LAW SOCIETY SUBMISSION

EUROPEAN AML PACKAGE

NATIONAL AML STEERING COMMITTEE

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1. Introduction

1.1. The Law Society is grateful for the invitation to make a submission to the Department of Finance about the impact the European AML package will have on the legal profession at this stage in the process of its enactment in the EU. It is hoped that this submission will be of assistance to the Department as part of its participation in the Council of Minister's deliberations who will have the power to support and/or amend the package at EU level.

1.2. Across Europe the legal profession is concerned by the potential for the AML package to damage the independent regulation of lawyers, a principle which underpins their role in the rule of law. The Council of the Bars and Law Societies of Europe (the CCBE), representing over 1 million European lawyers, will shortly make a submission to the Commission's public consultation process. Aspects of the Society's observations have been informed by having had visibility of the CCBE's draft policy for which the Society would like to thank the CCBE's AML Committee.

1.3. In addition, the President of the CCBE, Ms Margarete von Galen, wrote to the members of the Council working group in charge of the AML package on 24 November 2021 to highlight the European legal profession's particular concerns about the proposed Anti-Money Laundering Authority (AMLA) which include;

- AMLA supervisory powers go too far by allowing indirect supervision of national legal profession supervisors and the potential to issue legally binding decisions
- The risk that AMLA could interfere in individual matters at national level without adequate protections to safeguard the legal profession's independence
- The potential for AMLA and new national supervisory bodies to affect the independence of the legal profession which is an integral component of the rule of law and democratic systems
- The flawed approach of treating the supervision of the legal profession's activities in the same manner as other non-financial sectors
- The combination of existing national supervision combined with the effect of the proposals will only add to the complexity of AML

1.4. The call for reform may not be based on correct evaluations of the effectiveness of current supervision. Recital 69 of the Proposal for a 6th AML Directive suggests that self-regulatory bodies (SRBs) do not provide adequate and effective control and that there has been no or close to no public oversight on the supervisory activities of SRBs. This statement does not recognise the efforts of the Law Society as a competent authority for solicitors in Ireland nor does it acknowledge the efforts of solicitors in Ireland in complying with their AML duties.

1.5. The necessary tenets of democracies which empower citizen rights can be fragile and vulnerable to popular demands. While strengthening public and supranational oversight of lawyers as part of the European effort to enhance the effectiveness of AML may certainly be a popular political priority at this moment in time, a cornerstone of democracy is now at risk - a robust legal profession, independent from any suggestion of political interference or governmental oversight.

1.6. While there is no doubt that the legal profession has a role to play in preventing money laundering and terrorist financing and there is a role too for robust supervision, new proposals for political oversight by public authorities and a supranational European body will certainly and unnecessarily erode the independence of lawyers from governments. This independence is a key protection of the role of lawyers in the maintenance of the rule of law for all citizens.

1.7. The Society is mindful that most EU institutions and Member States were reluctant to include the legal profession when first designating non-financial gatekeepers. Shortly after the 11 September 2001 attacks, it was decided to include lawyers in the hope that it would prevent the financing of terrorism. This represented the most radical departure from the traditional understanding of the role of lawyers in legal systems respecting the rule of law. AML re-oriented lawyers away from their clients, the courts and the public interest in favour of the State and police investigative authorities. The AML package's proposals for oversight of the legal profession by national authorities and a supranational European body, AMLA, will turn the dial of a lawyer's independence even further away from client, court, public interest; not only towards police investigative authorities but also will require an eye to the requirements of state authorities as well as a supra-national authority.

2. The need to protect the independence of the legal profession from State and supra-national oversight

2.1. The independence of lawyers is an integral component of the right to a fair trial as enshrined in Article 6 of the European Convention on Human Rights (ECHR) and Article 47 of the Charter of Fundamental Rights of the European Union (EUCFR).

