

THE BRITISH VIRGIN ISLANDS APPROACH TO CRYPTOASSET BUSINESSES

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Introduction

The British Virgin Islands ("BVI") is a popular jurisdiction for cryptoasset businesses. Some of the most well-known names operate from a BVI business company. This article looks at developments in the field of regulation and litigation relevant to such businesses, and to those considering the BVI to establish their business.

The regulation of crypto asset businesses - background

The Financial Action Task Force (the "**FATF**") is the global Anti-Money Laundering and Anti-Terrorist/Proliferation Financing watchdog. Established in 1989, it issues standards and guidance designed to prevent organised crime, corruption and terrorism. Over 200 countries and jurisdictions have committed to implement its standards. It has issued guidance in relation to virtual assets and virtual asset service providers ("**VASPs**") which was most recently updated in October 2021. One of the key recommendations is that jurisdictions require VASPs to register with the jurisdiction's regulator, and implement anti-financial crime processes and controls. Due to the pseudonymised nature of activity in relation to cryptoassets, the FATF views the crypto industry as posing a high risk of being used for financial crime.

The BVI's approach

Within this context, the BVI has implemented legislation that requires VASPs to register with its financial services regulator, the BVI Financial Services Commission (the "**Commission**"). This legislation is the Virtual Asset Service Providers Act (the "**Act**"). VASPs are also required to comply with the BVI's Anti-Money Laundering Regulations and the Anti-Money Laundering and Terrorist Financing Code of Practice unless a transaction involves virtual assets valued at below \$1,000. It is an offence to operate as a VASP in or from within the BVI as a business until the necessary registration has been obtained. The exception is for VASPs who were operational when the Act came into force on 1 February 2023 and who took advantage of the transitional relief in the Act. The registration process is thorough. Many aspects are comparable to those of a traditional financial services licence.



The Commission has issued guidance for applicants on making an application (available on its website).

In line with the BVI's approach to more traditional financial instruments, the Commission does not regulate the instruments or products themselves. Instead, the providers are regulated if carrying out a "virtual asset service" as a business in or from within the BVI. It is also worth noting that not every crypto asset is a "virtual asset". In line with the FATF's guidance, NFTs for example will usually be virtual assets if used for investment or payment purposes. A simple token that is used within a game but which has no value and cannot be traded outside of the game will typically not be a virtual asset. Each novel crypto asset must however be assessed on a case by case basis.

Nor is every activity a "virtual asset service". The services that may bring a VASP into the scope of the Act mirror those in the FATF guidance. These include the conduct of one or more of the following activities or operations for or on behalf of another person as a business in or from within the BVI:

- exchange between virtual assets and fiat currencies;
- exchange between one or more forms of virtual assets;
- transfer of virtual assets;
- safekeeping or administration of virtual assets or instruments enabling control over virtual assets;
- participation in, and provision of, financial services related to an issuer's offer or sale of a virtual asset; or
- any such activity or operation as may be specified in the Act or prescribed by regulations.

Operating a "virtual assets exchange" or providing "virtual assets custody services" (as defined) require registration with the Commission.

Recent feedback from the Commission

Both the BVI government and the Commission view businesses as key stakeholders in fighting financial crime. An application for registration will not be approved unless it fulfils the necessary criteria for registration, including adequate anti-financial crime compliance measures. Although the Commission has not approved any VASP registrations, it anticipates doing so in Q1 of 2024. In the meantime, the Commission has provided general feedback based on the applications received to date. In particular:

- a VASP must have paid up capital resources which must be in fiat. These are not to be deployed as working capital in the business. The amount of capital must be proportionate to the scale, nature and complexity of the business;
- a VASP is required to have an auditor which has expertise in auditing a virtual assets business. In particular, the dedicated resources responsible for the audit must have expertise in virtual assets. The auditor must consent to act as the VASP's auditor and the VASP must submit the appropriate form to the Commission;
- a VASP must have insurance that is appropriate considering the nature, complexity and size of the VASP. This need not be in place at the time of making the application, however, a quote must be submitted;
- the VASP's management team must each have sufficient expertise;
- the Commission will assess the "controllers" of the VASP. The Commission may require information on all shareholders not merely those with a 10% or more interest;
- the compliance officer must have sufficient expertise in virtual assets; a corporate compliance officer rather than an individual will likely be rejected by the Commission; and
- all AML and outsourcing risks must be appropriately identified and mitigated.



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The BVI courts

The BVI courts have heard a number of matters involving cryptoassets. Several are in the context of fraud and insolvency. As a result, its judiciary are familiar with the legal and commercial issues associated with this asset class. Two points merit highlighting:

- cryptoassets are treated as property under BVI law. Therefore remedies used for more traditional types of property (such as fiat) are available. These include interim proprietary injunctions. In taking this approach, the BVI court has followed English case law (*AA v Persons Unknown* (2019) EWHC 3556 (Comm)); and
- given the pseudonymised nature of cryptoasset activity, the BVI courts have taken a pragmatic approach to service, particularly where the defendant/respondent are "persons unknown". They have ordered service by email and would, in appropriate cases, likely follow English case law to permit service via NFT. They have also permitted service by X (formerly known as Twitter) in an insolvency context.

Conclusion

The BVI is expected to remain a popular choice for cryptoassets businesses due to the certainty and proportionate nature of its regulation, and the expertise of its courts and service providers. Its approach to regulation is expected to track evolving global standards and be proportionate to the risks to which the businesses in this industry (and their customers) are exposed.