



Bar Council response to the Fifth Money Laundering Directive Consultation

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to HM Treasury's consultation paper entitled: "Transposition of the Fifth Money Laundering Directive: consultation"¹.
2. The Bar Council represents over 16,000 barristers in England and Wales. It promotes the Bar's high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.
3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board (BSB).

Overview

4. The Bar Council is the Supervisory Authority under the *Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017* ("the 2017 Regulations"). Along with the regulatory functions described above, the supervision for anti-money laundering/counter-terrorist financing (AML/CTF) is discharged through the BSB, which acts independently from the Bar Council. In all fields, the BSB's rules, and its supervision and enforcement strategies, are well able to address the AML/CTF risks in a proportionate and effective manner. The BSB has responded separately to this consultation.

¹ HM Treasury (2019) Transposition of the Fifth Money Laundering Directive. Available here: <https://www.gov.uk/government/consultations/transposition-of-the-fifth-money-laundering-directive>

5. The Bar Council publishes guidance² for barristers to explain their obligations and illustrate best practice for AML/CTF compliance, and will be looking to add further practical assistance and examples into that guidance to further assist barristers in applying it in practice. However, the majority of self-employed barristers do not undertake work that falls within the scope of regulated business for independent legal professionals as defined by regulation 12(1) of the 2017 Regulations.

6. The work of barristers generally consists of advising on and conducting contentious litigation which falls outside the AML 'regulated sector'. Unlike solicitors, self-employed barristers rarely become involved directly in any transactional work and they are not permitted to receive, control or handle client money³. Barristers do not, and are not entitled to, administer client accounts. They are only entitled to be paid for their services. As the BSB's approach to supervision is strictly risk based, where a greater risk is identified, then the BSB has more stringent statutory powers under the Legal Services Act 2007 to manage it. Like self-employed barristers, the very small number of BSB regulated entities⁴ are not permitted to handle client money.

7. A few barristers in some specialist fields are involved in non-litigation work that might fall within the 'regulated sector' (e.g. tax barristers and chancery barristers involved in advising on trust documentation), but they are generally instructed by other professionals (usually solicitors) who will deal with the lay client and who will therefore be better placed to deal with AML/CTF issues and should already have addressed them.

8. The Bar Council has only responded to those questions in the consultation which may present some relevance to the Bar, namely questions 1-2 (combined), 47, 49, 53, 57, 59, 60, 61, 64, 66, 67, 68, 72, 73, 75, 77, 77-79 (combined), 88, 96 and 97.

Chapter 2 – New obliged entities

Question 1: What additional activities should be caught within this amendment

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.

² Bar Council "Money Laundering and Terrorist Financing" available here:

<https://www.barcouncilethics.co.uk/documents/money-laundering-terrorist-financing/>

³ BSB Handbook Rule C73, available here:

https://www.barstandardsboard.org.uk/media/1983861/bsb_handbook_april_2019.pdf

⁴ The current list of BSB entities is published on their website here:

<https://www.barstandardsboard.org.uk/regulatory-requirements/entities,-including-alternative-business-structures/>

9. The case for the expansion of the category of “tax advisor” has not been clearly made out. The category of tax adviser that is not already covered by the existing rules but which needs to be brought within the regime is not made clear. The result of the proposed change would appear to be the imposition of a further and considerable regulatory burden for those who already have to work out whether they have “tax adviser” status for a questionable or at least, ill-defined, policy benefit.

Chapter 4 – Customer due diligence (CDD) measures

Question 47: To what extent would removing ‘reasonable measures’ from regulation 28(3)(b) and (4)(c) be a substantial change? If so, would it create any risks or have significant unintended consequences?

10. The current requirement that relevant persons must, where a customer is a body corporate, take ‘reasonable measures’ to determine and verify the law to which a body corporate is subject, its constitution and the full names of the board of directors and the senior persons responsible for the operations of the body corporate is consistent with the risk-based approach that informs the 2017 Regulations. Replacing ‘reasonable measures’ with a ‘requirement to verify and determine’ departs from the risk-based approach and might well lead to a ‘mechanical’ approach to CDD, adding to the regulatory burden but not enhancing the fight against money laundering and the financing of terrorism.