2.2. The CCBE's Charter of Core Principles of the European legal profession provides that;

> "a lawyer needs to be free – politically, economically and intellectually – in pursuing his or her activities of advising and representing the client. This means that the lawyer must be independent of the state and other powerful interests […]. The lawyer's membership of a liberal profession and the authority deriving from that membership helps to maintain independence, and bar associations must play an important role in helping to guarantee lawyers' independence. **Self-regulation of the profession is seen as vital in buttressing the independence of the individual lawyer**."[1]

2.3. The Charter was designed to help bar associations struggling to establish their independence. It also increases the understanding among lawyers, decisions makers and the public in general of the importance of the role of lawyers in societies which respect the rule of law. Independence serves as a guarantee to clients that lawyers will defend their rights, and act without "undue [internal or external] hindrance", in order to advise, represent and defend their clients effectively.[2]

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[1] CCBE, Charter of core principles of the European legal profession, available here.

[2] ECtHR 24 March 2004, Elci and others v. Turkey, §669. See also § 3 of the Reply to the recommendation 2121 (2018) of the parliamentary assembly of the Council of Europe (DoC. 14825, 5 February 2019: "The Committee of Ministers agrees with the Assembly that lawyers play a vital role in the administration of justice and that the free exercise of the profession of lawyer is indispensable to the full implementation of the fundamental right to a fair trial guaranteed by Article 6 of the European

2.4. A necessary and essential corollary to the independence of lawyers is an independent Bar.[3] The importance of independent lawyers and an independent Bar has been recently recognised by the European Commission in its 2021 Rule of Law Report:

> "Legal professions play a fundamental role in ensuring the protection of fundamental rights and the strengthening of the rule of law. An effective justice system requires that lawyers be free to pursue their activities of advising and representing their clients, and **bar associations play an important role in helping to guarantee lawyers' independence and professional integrity**."[4]

2.5. Bingham[5] places the importance of an independent legal profession at the epicentre of a legal system respecting the rule of law. Looking at the ideal characteristics of an independent legal profession more closely, **Robert Gordon attributes four characteristics to the concept of an independent legal profession**. These evoke features such as:

(1) the ability of lawyers to "assert and pursue client interests free of external controls" and independent of state interference

(2) **the freedom of the Bar to regulate their own practices and the "freedom from outside regulation"**

(3) the freedom of lawyers to choose clients and decide the manner in which a case will be conducted

(4) the exercise of independence from the instructions of clients which are in conflict with the public interest – while "lawyers' services and technical skills are for sale, their personal and political convictions are not...a part of the lawyer's professional persona must be set aside for dedication to public purposes."[6]

2.6. At European level, the European Court of Justice ruled in favour of protecting the independence of the legal profession, even where to do so infringed competition law principles, in the case of Wouters. The court was asked to consider, inter alia, the legality of a regulation, introduced by the legal professional body for lawyers in the Netherlands and supported by the Dutch Government, which it was claimed restricted competition by prohibiting multi-disciplinary partnerships for the provision of legal services which included non-lawyer ownership of firms. The ECJ supported the reasoning for the prohibition on the delivery of legal services from firms comprised of, for example, lawyers and accountants, on the basis that the restriction was required to guarantee the independence and loyalty to the client of members of the Bar. The court supported the approach of the Netherlands Bar which ensured "the proper practice of the profession…the duty to act for clients in complete independence and in their sole interest, the

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Convention on Human Rights. In this respect, the Committee of Ministers is concerned by the threats, in certain national contexts, to the safety and independence of lawyers as well as to their ability to perform their professional duties effectively. This is particularly the case for defence lawyers in criminal proceedings."

[3] ECtHR 23 November 1983, Van der Mussele v. Belgium, §29.

[4] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: 2021 Rule of Law Report. The rule of law situation in the European Union COM(2021) 700 final, p. 5.

[5] Bingham, T, "The Rule of Law" (2011)

6 Gordon, Robert W. "The Independence of Lawyers" (1988), Faculty Scholarship Series, Paper 1361 at 6-10

duty… to avoid all risk of conflict of interest and the duty to observe strict professional secrecy" and the requirement that **lawyers "should be in a situation of independence vis-à-vis the public authorities, other operators and third parties, by whom they must never be influenced."** Ultimately, the court believed that multi-disciplinary practices for the provision of legal services could interfere with the "proper practice of the legal profession"

2.7. The Canadian courts have gone somewhat further than Wouters. In Canada, the independence of **the profession is aligned with constitutional principles**; principles which are similarly well-established in Ireland, but have not yet been interpreted in terms of the legal profession's role. In Andrews v. The Law Society of British Columbia the court noted that **"...the legal profession plays...a fundamentally important-role in the administration of justice...in the absence of an independent legal profession...the whole legal system would be in a parlous state."**

2.8. No Irish decision exists which provides clarity around the precise constitutional status of the independence of the legal profession nor the need for regulation which is independent of the State. Thankfully, this is likely an outcome of the robustness of the current mechanisms within the Irish legal system which protect the role of lawyers in Ireland. In addition, it would be difficult to envisage the courts straying far from the protections afforded to independence by the ECJ and also in the Canadian courts.

