

FINANCIAL REGULATION  
CORPORATE GOVERNANCE AND COMPLIANCE  
PENSIONS AND EMPLOYEE BENEFITS

## Arthur Cox Q&A: MLD5 Transposition and AML Horizon-Scanning

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The transposition of the Fifth Money Laundering Directive (**MLD5**) into Irish law last month, the expected deliverables under the European Commission's AML Action Plan, and the European Banking Authority's recent guidelines, opinion and consultation all serve as reminders of the strategic importance attached to AML and CFT at EU level and in Ireland.

This Q&A examines:

- the **transposition of MLD5** into Irish law
- the welcome clarification on the scope of the framework for the **beneficial ownership of express trusts**
- the expected deliverables under the **European Commission's AML Action Plan**
- the areas of the EU's anti-money laundering/countering the financing of terrorism (**AML/CFT**) framework on which the European Banking Authority (**EBA**) was focused on Q1 2021

### OVERVIEW

#### What does MLD5 focus on?

Building on the risk-based approach

that underpinned the Fourth Money Laundering Directive (**MLD4**), MLD5 seeks to mitigate the money laundering (**ML**) and terrorist financing (**TF**) risks posed by new technologies and trends. It also focuses on transparency, and on information-flow between competent authorities.

#### When was MLD5 transposed?

MLD5 was transposed into Irish law on 18 March 2021 by way of the [Criminal Justice \(Money Laundering and Terrorist Financing\) \(Amendment\) Act 2021](#) (the **Irish MLD5 Act**), with the exception of:

- certain provisions on beneficial ownership which had already been transposed (see '*Beneficial Ownership*' below)
- provisions regarding payment accounts

which will be transposed separately (see '*Payment Accounts*' below)

Rather than being a stand-alone piece of legislation, the Irish MLD5 Act amends the existing Criminal Justice (Money Laundering and Terrorist Financing) Acts 2010 to 2018 (the **Irish AML Act**). One or more commencement orders will be needed before the Irish MLD5 Act comes into effect.

#### What are the key changes?

The Irish MLD5 Act introduces general AML/CFT-related changes which are summarised in the table below.

It also clarifies the Irish framework for the beneficial ownership of express trusts (see '*Beneficial Ownership*' below).

### KEY CHANGES

#### Virtual Asset Service Providers – new registration and supervision regime

MLD5 introduces a new registration and supervision regime for virtual asset service providers (**VASPs**).

In addition to being subject to AML and CFT obligations generally, VASPs carrying on business in Ireland will need to register with, and will be supervised by, the Central Bank of Ireland (**CBI**).

*We will be publishing detailed analysis on the new regime for VASPs in the coming days.*