Question 49: Do related ML/TF risks justify introducing an explicit CDD requirement for relevant persons to understand the ownership and control structure of customers? To what extent do you already gather this information as part of CDD obligations?

11. The Bar Council suggests that clarification of the obligation on relevant persons in respect of the nature of their customer’s business and its ownership and control would be helpful but, consistent with the risk-based approach that informs the 2017 Regulations, would propose that this remain subject to a ‘reasonable measures’ standard currently adopted by reg. 28(3)(b) and 4(c).

Chapter 5 – Obligated entities: beneficial ownership requirements

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

12. The Bar Council agrees with the approach envisaged, in particular its focus upon *new* business relationships only.

Chapter 6 – Enhanced due diligence

Question 57: Are there any other views that the government should consider when transposing these Enhanced Due Diligence measures to ensure that they are proportionate and effective in combatting money laundering and terrorist financing?

13. The Bar Council notes and supports the government’s intention to narrow the definition of business relationships or transactions “involving” high-risk third countries as set out at para 6.14. The nature of the enhanced due diligence undertaken should relate to the risk presented and should be proportionate to the level of that risk.

Chapter 7 – Politically exposed persons

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?

14. The Bar Council agrees 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.

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?

15. The Bar Council agrees with the government’s envisaged approach to this issue.

Chapter 8 – 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?

16. The Bar Council considers that obliged entities should only be required to inform Companies House of any discrepancies between the beneficial ownership information they hold and information held on the public register at Companies House where the corporate entity is taken on or retained as a client.

Chapter 9 – Trusts Registration Service

Question 64: Do respondents have views on the UK’s proposed approach to the definition of express trusts? If so, please explain your view, with reference to specific trust type. Please illustrate your answer with evidence, named examples and propose your preferred alternative approach if relevant.

17. The Bar Council notes that the new regime will leave the identification of relevant trusts to trustees (para 9.12 of the consultation). This seems to exempt the Government from framing the obligation with precision, instead placing a significant regulatory burden on trustees. While the basic idea of what is an “express trust” is, *prima facie*, acceptable, the Bar Council believes that compliance with the details of the proposal will not be straightforward. It is significant that HMRC will run a further consultation exercise later this year (as noted at para 9.4). The Bar Council has strong reservation as to whether there will be any proportionate policy benefit produced by requiring, for example, that every will, trust or bare trust be registered.

Question 66: Do you have any comments on the government’s proposed view that any obligation to register an acquisition of UK land or property should mirror existing registration criteria set by each of the UK’s constituent parts?

18. The Bar Council considers the proposal to be an acceptable approach.

Question 67: Do you have views on the government’s suggested definition of what constitutes a business relationship between a non-EU trust and a UK obliged entity?

19. The Bar Council considers the proposal to be an acceptable approach.

Question 68: Do you have any comments on the government’s proposed view of an ‘element of duration’ within the definition of ‘business relationship’?

20. The Bar Council notes that the concept of the duration of a business relationship seems fraught with difficulties. It is not clear, for example, whether there is to be a fixed period, a form of rolling-period, or a type of qualitative judgement made in each situation, when defining what constitutes an “element of duration”. Moreover, it is unclear as to what is meant by “working interactions” (para 9.19 of the consultation).

21. The Bar Council notes that the business relationship in a barrister’s situation, is for the vast majority of cases with a professional client such as a solicitor, who instructs the barrister on specific instructions as opposed to a general retainer. Defining whether or not their situation falls under the 12 month period, therefore, is likely to defy calculation and may require an arbitrary estimation. Initial instructions may be

only the start of subsequent instructions, which may, if considered together, take the “business relationship” over the threshold of 12 months.

Question 72: Does the proposed deadline for existing unregistered trusts of 31 March 2021 cause any unintended consequences for trustees or their agents? If so, please describe these, and suggest an alternative approach and reasons for it.

22. The Bar Council notes that the proposed deadline of 31 March 2021 for unregistered trusts should allow sufficient time for compliance.

Question 73: Does the proposed 30 day deadline for trusts created on or after 1 April 2020 cause any unintended consequences for trustees or their agents? If so, please describe these, and suggest an alternative approach and reasons for it.