2.9. Similar to the principle of legal professional privilege being a right of the client and not the legal professional, the independence of the legal profession should be regarded as a right not of the profession itself but of citizens, a right of those seeking legal advice and assistance to access a lawyer who is independent of the state and loyal to clients' interests, within the parameters of the law. Access to a lawyer is a right of every citizen. The independence of lawyers is a critical element of the right to access a lawyer. Therefore, **the independence of lawyers from State interference is not a privilege of the legal profession but a right of citizens. The fragility and nuanced nature of this essential citizen right should not be unnecessarily reduced in the pursuit of the prevention of money laundering and terrorist financing.**

2.10. It is essential that the principle of independence of lawyers is respected not only by national authorities, but also by Union bodies and institutions including the proposed AMLA.

3. Aspects of the AML package which threaten the independence of the legal profession

3.1. The CCBE's position paper will contain detailed analysis of the AML package which includes assessment of the manner in which the AML package may directly threaten the independence of the legal profession.

3.2. For example, Article 38 requires that the activities of SRBs who supervise AML compliance be subject to oversight by a public authority. However, this is in conflict with the Commission's 2021 Rule of Law Report which views bar associations as playing an integral role in guaranteeing the independence of lawyers.

3.3. There are concerns about the proposed AMLA powers to issue formal opinions to national supervisory authorities and individual decisions to SRBs. There are also concerns about the power of national supervisors to interfere with the supervision by SRBs which have the potential for State/public authorities to influence the decision making of a legal profession.

3.4. AMLA will have the power to directly instruct Bars when it deems the actions of a national supervising authority to be insufficient. The wording does not imply any limits to the context or duration of these instructions. Even if these instructions were of a more general nature, the potential to damage the independence of the legal profession independence is apparent.

3.5. Chapter II Section 5 (Articles 31 & 32) of the AMLA Regulation is dedicated to the oversight of the non-financial sector. The powers of AMLA as regards the non-financial sector go far beyond a mere coordination of national supervision. AMLA is not restricted to functions and powers that are geared towards completing the single rulebook and introducing common supervisory standards and achieving supervisory convergence. While policy and regulatory work (technical standards, guidelines and recommendations) are the tools for completing the single rulebook, there are further powers that impact on national supervision. The tools that aim to improve convergence of the public authorities that are entrusted with supervision of non-financial sector entities or oversight of SRBs (such as thematic reviews, AML/CFT database and peer reviews, breach of Union law procedures), may encroach on the independence of Bars and individual obliged entities. Even if there is no direct interaction between AMLA and individual non-financial obliged entities, individual decisions of AMLA may nevertheless have an indirect impact on specific cases and individual obliged entities. It is essential that the development of legal sector guidance is retained by the legal profession.

3.6. There is the potential that AMLA will have full discretion to establish a breach of EU law with regard to the legal profession. AMLA shall have powers over supervisory authorities (Article 32(1)):

> "where a supervisory authority in the non-financial sector has not applied the Union acts or the national legislation referred to in Article 1(2), or has applied them in a way which appears to be a breach of Union law, in particular by failing to ensure that an entity under its supervision or oversight satisfies the requirements laid down in those acts or in that legislation."

3.7. This could empower AMLA to act as soon as there "appears" to be a breach of EU law. This implies that AMLA will be able to determine itself if such a breach of EU law – which is not limited to legislation on AML/CFT, as can be seen from Article 1(2) – "appears" to have taken place. This competence is very broad and neither limited to the introduction of a single rulebook nor to common supervisory standards or supervisory convergence.

3.8. AMLA will also have access to information without any limitation. As soon as there appears to be such a breach in the view of AMLA (Article 32(2)):

> "the supervisory authority shall, without delay, provide the Authority with all information which the Authority considers necessary for its investigation including information on how the Union acts or in that legislation referred to in Article 1(2) are applied in accordance with Union law.

