

Introduction

The Department of Finance and the Department of Justice and Equality have carefully considered your submission on the Criminal Justice (Money Laundering and Terrorist Financing) (Amendment) Bill 2018 and wish to provide the following updates. The Law Society would like to thank the Departments for this update and have provided additional information where relevant in relation to each of our Recommendations below in red.

1. Provide adequate time between enactment and commencement of the Bill to facilitate updating (1) by designated persons of their AML compliance and (2) by competent authorities of their systems for supervision

Update: *It is not possible to say when the Bill will be commenced as we do not know when it will be enacted. We are aiming for the Bill to be commenced as soon as possible, in light of the infringement proceedings.*

LSI Response:

The Society appreciates the pressures under which both Departments are working and the impossible pressure to implement legislation which is itself being amended even before enactment.

Nonetheless, sufficient time between enactment of the 2018 Bill and its commencement is needed to enable adequate preparations by both designated bodies and non-State competent authorities. For example, in the case of GDPR, while a Regulation and not a Directive, there was a benefit for businesses in having a set date to work towards and the publication of legislation some months in advance of the commencement date so as to enable sectoral guidance.

In the interests of good compliance outcomes and supervision from all designated bodies and non-State competent authorities, the Society repeats its recommendation that a transitional period of six months between enactment and commencement be considered. This gives business an opportunity to (1) have visibility of final wording of their statutory obligations, (2) review relevant guidance, (3) attend training and (4) update their AML policies so as to ensure they are in compliance with their statutory obligations on the day that those statutory obligations commence.

In 2010, the Department of Justice and Equality facilitated this when implementing the Third Directive, 2005. The Department greatly assisted designated bodies and competent authorities by indicating a number of weeks in advance the date on which the Act would commence. This facilitated the publication of guidance for solicitors about their obligations under the Act and the Society's monitoring obligations two weeks before the Act commenced. The Society would welcome and appreciate similar notification in relation to the commencement of the 2018 Bill.

2. Bring clarity to legal fees lawfully earned by solicitors

Update: *The Department of Justice and Equality will give the matter further consideration in the context of the Bill to transpose the Fifth Anti-Money Laundering Directive.*

LSI Response:

The Society would like to thank the Departments for their engagement with this Recommendation and welcomes its further consideration in the future.

3. Avoid gold-plating the extent to which the standard CDD obligation to monitor clients is necessitated by the Fourth Directive

Update:

The Department of Justice and Equality intends to amend the current Bill, by clarifying that monitoring is to be carried out on a risk-sensitive basis.

LSI Response:

The Society welcomes an amendment which will address Recommendation 3.

4. Beneficial ownership and trust provisions: provide actual text for definitions

Update:

The Department of Finance and the Department of Justice and Equality consider that an amendment to the current Bill is not necessary- please refer to the Directive. The term was defined this way for consistency with the existing statutory instrument 560/2016 concerning beneficial ownership of bodies corporate.

LSI Response:

While the Society recommends the provision of statutory definitions in implementing legislation, we note the Department's objective to achieve consistency with existing SIs.

5. For business risk assessments, clarify the meaning of the word "individual"

Update:

This word was not intended to refer to customer-specific risk assessments, rather assessments relating to the business or groups of customers.

LSI Response:

The Society welcomes clarification about the meaning of "individual" when a competent authority indicates to a designated body that a documented business risk assessment is not required.

6. Ensure the obligation to carry out CDD on persons acting on behalf of customers does not, unnecessarily, include co-advisors or other professional service providers

Update:

The Department of Finance and the Department of Justice and Equality consider that amendments to the current Bill are not necessary.

On 6.4, while the concern is understood, this provision has been in existence since 2010, derives from the Directives, and does not appear to have caused any difficulties to date.

LSI Response:

The Society thanks the Departments for the clarification that, in relation to the new section 33(2A), amendments are not necessary. The Society appreciates this clarification which will be of assistance when developing best practice guidance for solicitors.

In relation to our recommendation at paragraph 6.4, the Society notes that the definition of “customer” at section 24(1) has been in its current form since 2010 and is not the subject of the 2018 Bill. The Society would like to request that the Departments consider our recommendation again when implementing the Fifth Money Laundering Directive so as to ensure consistency of CDD exemptions available for non-AML regulated legal services irrespective of whether those legal services are provided by a barrister or solicitor.

