10 June 2019

Consultation on the Transposition of the 5th Money Laundering Directive
https://www.gov.uk/government/consultations/transposition-of-the-fifth-money-laundering-directive

For clarity, we have only commented on questions where we have specific comments to raise and where the subject addressed is within the remit of the Bar Standards Board (BSB).

Chapter 2 – New obliged entities

Box 2.A: Expanding the definition of "tax advisor"

Question 1: What additional activities should be caught within this amendment?
The Anti-Money Laundering Guidance for the Legal Sector, which has been approved by HM Treasury, states (page 17) that the following are specifically excluded from the scope of the Money Laundering Regulations (MLRs):

- provision of legal advice
- participation in litigation or a form of alternative dispute resolution
- work funded by Legal Aid

We do not believe that it is the intention that this type of work should be brought within scope in relation to tax advisory work so, for clarity, this should continue to be explicit in the approved guidance and/or the Regulations.

Question 2: In your view, what will be the impact of expanding the definition of tax advisor? Please justify your answer and specify, where possible, the costs and benefits of this change.

Should the government take the view, in relation to tax advice, that legal advice, participation in litigation or alternative dispute resolution and work funded by Legal Aid are within the amended definition, it would result in more barristers coming within scope of the MLRs. We do not think this is the intention as we do not think there is sufficient evidence that this activity gives rise to a risk of barristers participating in/ facilitating Money Laundering/ Terrorist Financing. Therefore, this would disproportionately add to the regulatory burden for the BSB, as well as for barristers and BSB entities. It would distract us from concentrating on the areas of highest risk as identified in the National Risk Assessment.

Chapter 4 – Customer due diligence

Box 4.A: Electronic identification processes

Question 44: Is there a need for additional clarification in the regulations as to what constitutes "secure" electronic identification processes, or can additional details be set out in guidance?

We think that this is best addressed in the Treasury-approved guidance, which enables updates to be made more easily than through legislation.

Question 45: do you agree that standards on an electronic identification process set out in Treasury-approved guidance would constitute implicit recognition, approval or acceptance by a national competent authority?

We agree with this.

Question 46: is this change likely to encourage firms to make more use of electronic means of identification? If so, is this likely to lead to savings for financial institutions when compared to traditional customer onboarding? Are there any additional measures government could introduce to further encourage the use of electronic means of identification?

The vast majority of instructions to barristers are received via other legal professionals, particularly solicitors (who are subject to the MLRs) rather than directly from members of the public. Under the MLRs, barristers can rely on other legal professionals to carry out customer due diligence (CDD) and obtain confirmation from them that the required checks have been undertaken.

Discussions within the Legal Sector Affinity Group and with HM Treasury have highlighted the issue that providers of electronic means of identification are reluctant to allow reliance on the CDD evidence they provide to solicitors. This means that solicitors that use service providers to conduct CDD are prevented from passing on this information to barristers. This results in the barrister duplicating CDD procedures, which causes additional costs for both barristers and clients. The support of HM Treasury in finding a solution would be welcome.

Chapter 5 – Obliged entities: beneficial ownership requirements

Box 5.A: Checking registers when entering into a new business relationship

Question 53: Do respondents agree with the envisaged approach for obliged entities checking registers, as set out in this chapter (for companies) and chapter 9 (for trusts)

We agree with the envisaged approach.

Chapter 7 – Politically exposed persons: prominent public functions

Box 7.A: Politically exposed persons: prominent public functions

Question 59: Do you agree that the UK functions identified in the FCA's existing guidance on PEPs, and restated above, are the UK functions that should be treated as prominent public functions?

We agree with this approach to identify prominent public functions.

Question 60: Do you agree with the government's envisaged approach to requesting UK-headquartered intergovernmental organisations to issue and keep up to date a list of prominent public functions within their organisation?

We agree that this would be particularly helpful for smaller chambers and sole practitioners accepting public access instructions (i.e. directly from members of the public without the involvement of a solicitor or other obliged entity) who are less likely to have access to subscription databases to identify PEPs, so that efforts are appropriately targeted and proportionate.

