E-Briefing – Detailed Version
(Covering the period from 14 October to 31 December 2008)

1. Professional Representation

1.1 CLLS Associates Forum

As a result of a recent email to senior partners of member firms, a number of new members have now joined the Associates Forum. The Forum now has a new Chair and Deputy Chair, and is currently meeting approximately once every two months. The Forum is currently going back through the five points contained in its submission to the Law Society's "Great Quality of Life Debate" (which was made in 2007) and looking at what constitutes "best practice" within firms in relation to each of those points. The five points are:

- Challenge/quality of work;
- Transparency of career path (including formal appraisals);
- Management and communication;
- Valued through tangible benefits; and
- Valued through intangible benefits

(The original submission can be found at http://www.citysolicitors.org.uk/FileServer.aspx?oID=301&lID=0)

The "Challenge/quality of work" and "Management and communication" points were considered at the group's November meeting.

1.2 Professional Rules and Regulation Committee

The PR&RC recently made a detailed response to an SRA consultation regarding new application forms for the approval of new partnerships and non-lawyer managers (see http://www.citysolicitors.org.uk/FileServer.aspx?oID=440&lID=0 for the response).

The PR&RC also recently responded to SRA Consultation paper 11 "Legal Services Act: Further amendments to SRA rules" (see http://www.sra.org.uk/securedownload/file/1392 for the consultation). The response noted the short amount of time that had been allowed for the consultation. Due to the limited time available, the response only commented in detail on the proposal for Solicitors Code of Conduct Rule 4.02. However, it noted that further amendments were also required to be made to Rules 4.03, 4.04 and 4.05.

The PR&RC also recently commented on the draft SRA (Cost of Investigations) Regulations Consultation. (See http://www.sra.org.uk/sra/consultations/1566.article for the consultation paper, and http://www.citysolicitors.org.uk/FileServer.aspx?oID=478&lID=0 for the response.) The response stated that:

- While in effect dealt with under Regulation 5 ("Decision to require payment of charges"), Regulation 3 ("Discipline investigations") should

perhaps make it clear that the adverse finding should relate to the issues investigated, and not to some previous issue; and

- In Regulation 5, where a matter is resolved by agreement, the amount of the fee should be the subject of agreement too. Currently it appears that the SRA representative making the agreement has absolute authority to impose charges, despite what has been agreed.

1.3 Training & Education Committee

As the Chair of the Training Committee recently stated in an online article:

> The Training Committee organised a Seminar for CLLS members on 3 December at the offices of Slaughter and May to discuss the proposals in the SRA's Consultation Paper on "Arrangements for qualified lawyers transferring to become solicitors in England & Wales". (This Consultation Paper is available from the SRA's website – www.sra.org.uk)
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> The Consultation Paper contains proposals to change the Qualified Lawyers Transfer Regulations 1990 as amended (the "QLTR") and the principal purpose of the Seminar was to gather views for inclusion in the CLLS's Response to the Consultation which the Training Committee is preparing.
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> The meeting was led by Tony King and Louise Stoker of the Training Committee and Jonathan Spencer (member of the SRA Board & the Chair of the SRA's Education & Training Committee) attended to give an insight into the SRA's thinking behind the proposals.
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> There were some 30 people at the meeting, made up of members of the Training Committee, members of the CLLS and representatives of providers of the Qualified Lawyers Transfer Test.
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> The discussions focused on the proposals of particular importance to CLLS members, namely:
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> - a substantially extended and more rigorous Test;
> - the abandonment of the work experience requirement to which some of the jurisdictions currently within the scope of the Regulations are subject; and
> - plans to introduce new criteria to determine the jurisdictions whose lawyers would in future be covered by the Regulations.
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> Other aspects of the proposals (for example, the plan for the SRA to appoint an "agent" to run the assessments, which entity would not be allowed to offer training leading to the assessments) were also discussed.
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> It was clear that the QLTR are in need of review and those attending the Seminar appreciated the willingness of the SRA to engage with the profession on this issue.
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> It is not the purpose of this piece to give a detailed report on the full range of points discussed at the meeting, rather it is to flag the key points of interest to members which were discussed.
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> One of the principal changes being proposed in the Consultation Paper is to drop the current work experience requirement imposed on lawyers from many of the jurisdictions covered with the extension to the suite of exams as a balancing factor.

