EU authorised banks or investment firms, it will not be possible to “passport” an Irish registration into other EU Member States and avoid the potential application of local rules. Therefore Irish-registered VASPs operating in multiple EU jurisdictions will need to consider the applicability or otherwise of AML/CFT rules in each jurisdiction in which they operate.

More generally, a jurisdiction by jurisdiction analysis on licensing requirements is required before conducting VASP activities in the EU to avoid unwittingly triggering a local licence or authorisation requirement. In time the proposed [Regulation of the European Parliament and of the Council on Markets in Crypto-assets](#) will seek to harmonise regulation of certain crypto asset activities across the EU.

Next steps

As 5AMLD implementation is already significantly delayed in Ireland, we expect the Amended Bill to progress quickly and anticipate that it could be enacted before the end of 2020 or early in 2021.

It is likely that the Amended Bill will be amended further before it is enactment. Therefore, upon enactment it will be important for anyone conducting VASP activities to consider the final terms and assess the impact on their business.

How can Walkers help?

We are advising firms in relation to the application of existing and forthcoming rules to virtual assets and we are ready to assist newly in-scope designated persons with the VASP registration process and the design of bespoke AML/CFT frameworks.



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10
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