Chapter 8: Mechanisms to report discrepancies in beneficial ownership information

Box 8.A: Mechanisms to report discrepancies in beneficial ownership information

Question 61: Do you have any views on the proposal to require obliged entities to directly inform Companies House of any discrepancies between the beneficial ownership information they hold, and information held on the public register at Companies House?

The consultation makes clear at paragraph 8.11 that Companies House would *"likely contact the company to bring the issue to their attention and ask the company to amend the data on the register or reconfirm that it is accurate"*. We have two concerns about an obligation to report discrepancies found during an obliged entity's CDD checks:

1. This may amount to tipping off if the obliged entity has also made a Suspicious Activity Report regarding the beneficial owner in question.
2. The vast majority of barristers are self-employed and would therefore be obliged to report as individuals. From experience, an individual making a report to Companies House can feel vulnerable as their personal information is passed on by Companies House to those who could have criminal intent.

We think that the Government should give careful thought to how the reporting mechanism to Companies House will work and, before establishing an obligation, ensure that there is an appropriate and transparent process for reporting and how Companies House will handle the information, so that the personal information of individuals making reports is appropriately protected.

Question 62: Do you have any views on the proposal to require competent authorities to directly inform Companies House of any discrepancies between the beneficial ownership information they hold, and information held on the public register at Companies House?

We assume that the FATF definition of competent authority applies here and this does not create an obligation on Professional Body Supervisors such as the BSB.

Question 63: How should discrepancies in beneficial ownership information be handled and resolved, and would a public warning on the register be appropriate? Could this create tipping off issues?

Please see our response to question 61.

Chapter 11 Requirement to publish an annual report

Box 11.A: Requirement to publish an annual report

Question 88: Do you think it would still be useful for the Treasury to continue to publish its annual overarching report of the supervisory regime as required by regulation 51 (3)?

We think there is merit in HM Treasury preparing a report that provides a whole-system view of AML/CFT supervision.

We would encourage HM Treasury to:

- consider whether a report is needed every year (we note the last report covered 2015-17);
- be consistent from year-to-year in what information they require, so we can ensure we have systems in place to collect the data;
- work together with stakeholders such as ourselves to ensure a shared view of key messages in our respective reports; and
- avoid duplication of effort as much as possible, given that we need to report to HM Treasury, provide information to OPBAS (who in turn are publishing their own reports) and publish our own report. The considerable time required to prepare all this information distracts from the time we would otherwise spend on supervising barristers and BSB entities.

Chapter 12 Other changes required by 5MLD

Box 12.A: Other changes required by 5MLD

Question 90: Are you content that the government's existing approach to protecting whistle-blowers satisfies the requirements in Article 38 of 4MLD as amended?

Whistle-blowing anonymity and employee protection can only be guaranteed where the relevant legislation applies. The BSB has considered the issue of whistle-blowing very carefully; due to the predominantly self-employed nature of the Bar, most barristers are not covered by the statutory provisions. We have also taken legal advice and, from this, we have

concluded that we are not able to guarantee anonymity to whistle-blowers or those reporting in a similar manner.

The government's existing approach to protecting whistle-blowers therefore only satisfies the requirements in Article 38 of 4MLD as amended for those who are employed.

Chapter 14 Additional technical amendments to the MLRs

Box 14.F: Criminality checks

Question 103: Do the proposed requirements sufficiently mitigate the risk of criminals acting in regulated roles? (listed as question 104 in Annex B)

Following a period of public consultation and stakeholder engagement, we have taken a policy decision that will require all prospective barristers to have a standard DBS check upon entry to the profession (which legislation allows). Having taken advice, we have decided that this will be at the point of Call to the Bar. This will strengthen the controls that are currently in place, which require *practising* barristers who are carrying out work within the MLRs to obtain a basic DBS check. The new policy will mean that unregistered barristers will have been subject to standard DBS checks.

Call is administered by the four Inns of Court, not by the BSB. It is the Inns who currently conduct fit and proper tests at that stage. We are therefore currently in discussion with the Inns as to how this requirement to obtain a standard DBS check will be implemented. A Memorandum of Understanding has been agreed which envisages that the Inns will administer the DBS checks with oversight by the BSB via an audit/supervision process. However, the BSB will not receive a copy of each DBS check. We anticipate that this will be implemented in 2020. Any amended wording in the MLRs will need to accommodate this arrangement.

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