The work experience requirement can cause problems for some lawyers wishing to go through the requalification process and this change would address those issues. However, the work experience requirement does ensure all entrants to the profession are exposed to the ethos of legal practice and concerns were expressed over whether the increased examination regime would be the right "trade off" for dropping the experience requirement.

Furthermore, the proposed examination regime would be likely to be more expensive than the current system and that could deter some lawyers from going through the requalification process under the QLTR. That cost factor coupled with the changes which the Legal Services Act 2007 bring in over the coming months may mean the QLTR route will decline in popularity.

On the examination regime (but without going into the details as they are set out in the Consultation Paper), three "suites" of exams are envisaged - for "UK lawyers", "European lawyers" and "international lawyers", each with a standard set of exams for lawyers falling under the relevant heading. An issue raised at the Seminar on that "blanket" approach was whether there should be some flexibility allowed to reflect the academic studies and/or practical experience of applicants.

Finally, there was some debate over the proposal to allow only lawyers from "recognised" professions (that is, to put it simply, professions which are independent of the home jurisdiction's Government and regulated by a professional body) to go through the QLTR process. While there are pros and cons to the proposal, some attending the Seminar expressed the view that the test might be better if it were based on the individual applicant's qualities rather than the nature of the jurisdiction in which he or she is qualified.

The outcome of the discussions at the Seminar will be reflected in the CLLS's Response to the Consultation. That Response will be available on the CLLS's website and members are encouraged to submit Responses to the SRA whether by referring to the CLLS's Response or by preparing their own.

2. Specialist Committees & Working Groups

2.1 Commercial Law

In October 2007 the European Commission published a proposal for a new Consumer Rights Directive. The Consumer Rights Directive would repeal four existing European consumer Directives; the Doorstep Selling Directive (85/577/EEC), the Unfair Terms in Consumer Contracts Directive (93/13/EEC), the Distance Selling Directive (97/7/EC) and the Consumer Sales and Guarantees Directive (1999/44/EC); and replace them with a single horizontal Directive. BERR published a consultation on the EU proposals on 10 November 2008. A copy of the BERR consultation documents can be viewed at http://www.berr.gov.uk/consultations/page48780.html. Furthermore, the Law Commission and Scottish Law Commission have published a joint consultation paper on the remedies available to consumers when they buy faulty goods. The Consultation Paper and a summary are available via http://www.lawcom.gov.uk/consumer_remedies.htm.

As the Committee Chair stated earlier in City Solicitor, the Committee has established a Working Party to suggest the CLLS's response to the above consultations.

2.2 Competition Law

As the Chair of the Competition Law Committee recently stated in City Solicitor*:*