KEY CHANGES	
<b>New obliged entities</b>	<p>Letting agents (in respect of transactions where the monthly rent is at least €10,000) and dealers in high-value art have been brought into the scope of the Irish AML/CFT framework.</p> <p>While, to date, tax advisors have been in scope for AML/CFT purposes, those whose principal business or professional activity is to provide, directly or through related persons, <i>“material aid, assistance or advice on tax matters”</i> are now also in scope.</p>
<b>Establishing business relationships/account opening</b>	<p>Before establishing a business relationship with a customer to which the MLD4/MLD5 beneficial ownership framework applies, a designated person will need to check that information on the customer's beneficial ownership has been entered on (in the case of an express trust) its beneficial ownership register or (in the case of a body corporate, ICAV, unit trust or credit union) on the central register maintained by the Companies Registration Office (<b>CRO</b>) or CBI, as appropriate.</p> <p>Until that step is taken, a bank or financial institution can allow the customer to open an account with it, but cannot allow transactions on those accounts by or on behalf of the customer or its beneficial owner(s).</p>
<b>Politically-exposed persons (PEPs)</b>	<p>MLD5 requires Member States to issue lists of those functions that qualify as <i>“prominent public functions”</i> for the purposes of establishing who constitutes a PEP. The Minister for Justice can issue that guidance (and is expected to do so shortly).</p> <p>Notably, the Minister can issue more general PEP-related guidance where it believes that it is necessary to do so to facilitate the <i>“consistent, effective and risk-based”</i> application of the PEP-related provisions of the Irish AML/CFT regime.</p> <p>However, the Government has indicated that it does not plan to issue the latter form of guidance in the short or medium term, and hopes that it will not be needed at all. Instead, designated persons and competent authorities are expected to develop an <i>“appropriate and reasonable approach without top-down guidance”</i>.</p>
<b>Due Diligence</b>	<p><b>PEPs:</b> A designated person must continue to apply enhanced due diligence (<b>EDD</b>) measures in respect of a PEP until that PEP is deemed not to pose any further PEP-specific risk.</p> <p><b>Beneficial Ownership:</b> A designated person must carry out customer due diligence (<b>CDD</b>) on a customer any time it contacts that customer for the purpose of reviewing information on its beneficial owner(s).</p> <p><b>Senior Managing Officials:</b> Where a senior managing official is identified as the beneficial owner of a corporate, its identity must be verified.</p> <p><b>High Risk Third Countries:</b> The previous requirement to carry out measures <i>“including enhanced monitoring of the business relationship”</i> when dealing with a customer established/residing in a high risk third country has been made more prescriptive. The designated person must now obtain additional information on the customer, its beneficial owner(s), and the intended nature of the business relationship. It must also obtain information on the source of funds and source of wealth of the customer and its beneficial owner(s), and the reasons for the relevant transactions. Senior management approval for establishing or continuing the business relationship must be obtained. The requirement to conduct enhanced monitoring remains, with clarification that this must involve increasing the number and timing of the controls applied, and selecting patterns of transactions that need further examination.</p> <p><b>Prepaid Instruments:</b> The €250 thresholds in MLD4 below which CDD did not need to be carried out in respect of certain prepaid instruments has been reduced to €150.</p> <p><b>Risk Factors:</b> Minor amendments have been made to the risk factors in Schedules 3 and 4 of the Irish AML Act (which are suggestive of lower or higher ML/TF risk respectively).</p>
<b>Anonymous safe-deposit boxes</b>	<p>Banks and financial institutions can no longer establish or maintain anonymous safe-deposit boxes.</p>
<b>Enforcement</b>	<p>FIU Ireland (Ireland's Financial Intelligence Unit) must provide, where practicable, feedback to designated persons in respect of suspicious transaction reports made by them to FIU Ireland.</p> <p>There will be a defence to proceedings relating to 'tipping-off' where the designated person can prove that the entity to whom the information was disclosed was a specified financial institution which is connected to the designated person or part of the same group structure.</p> <p>Competent authorities must also establish effective and reliable mechanisms to encourage the reporting of breaches of the Irish AML Act via secure communication channels.</p>

## BENEFICIAL OWNERSHIP

### Has the beneficial ownership framework for express trusts been clarified?

Yes. Preliminary requirements in respect of the registers of beneficial ownership to be established and maintained by express trusts were introduced in January 2019 (see our briefing here: [Express Trusts: Trustees must now set up Beneficial Ownership Registers](#)). The types of express trusts that are in scope has now been clarified.

### Why has the framework for express trusts taken longer to finalise?

Progress on the framework for a central register of the beneficial ownership of express trusts has been slow. The reasons for this were set out in detail by the Minister for Finance as the Irish MLD5 Act moved through the legislative process.

Trusts are widely used in Ireland across a range of sectors, including structured finance, occupational pension schemes, approved retirement funds (ARFs), employee share schemes, charities and clubs. In civil law jurisdictions across the EU, similar arrangements are often structured using bodies corporate rather than trusts. In light of that, concerns were raised that due to the widespread use of express trusts in Ireland, Irish individuals could be more likely to find their information included on a central register of express trusts by virtue of being a member of a pension scheme or an employee share scheme than citizens of other EU Member States.

Following consultation with, among others, the Office of the Attorney General, an approach was agreed to ensure that the Irish framework is aligned as closely as possible with that in other EU Member States, but is also proportionate.

### What express trusts are in-scope/out-of-scope?

- Occupational pension schemes, ARFs and employee share schemes: excluded

Trusts that are, in other EU Member States, structured using a legal vehicle are excluded from the Irish requirements regarding beneficial ownership. This includes occupational pension schemes, ARFs and employee share schemes.

It is possible that regulations may be made at a later date to introduce a beneficial ownership regime for those schemes more akin to that which is in place for corporates.

- Clubs and Charities: bespoke requirements

A tailored definition of “beneficial

owner” has been introduced for unincorporated amateur sports bodies and unincorporated charities. Only the trustees, committee, governing body or individuals in control of the trust will constitute its beneficial owners. Incorporated sports bodies and charities will instead be subject to the beneficial ownership framework that applies to bodies corporate.

