Response of the Law Society of England and Wales


March 2006
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INTRODUCTION

About the Law Society

The Law Society is the professional body which represents and regulates approximately 109,553 solicitors in England and Wales. As a supervisory authority under the UK’s Money Laundering Regulations, the Law Society has a role in ensuring that members comply with money laundering legislation and the Money Laundering Regulations 2003. We welcome this further opportunity to comment on the Commission’s work on developing implementing measures under the third money laundering directive.

The Law Society notes that there are several improvements made to the previous draft circulated in October 2005.

• The scope for further clarity provided through possible recitals
• The elaboration of criteria for low risk customers who are not public authorities or body.
• Certain clarifications of the definition of PEPs

Politically Exposed Persons

The Law Society is one of a handful of respondents speaking on behalf of non-financial entities and professions which have little or no prior experience in identifying PEPs and whose resources and structures are different from banks and other financial institutions. The current draft of the Commission’s Working Document although signalling a change in approach does not fully address some of the key difficulties and concerns which were set out in our previous response.

Paramount amongst these concerns is the apparent lack of consideration of the methods or systems that will need to be employed in order to comply with these criteria. The likelihood is that the majority of solicitors’ firms will find it extremely difficult to set up risk based procedures that could match all the various aspects of the wide definition of PEPs. We firmly believe that the technical criteria should attempt to rationalise the definition and not add to its complexity. We would therefore seek to impress upon the Commission, the importance of taking a proportionate approach in this difficult area. It would be unfortunate if by attempting to account for every possible meaning of this definition, we are left with a definition so unwieldy that it makes effective implementation overly-difficult for those who are assisting in combating money laundering and countering terrorist financing.
Recital 3

The Commission proposes recital 3 which explains why the Commission is against drawing up an exhaustive list of categories of persons. It goes on to state that such a list cannot be definitive taking into consideration the social, political and economic differences between the countries concerned. Unfortunately, these elements form the basis of the sort of judgment call that the Commission is compelling solicitors and others in the regulated sector to make every time they open a new client file or take new instructions from clients who are not based in the UK. They will need to consider nuances such as social, political and economic issues as well as all the various PEP categories. For this reason, we would encourage the formulation of categories that are limited and capable of easy identification.

Article 3 (1)

We reiterate our deep concern about the impact on firms which will need to implement procedures to detect, for example “a close associate of a person able to discharge managerial responsibilities” within a state-owned enterprise in the US. In our view, article 3 (1) (d) – (f) which lists categories of persons who are covered by the definition of PEP, crosses into a level of detail that is not helpful or proportionate. Consideration must be given to the inherent difficulties of identifying individuals according to their managerial responsibilities or their ability to exercise dominant influence in the decision-making process as opposed to the more straightforward roles such as heads of state, ministers etc.

Recital 5

The Law Society welcomes the inclusion of recital 5 which encourages Member States to give due consideration to the need to avoid an automatic liability for failure to identify a client as falling within one of the PEP categories, provided they have taken reasonable and adequate measures. Member States must consult stakeholders about what measures could be considered ‘reasonable and adequate’ in that regard.

Recital 7

Recital 7 brings helpful clarification to the obligation to identify close associates of PEPs. However, the concept of ‘publicly known’ still presents potential difficulties for persons implementing these criteria. A person may be publicly known in Uganda as a close associate of a PEP but this status might not be immediately ascertainable by a solicitor in a small firm
in Wales. The Law Society would encourage the Commission to consider these practical
difficulties and the workability of these criteria right across the regulated sector. A small but
nonetheless significant percentage of law firms in England and Wales are not e-enabled and
therefore could not hope to use any electronic software for the purposes of identifying PEPs.
It would be helpful for the Commission to consider the costs for small firms or sole
practitioners of getting external assistance in order to comply with the requirement to have
risk-based systems to identify PEPs. Although it is perhaps not the role of the Commission to
set out procedures for identifying PEPs, consideration of the eventual methods which will
need to be employed to meet this requirement must be a key part of the process of
developing high level criteria. It might act as an indicator of whether a criterion is
proportionate or not.

Article 4

The Law Society welcomes the change from an open ended definition of the length of time
an individual can be considered a PEP, to one year after they have left a prominent public
function.

Recital 8

The catch-all provision covering “any other person that, although not falling under any of the
above categories, is known to exercise similar powers or influence in the public domain”
extends the definition in a manner that makes it less precise and makes compliance
onerous.

The risk-based approach

As noted in our previous response, we believe that in order to have a truly risk-based
Directive, firms and entities covered by the directive must have the freedom to determine
according to their own risk assessment which factors, when considering all the available
information, present a low risk of money laundering. Practitioners do welcome non-
compulsory guidance on these matters but the prescriptive approach of defining criteria, in
our experience adds to the burden on practitioners and is not necessarily helpful in their
particular sector or area of practice. The Law Society has noted in the introduction to the
Commission’s working document that there is an indication that the Commission may decide
not to take any measures.
In any event, if such criteria must be established, then our view is that it is a role best-suited to the Member States in consultation with national stakeholders. Each jurisdiction in the UK needs to address money laundering risk in a way that best matches the needs of industry and the regulated sector. The Commission has however presented various low risk criteria in the most recent Working Document (of February 2006). Without prejudice to our basic position that practitioners and others should determine the level of risk of particular products, we offer the following comments.

Customers presenting a low risk of money laundering

As in our previous response, we would like the Commission to state expressly that law firms should be considered low risk customers if they meet the following criteria:

- subject to Money Laundering Regulations
- registered with their professional body and such details are publicly available
- are supervised by their professional bodies for money laundering compliance
- are subject to disciplinary procedures by their professional body for breach of Money Laundering Regulations.

Certainly in the case of solicitors in England and Wales, It is entirely appropriate that these firms which have the burden of compliance and the threat of sanctions from their supervisory body for breaches of identification, reporting and other obligations, should be treated as low risk customers.

Products or Transactions representing a low risk of money laundering

The Law Society welcomes the move away from the restrictive approach taken in the previous Working Document. As stated in our previous comments to the Commission, we genuinely believe that the range of products and transactions that could present a low money laundering risk should be decided by each Government in consultation with the relevant stakeholders. The Commission should permit Member States to derogate from the technical criteria in circumstances where products and transactions are protected by adequate checks and balances already built into existing legislation or where there is an appropriate level of transparency to support their categorisation as low risk.
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