> On 28 October 2008, representatives from the Competition Law Committee of the CLLS and the Joint Law Society and Bar Working Party ("JWP") met with officials from the OFT to discuss a project which the OFT has recently initiated concerning the transparency of its non-merger procedures, including Competition Act cases and Market Studies.
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> In addition to conducting an internal review of its procedures, an important part of the OFT's project is to canvass the views of stakeholders, and the meeting was an extremely useful setting in which the OFT could explain the background and objectives of the project, whilst at the same time obtaining valuable feedback from a number of practitioners.
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> The meeting was chaired by Heather Clayton (Senior Director, Infrastructure) who encouraged the CLLS and JWP participants to be as frank and open as possible regarding their experiences in dealing with the OFT, both informally and formally. Heather Clayton provided an overview of the OFT's project, which encompasses five broad areas, namely service standards, engagement pre-project, engagement with parties during a project, the provision of information to third parties and the scope for greater process transparency. The subsequent discussion covered a wide range of topics, including day-to-day engagement with the OFT, the provision of (or absence of) indicative timetables, engagement with parties during the early stages of a project, procedures with regard to information requests, and the OFT's interaction with third parties and the press.
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> The CLLS and JWP representatives suggested a number of ways in which the OFT's processes could be improved, ranging from simple steps such as providing contact details for all staff members on the OFT website, to more fundamental changes, for example providing indicative timetables in all cases. The OFT was encouraged to engage more openly with parties on matters of substance during the early stages in a case (i.e. prior to issuing a statement of objections), to give parties full details of case teams (and subsequent staff changes), to provide parties with indicative timetables, to give regular updates regarding the status of a case (perhaps quarterly), and to consult with parties prior to issuing extensive information requests.
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> The necessity and desirability of extending the OFT's transparency goals to third parties and the public more generally was recognised to be a difficult topic. Some concerns were expressed regarding the way in which developments in a case have become known to the public and/or interpreted by the press, which have resulted in inaccurate reporting. This may have reputational consequences for parties prior to a final decision being taken and the OFT was encouraged to tread cautiously before releasing information to the world at large, notwithstanding its desire for the public to be able to understand what cases are being pursued by the OFT. Ultimately the discussion was extremely constructive, and the CLLS has expressed its willingness to participate in further consultation going forward. The OFT is aiming to publish a document setting out its thoughts and next steps early in 2009. Discussions will then continue on the basis of this document, and there will be further opportunity to comment in writing or in further meetings.

2.3 EU Working Group

Further to the recent article in City Solicitor, the EU Working Group has retained Professor Lee of Cardiff University to assist in preparing a paper on the enablers for multijurisdictional legal practice. In its final form, the paper is expected to form the basis of discussions between the CLLS and the relevant officials in the European Commission.

A meeting was held between Professor Lee and the Working Group on 9 December to consider a draft of the paper.

2.4 Financial Law

The Financial Law Committee responded to HM Treasury's July consultation paper "Modernising the insolvency protections for the operation of financial markets – proposals to reform Part 7 of the 1989 Companies Act" (see http://www.hm-treasury.gov.uk/d/e1(1).pdf for the consultation document and http://www.citysolicitors.org.uk/FileServer.aspx?oID=442&lID=0 for the response). The response welcomed the proposals set out in the draft Financial Markets and Insolvency Regulations 2008 and supported the thinking set out in the consultation document. The response also noted a number of additional areas where (consistent with the thinking in the Consultation Document) improvement to the law protecting financial markets and infrastructures against the risk of default by one or more participants would be highly desirable.

The Financial Law Committee recently commented on clause 48(1) of the Banking Bill 2008 (as amended in the Public Bill Committee of the House of Commons and ordered to be printed on 18 November 2008). A copy of the CLLS's response can be viewed at http://www.citysolicitors.org.uk/FileServer.aspx?oID=477&lID=0. The response made a number of technical suggestions regarding the drafting of the provision, and stated that:

- The proposed amendments are technical, but deal with two fundamentally important distinctions in the financial law of the United Kingdom, namely:
    - between a security interest and a title transfer arrangement; and
    - between set-off and netting;
- It is important that the Banking Bill not undermine these distinctions, first to protect the integrity of the Banking Bill itself and of the safeguards under clause 48 and to protect the integrity of these concepts more generally under English financial law; and
- The proposed amendments to the definitions in clause 48(i) are designed to achieve this and also to ensure consistency with the definitions used in the Financial Collateral Arrangements (No. 2) Regulations 2003. The redraft of "security interest" and the new definitions of "close-out netting provision" and "title transfer collateral arrangement" are based on similar definitions used in those Regulations.