From a structured finance perspective, in the context of special purpose vehicles whose shares are subject to a charitable trust, this clarification is extremely useful.

#### • Further Regulations

The Minister for Finance may prescribe further trusts that are to be included or excluded from the beneficial ownership framework for express trusts.

Additional regulations will follow shortly that are expected to deal with the establishment and management of the central register of beneficial ownership of express trusts by the Revenue Commissioners.

### Are security trustees/note trustees in or out of scope?

For financial institutions that act as security trustees for syndicated loans or note trustees in the context of bond issuances, it is notable that these types of trust involving regulated financial institutions have not been excluded from the requirement to maintain a register of beneficial ownership.

This differs from the approach taken when the UK implemented MLD5. The impact of this may be mitigated by the clarification that where a trust does not operate entirely for the benefit of individuals, the trustee can list the class of beneficiaries generally as the beneficial owner.

## PAYMENT ACCOUNTS

### Have the provisions regarding payment accounts been transposed?

No. This is expected to take place separately under the remit of the Department of Finance.

By way of reminder, under MLD4 (as amended by MLD5), Member States must establish centralised automated mechanisms to allow those who hold or control payment accounts and bank accounts to be identified promptly.

The information that must be accessible and searchable via those mechanisms includes the name(s) of the account-holder and any person acting on their behalf, the beneficial owner of the account-holder, the account’s IBAN,

the date the account was opened, and the date the account was closed. The information in the centralised mechanism must be accessible by national FIUs (who must, in turn, be able to provide that information to other FIUs in a timely manner).

## HORIZON-SCANNING

### Has the CBI signalled its plans for AML/CFT this year?

The CBI has [emphasised](#) that AML/CFT continues to be a strategic priority for 2021. In addition to its focus on the new registration and supervision regime for VASPs, it plans to revise its AML/CFT Guidelines for the Financial Sector, and strongly supports the European Commission’s AML Action Plan (see below) which it views as a “game-changer”.

### What can we expect from the European Commission?

The Commission launched its [AML Action Plan](#) in May 2020, and committed to delivering on key action points in early 2021. Impending deliverables include a proposal for a harmonised single EU AML/CFT rulebook and a proposal for the establishment of a single, stand-alone AML/CFT EU supervisor.

The Minister for Finance [recently observed](#) that, as part of a recent ECOFIN meeting, he sought assurances that any future EU AML/CFT framework would take account of the nuances of common law jurisdictions as well as civil law jurisdictions, by reference to Ireland’s unique position as a common law jurisdiction within the EU following Brexit.

### What has the EBA been focusing on?

#### • De-Risking

In Q1 2021, the EBA was particularly focused on de-risking (the practice of refusing, or terminating, business relationships with entire categories of customers that are considered to present higher ML/TF risk).

In its [3 March 2021 Opinion on ML/TF risks affecting the EU’s financial sector](#), it noted that de-risking is a continuing trend and set out a number of actions that competent authorities should take to ensure that risk is appropriately assessed and managed instead of groups of customers being de-risked. Other AML/CFT risks highlighted by the EBA include risks associated with virtual currencies, FinTech, RegTech, Brexit and divergent supervisory practices.

#### • Amendments to EBA ML/TF Risk Guidelines

The EBA revised its [Guidelines on ML/TF Risk Factors](#) on 1 March 2021 to:

- add new guidance on the identification of beneficial owners
- provide guidance on the use of innovative solutions to identify and verify customers' identities
- set out how financial institutions should comply with EDD requirements relating to high-risk third countries
- include new sectoral guidelines for crowdfunding platforms, corporate

- finance entities, account information service providers, payment initiation services providers, and firms providing currency exchange services
- give more details on TF risk factors
  - clarify that a risk-based approach to AML/CFT does not require de-risking, but instead requires financial institutions to take steps to effectively manage the ML/TF risks associated with individual business relationships

- Possible changes to Guidelines on risk-based AML/CFT supervision
- The EBA is publicly consulting on changes to its existing [Guidelines on risk-based AML/CFT supervision](#). It is proposing practical step-by-step approaches to addressing those aspects of AML/CFT supervision that competent authorities have found particularly challenging. The consultation closes on 17 June 2021.

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