23. The deadline for trusts created on or after 1 April 2020 (30 day period) seems to be too short given the need to consult on the new regime, pass legislation and then permit time for education in relation to the changes and preparation to ensure compliance. It is also submitted that the suggestion that such a process could be completed in a sensible fashion by Spring 2020 is somewhat optimistic.

Question 75: Do you have any views on the best way for trustees to share the information with obliged entities? If you consider there are alternative options, please state what these are and the reasoning behind it.

24. The Bar Council notes with caution that the regime envisaged is somewhat disproportionate in that its design seeks to place the regulatory burdens entirely upon the private sector operators. While this element is not specifically being consulted upon, the Bar Council would query this assumption being made in para 9.37 of the consultation.

Question 76: Do you have any comments on the proposed definition of legitimate interest? Are there any further tests that should be applied to determine whether information can be shared?

25. The Bar Council notes that the entitlement of a third-party to access the relevant information is to be justified by reference to a “legitimate interest”. The Bar Council urges that, however that interest is subsequently defined, it must be subject to a high statutory threshold. Save for where there are genuine issues in relation to serious criminality such as money laundering or terrorist financing, the right to privacy must be afforded all due protection. The Bar Council supports the existence of a “clear and robust system to ensure that data is only released when [there is confidence] that a request meets the definition in full and that disclosure does not impede progress of ongoing law enforcement investigations” (para 9.46 of the consultation), but cannot support anything less rigorous than that.

Questions 77-79

Do the definitions of ‘ownership or control’ and ‘corporate and other legal entity’ cover all circumstances in which a trust can indirectly own assets through some kind of entity? If not, please set out the additional circumstances which you believe should be included, with rationale and evidence.

Do you have any views on possible definitions of ‘other legal entity’? Should this be defined in legislation?

Does the proposed use of the PSC test for ‘corporate and other legal entity’, which are designed for corporate entities, present any difficulties when applied to non-corporate entities?

26. These questions seek to identify how notions of ownership and control might be defined. The Bar Council notes that it would be possible either to follow the Companies Act tests, or to adopt tests from the tax code. The Bar Council strongly urges that the regime takes one of these courses and does not create its own, bespoke, tests which are likely to lead to confusion among the sectors and a greater regulatory burden.

Chapter 11: 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)?

27. The Bar Council does not object to this proposal, but submits that if it is introduced, self-regulatory bodies should not also be required to duplicate their versions of such reports based on the same or similar data, and be obliged to submit the same to various authorities. In order to avoid unnecessarily burdening the self-regulatory bodies, if this is implemented, it should be a ‘one-stop shop’.

Chapter 14: Additional technical requirements to the MLRs

Question 96: Do you agree with our proposed changes to information-sharing powers of regulations 51, 52?

28. While the Bar Council does not object in principle to information sharing between HM Treasury and OPBAS being made more explicit in the Regulations, we strongly suggest that any changes which result in additional information sharing by supervisors should be consulted on separately.

Question 97: Do you have any views on this proposed new requirement to cooperate?

29. The Bar Council does not object, in principle, to the introduction of a new requirement to cooperate with OPBAS. However, we point out to HM Treasury the disappointment that has been expressed by many other supervisors, with which we sympathise, as to the lack of transparency and communication in relation to some issues from OPBAS since its formation. Any such requirement to cooperate and share information transparently should, therefore, also apply to OPBAS regarding its relationship with professional body supervisors. Specifically, the Bar Council agrees with calls for greater clarity on OPBAS's business plan and related performance, its measures of supervision including supervisory visits and what these are proposed to entail and the allocation of OPBAS's resources. The Bar Council also agrees that it is vital that professional body supervisors are notified in advance of any public commentary by OPBAS that relates to them, including in official reports, and are granted a reasonable right to reply.

Bar Council⁵
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For further information please contact:

Melanie Mylvaganam, Senior Policy Analyst: Regulatory Affairs, Law Reform and Ethics

The General Council of the Bar of England and Wales

289-293 High Holborn, London WC1V 7HZ

Direct line: 020 7092 6804

Email: MMylvaganam@BarCouncil.org.uk

⁵ Prepared for the Bar Council by the Money Laundering Working Group