A Joint Working Party made up of representatives from the CLLS's Financial Law, Insolvency Law and Regulatory Law committees recently prepared comments on the Banking Bill with reference to the efficacy of planned subsidiary legislation. (A copy of the comments can be viewed at http://www.citysolicitors.org.uk/FileServer.aspx?oID=485&lID=0). As stated in the paper:

> In the course of review of the proposals for draft subsidiary legislation, the joint working party of the Financial Law, Insolvency Law and Regulatory Law Committees has identified provisions in the Bill which may cause difficulties in relation to the planned subsidiary legislation for the protection of set-off, netting, financial collateral and security

arrangements and compliance with the UK's Community obligations in that respect. We have also identified some more general issues in relation to the Bill. This paper addresses these issues. It is in addition to the paper of 17th December 2008 relating to Clause 48 and supplements that paper in so far as it deals with issues related to the planned subsidiary legislation.

The comments cover:

- Scope of the Bill (Clause 2);
- Transfers of securities – clauses 14 and following;
- Contractual override provisions – clauses 22 and 38;
- Foreign property – clause 39;
- Compensation – clauses 49 and following and "NCWO" provisions in November consultation; and
- Continuity provisions – clause 63 and following.

The Joint Working Party also submitted comments on clause 75 of the Banking Bill (see http://www.citysolicitors.org.uk/FileServer.aspx?oID=487&lID=0). The submission stated that it was helpful that this clause had been amended so as to clarify that the Bill itself, and any secondary legislation made under the Bill, cannot be amended pursuant to the powers granted to the Treasury under clause 75. However, the submission expressed concern that the clause remained wide enough to enable any other primary or secondary legislation to be amended, potentially with retrospective effect. The submission recommended changes to subclauses (3) and (8) of Clause 75.

Furthermore, the Joint Working Party also drafted a submission on the Banking Bill with regard to the impact of the Bill on cash management systems for corporate customers. The submission pointed out that set-off arrangements lie at the heart of numerous cash management arrangements offered by banks to groups of companies. The submission argued that disapplying or excluding set-off arrangements could destabilize the position of groups of companies by allowing the insolvency representative of a bank to require payment of the debit balances owing to the bank by group companies whose accounts are overdrawn, while treating group companies with credit balances on their accounts as mere unsecured creditors of the bank for the amount of those credit balances. It was argued that it was essential that the changes contemplated in the Banking Bill and its related secondary legislation do not undermine the ability of corporate customers and banks to report on a net basis and, if the need arises, to effect a net settlement by operation of netting or set-off.

2.5 Insolvency Law

The Insolvency Law Committee responded to the Insolvency Service's consultation on changes to the Insolvency Act 1986 (revised proposal concerning the use of websites by insolvency office-holders in their communication with creditors/members). The Committee supported the proposal to not require insolvency office-holders to obtain the consent of creditors as a pre-condition to sending reports and other documents via a website, as set out in the consultation paper dated 15 August 2008. The Committee agreed with the conclusions reached by the Insolvency Service in that paper. (For the Proposal, please see:

http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/con_doc_register/ChangesConDocSept08.doc; for the Committee's response, please see: http://www.citysolicitors.org.uk/FileServer.aspx?oID=445&lID=0)

The Insolvency Law Committee also recently made comments to HM Treasury on the Part 2 (Bank Insolvency) and Part 3 (Bank Administration) aspects of the Banking Bill (the submission can be accessed at http://www.citysolicitors.org.uk/FileServer.aspx?oID=488&lID=0). This response followed on from the Committee's response to the January consultation paper entitled "Financial Stability and Depositor Protection: Strengthening the Framework" and the July consultation paper entitled "Financial Stability and Depositor Protection: Special Resolution Regime". It was argued in the earlier responses that existing corporate insolvency procedures would be perfectly adequate for dealing with an insolvent bank. Serious concern was also raised in the earlier submissions about the impact that such special procedures could have on legal certainty, investor confidence and the international arena.. The submission raised questions as to whether the proposed bank insolvency and bank administration procedures would be recognised as insolvency proceedings for the purposes of the relevant cross border legislation, including, in particular, the UNCITRAL Model Law on Cross Border Insolvency and Directive 2001/24/EC on the reorganisation and winding up of credit institutions. For example, it is not clear whether bank insolvency or (especially) bank administration under the Banking Bill would satisfy the definition of a foreign proceeding under the Model Law, or whether they constitute a "winding up proceeding"(or "reorganisation measure" in the case of bank administration) for the purposes of the Winding Up Directive. As the submission states:

> If the bank insolvency and bank administration procedures do not fall within the relevant definitions of insolvency proceedings (or related terms) in the Winding Up Directive and the Model Law, such proceedings will not be automatically recognised throughout the EEA under the Winding Up Directive, and a foreign court in a jurisdiction which has implemented the Model Law will not be obliged to recognise the proceedings. Instead it will be a matter for the discretion of the courts of the EEA Member States or other jurisdiction where recognition is sought as to whether such proceedings are recognised. As has been demonstrated by some of the cross-border issues that have arisen in relation to the three Icelandic banks, this could lead to difficult conflict issues, particularly as the bank in question could well have branches and assets in a number of different jurisdictions.

The submission also raised a number of principal concerns, including:

- With regards to Part 2 of the Banking Bill:
  - Terminology and references to bank insolvency - clause 87;
  - Grounds on which the courts may order a bank insolvency - clauses 90(4) and 93(1)(a);
  - Objectives of the bank liquidator - clause 96; and
  - Liquidation committee - clause 97; and
- With regards to Part 3 of the Banking Bill:
  - Terminology and references to bank administration;
  - Objectives of the administration - clause 134;
  - Table of applied provisions; and
  - Exit routes - clause 151

2.6 Insurance Law

The Insurance Law Committee recently responded to the consultation by the Ministry of Justice on the Third Parties (Rights Against Insurers) Bill. The Committee supported the Bill's introduction to Parliament, and made only a few specific comments with regards to drafting. A copy of the bill can be accessed at http://www.lawcom.gov.uk/docs/272bill.pdf and the submission is available at http://www.citysolicitors.org.uk/FileServer.aspx?oID=474&lID=0.

2.7 Intellectual Property Law

The Intellectual Property Law Committee responded to the UK Intellectual Property Office's ("IPO") consultation "Taking Forward the Gowers Review of Intellectual Property: Penalties for Copyright Infringement" (see http://www.ipo.gov.uk/consult-gowers36.pdf for the consultation document and http://www.citysolicitors.org.uk/FileServer.aspx?oID=452&lID=0 for the response). The submission welcomed the consultation as far as it went. However, the submission considered that the consultation should have gone wider and looked in more depth at the law and practice of confiscation orders made under the Proceeds of Crime Act 2002 following convictions for any IP offences. As regarded the main purpose of the consultation, the submission was fully supportive of the legislative change being proposed, which it said corrected an anomaly in the law. The submission also put forward a number of detailed responses to the IPO's questions.

Furthermore, as the Committee Chair recently stated in *City Solicitor:*

> Much of the Committee's time has.. been spent on the detailed negotiations with, and drafts of an agreement with, the Copyright Licensing Agency (CLA). The CLA is the collecting society that licenses the photocopying of excerpts from books and journals and most firms in the City will have a CLA photocopying licence. Following a negotiation of over two years, a new model form of Law Firm Licence has been agreed both with the CLA and with the Law Society. The old Law Firm Licence has been discontinued.
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> This licence now permits both reprographic (i.e. photocopying) and electronic (i.e. scanning) copying under certain conditions both as to payment and as to the terms of such copying. The licence is available from the CLA (www.cla.co.uk). It is the view of the Committee that, whilst not ideal in a number of respects, the licence is better than that currently on offer for businesses generally, as that licence is not appropriate for law firms. It is, of course, up to individual firms to decide if they wish to take a licence on what terms. In that respect the agreed terms should be carefully considered. Amongst the key terms are:
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> - The licence fee is calculated by reference to 'Professional Employees' (qualified lawyers as well as others holding professional qualifications, such as accountants and HR professionals).
> - Copies can be supplied not just internally but also externally to actual and prospective clients.
> - Digital copies should contain appropriate copyright legends on them.
> - There are limits as to how much of a book or journal can be copied.
> - Digital copies can be stored on a secure network as part of a project database, but not so as to create an electronic library.
> - There are rights of audit for the CLA.