Whenever requesting information from the supervisory authority concerned has proven, or is deemed to be, insufficient to obtain the information that is deemed necessary for the purposes of investigating an alleged breach or non-application of Union law, the Authority may, after having informed the supervisory authority, address a duly justified and reasoned request for information directly to other supervisory authorities.

The addressee of such a request shall provide the Authority with clear, accurate and complete information without undue delay."

3.9. This will empower AMLA to decide which information is deemed to be necessary, which may include also information on specific cases without any limitation. Safeguards for confidentiality and legal privilege are not envisaged with regard to this power and, in any event, would be inadequate with regard to the protection of independent supervision of the legal profession.

3.10. Furthermore, AMLA has powers to directly intervene with supervisory authorities and SRBs. Article 32(3) provides AMLA with the power to issue a "recommendation" to the supervisory authority, which may effectively operate as a binding power, as the supervisory authority has to inform AMLA within ten working days about the steps taken to comply with the recommendation. The time-frame is also unworkable.

3.11. If the supervisory authority does not comply with the recommendation, AMLA can request that the Commission issues a "formal opinion" directed to the supervisory authority (Article 32(4)), which should be issued within three months after the recommendation. The supervisory authority has to comply within ten working days (Article 32(5)).

3.12. If the supervisory authority does not comply, it is again up to AMLA to take action, this time by issuing an "individual decision" directed to an SRB(Article 32(6)).

3.13. Therefore, AMLA has direct powers to issue individual decisions towards SRBs (such as bars and law societies). Such decisions may also include individual cases and may – for example – include steps the SRB has to take as regards a specific case or towards a specific law firm or even an individual lawyer.

3.14. If the SRB deems a decision by AMLA unjustified, there might be a legal remedy, but the AMLA Regulation does not outline how such a remedy might work with regard to admissibility and the status of the decision pending appeal. It is likely that it would need to be directed to the CJEU.

3.15. With regard to SRBs, AMLA also appears to encompass the power of an administrative body and a judicial body as the AMLA itself can issue legally binding decisions whenever they deem necessary (even if a national supervisor acted, but in the opinion of AMLA, not in an adequate way). This may constitute a breach of the principle of separation of powers.

3.16. There are also proposals that national public authorities shall have ample responsibilities and shall be granted "adequate powers". They may issue instructions to a self-regulatory body for the

purpose of remedying an alleged failure to perform its functions or to comply with the requirements or to prevent any such failures. These powers are incompatible with the independence of bars and exemptions for the legal profession in Article 38 par.3 are necessary.

3.17. Safeguards for legal professional privilege or confidentiality are no substitutes for the necessary independence from State interference. There seems to be an over reliance on the ability of these safeguards to replace a regulatory model which is independent from the potential for state or supra-state interference.

3.18. AML supervision seems to have been assessed in isolation with no regard for the extent to which current non-AML processes which regulate the legal profession across Europe already deliver many of the supervisory objectives of the AML package. For example, national systems such as CARPA in France or the manner in which the Law Society itself already delivers robust financial regulation of solicitors in Ireland. The value of these existing systems in ensuring effective supervision seems not to have been reflected in the proposals.

3.19. Adopting the view that every model of legal profession regulation across Europe is self-regulatory may also be a fundamentally flawed approach. For example, the Law Society is not a self-regulatory body but rather it is a statutory co-regulator. With regard to non-client initiated events, the Society regulates in conjunction with the independent statutory Legal Practitioners Disciplinary Tribunal and the President of the High Court. Similar co-regulatory approaches may exist across Europe where a member of the judiciary acts as ultimate regulator holding the power to prohibit a person from continuing to practice law. These mechanisms are in place to ensure that only the profession itself or an independent judiciary can remove a lawyer from practice or have the potential to oversee the delivery of individual legal services. The manner in which the proposed national authorities and AMLA will be inserted into diverse national regulatory models in which the judiciary play a key role is not reflected in the proposals. Ultimately, lawyers are officers of the courts.