7. Avoid gold-plating the standards to which simplified due diligence can be undertaken

Update:

The Department of Finance and the Department of Justice and Equality consider that amendments to the current Bill are not necessary. A ‘subjective’ test for applying simplified due diligence would be open to abuse. It would not seem to be in keeping with the Directive to effectively allow entities to apply simplified due diligence in any case. The section allows simplified due diligence to be applied based on the designated person’s assessment of the risk attaching to the customer or transaction, but there must be a reasonable basis for that assessment. The 2010 Act already has an element of ‘reasonableness’: CDD measures are to be applied ‘to the extent reasonably warranted by the risk of money laundering and terrorist financing’.

LSI Response:

The Society understands the Departments’ position in relation to introducing an objective test to determine whether simplified CDD can be applied.

8. Extend protections for non-AML regulated legal services to Business Risk Assessments

Update:

The Department of Finance and the Department of Justice and Equality consider that it is already clear in legislation and there is no need for amendment- please see amendment made by section 5 of the Bill.

LSI Response:

The Society appreciates the Departments’ confirmation that the protections for non-AML regulated legal services apply to Business Risk Assessments and this will be of assistance when developing best practice guidance for solicitors.

9. Help SMEs comply with AML obligations by introducing a national centralised register of domestic PEPs

Update:

Guidelines on Domestic PEPs are being prepared by a sub-committee of the Anti-Money Laundering Steering Committee and guidelines will be issued in due course.

LSI Response:

The Society welcomes the publication of guidance in relation to domestic PEPs which will be of great assistance to all designated bodies. The Society wonders whether designated bodies and non-State competent authorities will be afforded an opportunity to contribute to their development or whether a consultation process is envisaged?

10. Enable third-party reliance on CDD carried out by Irish solicitors irrespective of any legal service being provided

Update:

The Department of Justice and Equality will consider including an amendment to address this issue in the Bill which will transpose the Fifth Anti-Money Laundering Directive.

LSI Response:

The Society would like to thank the Departments for their engagement with this Recommendation and greatly welcomes its further consideration in the future.

11. Facilitate reliance available across all CDD including for (1) simplified CDD, (2) the standard CDD requirement to carry out ongoing monitoring and (3) all enhanced CDD measures

Update:

The Department of Finance and the Department of Justice and Equality consider that amendments to the current Bill are not necessary. 4AMLD (Article 13 (1)) does not allow third party reliance for the monitoring obligation.

LSI Response:

The Society understands the Departments' position in relation to third party reliance with regard to monitoring obligations.

In addition, the Society wonders whether it might be worthwhile to explore the benefits of third party reliance being available on a statutory basis in the future and, in particular, for simplified CDD.

12. Introduce safeguards to FIU powers

Update:

The FIU's ability to obtain information without undue delay is an important part of the Directive and the FATF recommendations. The power is constrained by the terms of the provision itself- it is limited to information 'required for its functions'. Other constraints, such as legal professional privilege, will still apply- we have been advised that this does not need to be stated in legislation.

LSI Response:

The Society notes the Departments' position in relation to the requirements of the Directive.

Nonetheless, while the new FIU powers may be self-limiting, the importance of oversight of the use of these new powers cannot be understated. In addition, while constraints on the potential abuse of these powers might be available in theory, the Society recommends that the Departments clarify those constraints in implementing legislation.

Accordingly, the Society would like to request that the concerns we outlined in relation to Recommendation 12 might be considered further in advance of the introduction of these new police powers in Ireland.

13. Introduce safeguards to the powers of FIU to request additional information from any designated person who is required to make a section 42 report

Update:

The power to obtain additional information is required by the Directive. Section 46 will apply in relation to this new subsection- it is unnecessary to restate it.

LSI Response:

While the Society appreciates the Departments' position, we believe it is vital to include safeguards in the new FIU powers in the Bill.

Accordingly, the Society would like to request that the concerns we outlined in Recommendation 13 might be considered further in advance of the introduction of these new police powers in Ireland.

14. Ensure the safeguards for legal professional privilege in section 46 of the 2010 Act are extended to all coercive State powers

Update:

As stated above, we have considered this issue and sought advice from the Office of the Attorney General. We have been advised that legal professional privilege applies in respect of powers to obtain information- it does not need to be explicitly stated in legislation.

LSI Response:

The Society appreciates and welcomes the Attorney General's confirmation that legal professional privilege applies without being explicitly stated in legislation.