> Vanessa Marsland (Clifford Chance) and Richard Marke (LG) were primarily responsible for the negotiations and the drafting and my thanks goes out to them in particular.

2.8 Land Law

The Land Law Committee has recently published a form of rent deposit deed, which can be accessed at http://www.citysolicitors.org.uk/FileServer.aspx?oID=479&lID=0. The Committee recognised that a number of different deposit arrangements were possible, but adopted as the basis for the deed the arrangement where the tenant's money is charged in the landlord's favour (as this was judged to be likely to be the most common arrangement). The deed attempts to cover the majority of issues arising in a rent deposit situation.

2.9 Litigation

The Litigation Committee responded to the Ministry of Justice's Consultation "Civil Procedure Rules: Costs Capping Orders" (see http://www.justice.gov.uk/docs/costs-capping-consultation.pdf for the consultation document and http://www.citysolicitors.org.uk/FileServer.aspx?oID=456&lID=0 for the response). The submission made a number of detailed comments in response to the consultation response form's questions, and noted generally that costs capping should be limited to exceptional cases and that there should be a high hurdle to be overcome to obtain a costs capping order.

The Litigation Committee held an open meeting on Tuesday 2 December on the subject of the Commercial Court pilot of the proposals made by the Long Trials Working Party in December 2007. The aim of the open meeting was to give practitioners across the City an opportunity to discuss how the proposals have worked in practice and give feedback to the Commercial Judges to assist their own review of the trial period which they will be conducting early in 2009. The meeting was open to all solicitors in the Society's corporate member firms and to individual members.

A panel of litigation practitioners from City firms led the discussion on key areas covered by the Long Trials Working Party recommendations and there was an opportunity for discussion and contributions from members of the audience. The Judge in charge of the Commercial Court, Mr Justice Andrew Smith joined the Panel.

Freshfields Bruckhaus Deringer kindly agreed to host the meeting at their premises.

2.10 Planning & Environmental Law

The Planning & Environmental Law Committee responded to the Planning for a better London report, issued by the Mayor of London (see http://www.london.gov.uk/mayor/planning/docs/plan-better-london.pdf for the report and http://www.citysolicitors.org.uk/FileServer.aspx?oID=454&lID=0 for the response). The response stated (in part):

> We welcome the prompt publication of the Planning for a Better London report by the Mayor of London. Given the long lead times which are necessary for development in London, we think it is essential for certainty to be established as quickly as possible over the future direction of policy. It is therefore helpful to know the key areas which the Mayor

> intends to address in revising the London Plan. The opportunity to comment now before the detail of the Mayor's revisions is fleshed out in formal alterations to the London Plan is appreciated, since it gives those of us who are involved in the delivery of new development the opportunity to express our views.

The response dealt with the different sections of the report, namely “The Mayor’s approach”, “The key challenges”, “Key policy responses” and “Making it happen”, commenting on those proposals that were of relevance to the CLLS membership.

The Committee also responded to a consultation on revised waste exemptions from environmental permitting (see http://www.defra.gov.uk/corporate/consult/waste-exemption-review/consultation.pdf for the consultation paper and http://www.citysolicitors.org.uk/FileServer.aspx?oID=455&lID=0 for the response). (The consultation document was issued jointly by DEFRA, the Welsh Assembly Government and the Environment Agency). The response welcomed the efforts of the Government to provide greater clarity in respect of the scope, interpretation and application of exemptions from the Environmental Permitting (England and Wales) Regulations 2007 (the “Regulations”). The response specifically called for greater clarity in the Regulations with regards to the status of materials which are the product of demolition works on site, where those materials are to be reused at that site for backfilling etc.

2.11 Regulatory Law

The Regulatory Law Committee responded to HM Treasury’s July consultation paper “Modernising the insolvency protections for the operation of financial markets – proposals to reform Part 7 of the 1989 Companies Act“ (see http://www.citysolicitors.org.uk/FileServer.aspx?oID=446&lID=0 for the response). The response supported the response made by the CLLS Financial Law Committee (as above) and made several additional points.