4. The relationship and interplay between new EU laws establishing AMLA and national oversight bodies and a member state's existing national laws with regard to self or co-regulatory bodies including the legal profession

4.1. The legal profession is an essential component of every Member State's own legal system and, as such, each Member State's individual legal systems have evolved in unique ways to create rule of law mechanisms which protect the independent regulation of lawyers. These systems comprise regulatory models which have evolved over the years to be rule of law-proofed with regard to the independence of lawyers which is essential in the protection of their rule of law role.

4.2. It may be important to consider the relationship and interplay between new laws which will underpin both AMLA and a national supervisory body and a member state's existing national laws with regard to self or co-regulatory bodies including the legal profession.

4.3. Also, has consideration been given to the extent to which AMLA and national oversight bodies will be overseeing, directly or indirectly, the work of lawyers as officers of the courts? This may unintentionally interact with the rule of law, the judiciary, the courts, the delivery legal services,

access to justice and, of course, independence from State or supra-state oversight? It may be that in other member states, the legal profession will also play similar court officer roles. In Ireland, solicitors' rights and obligations as officers of the courts are derived from section 78 of the Judicature (Ireland) Act 1877 – which states: "**any solicitors, attorneys or proctors to whom this section applies shall be deemed to be officers of the Court** of Judicature: and that court and the High Courts of Justice and the Court of Appeal respectively or **any division or judge thereof, may exercise the same jurisdiction in respect of such solicitors or attorneys** as any one of Her Majesty's superior courts of law or equity might previously to the passing of this act have exercised in respect of any solicitor or attorney to practise therein" – and section 61 of the Courts (Supplemental Provisions) Act 1961. There is no legislative definition of the duties of solicitors as officers of the court, and case law provides guidance. Rights and duties accrue to solicitors by virtue of their relationship with the court. The latest edition of the Guide to Good Professional Conduct for Solicitors (2013) states that "a solicitor not only acts for his client and owes a duty to do his best for that client but he also owes a duty to the court". The superior courts have an inherent supervisory role over solicitors who are officers of the court due to the nature of solicitors' positions, which gives certain rights and privileges. This is to ensure that solicitors comply with their ethical obligations and act with the highest standards of conduct. The purpose of the court's jurisdiction is to enforce honourable conduct by an officer of the court. The supervisory role of the court is separate to that of the Law Society or the Legal Services Regulatory Authority or the Legal Practitioners Disciplinary Tribunal and allows the court to discipline or penalise solicitors who have failed in their duty to the court. It may be important for all member states to consider the manner in which AMLA and proposed national supervisory bodies will be able to interact within regulatory frameworks which are connected with the courts and the judiciary.

4.4. Given the significant differences in approach to lawyer supervision across Europe, it will be impossible to predict the manner in which the AML package may interfere with regulatory models in individual countries.

5. Conclusion & Recommendations

5.1. The Society encourages the Department to consider all of the implications outlined in this submission with regard to the proposed AML package. The creation of national supervisors and a supra-national body such as AMLA has never before been contemplated with regard to any aspect of the legal profession across Europe and no similar model exists in any democracy. While supra-national EU bodies exist with regard to the financial sector, there is the potential for similar supra-national structures to damage national mechanisms which ensure the regulation of the legal profession is independent of state interference. A necessary corollary of this must be that the regulation of the legal profession must also be independent of supra-national interference.

5.2. The AML package will require the legal profession to demonstrate AML compliance to state and supra-state bodies which has the potential to irrevocably damage the independence of the legal profession. Instead, the fragility and nuanced nature of an independent legal profession can be protected by the enhancement of current supervisory models within the existing rule of law compliant framework. There are alternatives to the draconian proposals which have not been explored.

5.3. It is essential that proposals are developed to specifically safeguard the rule of law role of the legal profession and the independent regulation of the legal profession. It is a flawed approach to treat the legal professionals in the same way as the financial and non-financial sectors.

5.4. It is also important to ensure that the harmonisation of AML rules and the issuing of guidelines does not damage the independence of lawyers.

5.5. Any provision which provides AMLA and national supervisory authorities with powers to issue legally binding decisions must not be applied as regards the legal profession, accordingly exceptions must be added to the proposed legislative measures.

5.6. It is necessary to avoid the temptation to adopt a simplistic one-size-fits-all solution when nuances of our freedoms merit tailored approaches. The independence of lawyers is as equally important a value to preserve as the securitisation promise of AML/CFT.

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