However, the primary legislation (the 2010 Act) provides an explicit statutory protection for legal professional privilege. Unfortunately, the wording of section 46 prevents it from applying to any requirement to disclose information which arises in any chapter other than Chapter 4. The FIU's powers are contained in a new Chapter 3A to which section 46 cannot apply. It is unlikely that the Oireachtas, when debating the 2010 Act, envisaged new disclosure/State power provisions being inserted in the future in different Chapters of the Act. Accordingly, the Society would like to request that the concerns we outlined in Recommendation 14 might be considered further in advance of the introduction of these new police powers in Ireland.

15. Broaden the 'tipping off' offences to enable designated persons make necessary disclosures to consumer complaints bodies and the Data Protection Commissioner

Update:

This comment does not relate to the Bill, rather to the current Act. We have not been advised of any issues arising in practice in this regard. In any case, the Directive does not appear to permit exceptions to the offence of tipping off beyond those expressly provided for.

LSI Response:

The Society is aware that our concerns expressed at Recommendation 15 do not arise in the context of the current Bill, however, our submission on the Bill was the first available opportunity to bring this issue to the Departments' attention. We hope that there is potential to resolve the issue in this Bill or legislation to implement the Fifth Directive.

By way of information, this issue was brought to the Society's attention at a meeting of the Private Sector Consultative Forum earlier this year. At that meeting a number of representatives from a variety of designated bodies raised this particular concern and noted having experienced it. It was reported at the Private Sector Consultative Forum that designated bodies have paid minor fines for breaches of consumer protection laws in circumstances where a full defence could not be made because of the tipping off offence.

The Society recommends that consideration be given to the need to empower designated bodies to share AML compliance decisions with relevant regulators on a confidential basis.

Accordingly, the Society would like to request that the Departments consider our concerns at Recommendation 15 further.

16. Introduce a requirement that PCPs be documented in writing

Update:

The Department of Finance and the Department of Justice and Equality consider that amendments to the current Bill are not necessary. The Society may wish to note that the Bill provides that designated persons shall have regard to guidelines issued by the competent authority when preparing policies and procedures.

LSI Response:

The Society would like to thank the Departments for their consideration of this Recommendation and the suggestion in relation to guidelines. The Society's current guidelines explain, at paragraph 13.5, that the Society, when exercising its functions as a competent authority, will "look for evidence that there are proper written procedures within the firm for the prevention and detection of money laundering and terrorist financing."

Nonetheless, during the course of an inspection of a solicitor's firm, when it was discovered that no written policies were available, Senior Counsel for the firm noted that the statutory requirement to adopt policies and procedures did not require that those policies and procedures be in writing. Accordingly, on the basis of our experience as a competent authority, the Society would like to request that the concerns we outlined in Recommendation 16 might be considered further. The insertion of the word "written" after "adopt" in the proposed substituted sections 54(1) and 54(2) would resolve the issue for the future unless there are other policy reasons for not requiring that PCPs be in writing.

17. Clarify data retention obligations

Update:

The Department of Justice and Equality intends to amend the current Bill and ensure that Garda directions for lengthier retention periods be in writing.

LSI Response:

The Society would like to thank the Departments for their engagement with this Recommendation and greatly welcomes this clarity.

18. Protect the confidentiality of the solicitor-client relationship from State interference

Update:

The Department of Finance and the Department of Justice and Equality consider that it is not possible to amend the Bill as suggested. The Directive requires that the obligations apply to all obliged entities.

LSI Response:

The Society's serious concerns about the manner in which Article 42 of the Fourth Directive will be implemented by section 28 of the Bill remain.

While Article 42 applies to obliged entities, Article 2 excludes non-AML regulated legal services from falling within the legal services provided by an obliged entity who is a legal professional:

"1. This Directive shall apply to the following obliged entities:

...

(3) the following natural or legal persons acting in the exercise of their professional activities:

...

- (b) ... other independent legal professionals, where they participate, whether by acting on behalf of and for their client in any financial or real estate transaction, or by assisting in the planning or carrying out of transactions for their client concerning the:
- (i) buying and selling of real property or business entities;
 - (ii) managing of client money, securities or other assets;
 - (iii) opening or management of bank, savings or securities accounts;
 - (iv) organisation of contributions necessary for the creation, operation or management of companies;
 - (v) creation, operation or management of trusts, companies, foundations, or similar structures;”

While section 25(1A) brings welcome clarity that a solicitor is only a designated person for the purposes of the 2010 Act, as amended, when they provide AML-regulated legal services (as defined in section 24(1) “relevant independent legal professional”), there is a considerable risk that a Garda enquiry under the amended section 56 could over-reach to include a person to whom the solicitor provides a non-AML regulated legal service. The Society believes that, as currently drafted, section 56 goes beyond what is necessitated by the Directive.