The Committee also responded to HM Treasury’s September consultation on the Building Societies (Funding) and Mutual Societies (Transfers) Act 2007 (see http://www.hm-treasury.gov.uk/d/consult_buildmutsociety_act2007.pdf for the consultation document and http://www.citysolicitors.org.uk/FileServer.aspx?oID=453&lID=0 for the response). The response dealt with two aspects of the consultation paper, namely the proposal to allow HM Treasury the power to increase building societies’ wholesale funding limits to 75% of their funds, and the proposed change to the priority order on winding-up. The Committee was concerned by the proposal to increase wholesale funding limits, and asked HM Treasury, in the strongest terms, to reconsider and revisit this proposal for the reasons set out in the submission.

The committee also responded to the HMT ("HMT") consultation on the Financial Services and Markets Act 2000 (Financial Promotion) Order 2008 (which was attached at Annexure A to the second consultation regarding the Financial Services and Markets Act 2000 (Financial Promotion) (Amendment) Order 2008). (A copy of the consultation can be found at http://www.hm-treasury.gov.uk/d/consult_financial_promotion.pdf, and the response can be found at http://www.citysolicitors.org.uk/FileServer.aspx?oID=472&lID=0.)

The response made a number of specific points regarding the proposed order, and stated generally that:

> The reference to "employees" seems unnecessarily narrow, especially given that many firms now have adopted flexible working arrangements and care should be taken in its definition. We would make the same point about the employee share scheme exemption in Article 60 and the existing exemptions relating to the promotion of pension products by employers to employees. Further, we are not clear why former employees and relatives of employees/former employees are not included in this definition, as they are under Article 60. Presumably, a communication to a former employee inviting him/her to make a further contribution to an existing group pension product also ought to be covered.
>
> We note that, in the case of each Article in the draft Order, communications are only exempted if made to employees. Conversely, there is no such restriction in Article 60 provided that, in any case, a communication "is for the purposes of an employee share scheme" and relates to a relevant investment. Though this might not have a great impact in practice we think it would be preferable, for example, for a communication by a contracted third party to an employer and/or another member of its group to automatically be exempted under these Articles.
>
> We note, also that none of the proposed exemptions take account of group structures (i.e. the exemption should apply to, for example, a pension scheme offered by a company to an employee of another member of its group). This should be taken into consideration in the final drafting.

The Committee responded to the consultation by HMT and the Financial Services Authority ("FSA") on the implementation of the Acquisition Directive. Background FSA information regarding the implementation of the directive can be viewed at http://www.fsa.gov.uk/pages/About/What/International/pdf/AD.pdf, and http://www.fsa.gov.uk/pages/About/What/International/pdf/acquisitions_directive.pdf, and the joint FSA/HMT consultation document on the directive can be viewed at http://www.fsa.gov.uk/pubs/cp/acquisitions_directive.pdf. The CLLS response can be accessed at http://www.citysolicitors.org.uk/FileServer.aspx?oID=473&lID=0 . The CLLS response endorsed the draft responses of the Law Society Company Law Committee and the Financial Services and Markets Legislation City Liaison Group to the consultation. The key issues mentioned in the CLLS submission included that:

- “acting in concert” within the implementing legislation should relate to the acquisition of shares, rather than the coming together of those that already hold shares;
- some draft clauses that gold plate the Directive requirements should be deleted as the directive is a maximum harmonising measure;
- “It remains unclear whether the Directive prohibits acquisitions from taking place before approval has been obtained. We understand that, elsewhere in the EU, it may be possible to proceed with an acquisition prior to the notification period having expired or the competent authority having given its approval without the risk of a criminal sanction, on the basis that the competent authority could subsequently require the transaction to be unwound. There is some merit in this approach (at, for example, 10%) from the point of view of not impeding market operations; and

- the FSA should review its Handbook text where it deals with this issue.

Robert Leeder
Policy & Committees Coordinator