The broad sweeping powers with which an extended section 56 of the Act will allow the State to question solicitors about the identity of clients and the nature of relationships with clients are too extensive and threaten the independence and confidentiality of the solicitor-client relationship.

The Law Society recommends that solicitors be exempted from complying with section 56.

Failing that, safeguards must be included in section 56 to protect against intrusion into the privacy of the solicitor-client relationship beyond anything necessitated by EU legislation to prevent money laundering and terrorist financing.

The Society also notes that the safeguards for legal professional privilege and advice in section 46 of the 2010 Act are not extended beyond Chapter 4, however, section 56 appears in Chapter 7. The Society, therefore, also recommends the extension of section 46 to section 56 (see also Recommendation 14).

Accordingly, the Society encourages the Departments to consider Recommendation 18 once more.

19. Maintain the defence of having had regard to guidelines

Update:

While the specific defence is to be deleted, the Bill makes references throughout to guidelines to be issued by a competent authority.

LSI Response:

The Society notes the Departments’ position which is understandable in the context of supervision by a competent authority. However, the 2010 Act as amended creates a considerable number of prosecutable criminal offences. It is in the context of a potential future criminal prosecution that the Society believes it is important to maintain the statutory defence of having had regard to guidelines. From a criminal justice perspective, this remains an important defence against the many compliance offences created in the Act which are prosecutable in the future. Accordingly, the Society requests the Departments to consider Recommendation 19 once more.

20. Empower competent authorities to apply sanctions/fines

Update:

The Department of Finance and the Department of Justice and Equality consider that such amendments to the current Bill are not possible.

LSI Response:

The Society notes the Departments' position. We wonder whether it might be possible to consider empowering competent authorities to apply sanctions/fines in future legislation? Accordingly, the Society would welcome an opportunity to engage with the Departments on this issue in the future.

21. Provide a nationally maintained and publicly accessible real-time single searchable list of low and high-risk third countries

Update:

The Department of Finance and the Department of Justice and Equality have no plans to introduce such a system.

LSI Response:

The Law Society recommends that consideration be given in the future to Recommendation 21: the provision of this key information would greatly reduce the regulatory burden on all designated small businesses in Ireland.

22. Maintain the exemption for CDD for solicitor pooled client accounts or provide clarity about the treatment of solicitor pooled client accounts when banks carry out Customer risk assessments on law firms

Update:

The Directive does not allow Member States to introduce blanket simplified due diligence. Even if pooled accounts are considered to be an 'area of low risk', the obliged entity must also be satisfied that the customer or transaction concerned presents a low risk. This is also the case in the UK money laundering regulations, quoted in the Society's letter. The ECB guidelines indicate such that such pooled accounts can avail of SDD where national law allows. There is no prohibition in the Bill on pooled accounts being considered an 'area of low risk' provided that they are identified as such in the designated person's risk assessment.

LSI Response:

The Society appreciates the Departments' engagement with this recommendation.

While there is comfort in the fact that there is no prohibition excluding solicitor pooled client accounts from being considered an 'area of low risk' in Ireland, provided they are identified as such in a designated person's risk assessment, we remain concerned that Irish

implementing legislation does not explicitly provide for this treatment to the same extent as UK legislation.

The Law Society requests that further consideration be given to Recommendation 22 by the Departments. There is an important opportunity now to avoid potential unnecessary disruption to the significant Irish and EU business transacted through solicitor pooled client accounts upon commencement of the Act. Solicitor pooled client accounts hold funds for house purchases. It is also important to consider amendments which might minimise potential economic disruption. It may be that clarity will be brought to the eligibility of solicitor client pooled accounts for simplified CDD in financial sector guidelines.

23. Clarify the application of Data Protection Obligations of Designated Persons and prescribe any necessary restrictions of data controller obligations and rights of data subjects when a data controller processes data in compliance with AML obligations

Update:

The Department of Finance and the Department of Justice and Equality would ask that the Law Society clarifies what is the precise nature of its concerns on this matter.

LSI Response:

The Society's recommendation is in the context of whether the Data Protection Act 2018 provides adequate clarity for designated persons/competent authorities as data controllers when they comply with their statutory AML obligations. The two Departments may wish to seek clarity from the Data Protection Commissioner?