E-Briefing Detailed Version
(Covering the period from 18 December 2010 - 31 January 2011[1])

Past consultations

1 Representational Committees

1.1 Professional Rules & Regulation Committee ("PRRC")

(20/12/10) The PR&RC recently responded to the LSB consultation "Referral fees, referral arrangements and fee sharing *Discussion document on the regulatory treatment of referral fees, referral arrangements and fee sharing"* (See http://www.legalservicesboard.org.uk/what_we_do/pdf/20100929_referral_fees.pdf for the consultation document and http://www.citysolicitors.org.uk/FileServer.aspx?oID=910&lID=0 for the response.) The consultation paper said that bans on referral fees could not be justified on current evidence, but that "current disclosure arrangements do not always work effectively". The paper suggested that regulatory intervention was required, perhaps in the form of "management measures surrounding disclosure and transparency rather than by any prohibitions." A number of "key proposals on transparency measures" were identified.

As the CLLS response stated:

> In February this year, we responded to the Legal Services Consumer Panel Investigation into Referral Arrangements. In that response, we did not comment on the question of the payment of referral fees in personal injury or other cases or matters for private individuals, as this is not the type of work in which our members are predominantly involved.
>
> **Referral arrangements**
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> We did point out, however, that our member firms will regularly be referring business to, and receiving referrals of business from, lawyers and other professionals such as accountants. These referrals are commonplace and arise for a number of reasons including, for example, conflicts, a lack of the requisite expertise within a firm (e.g. divorce or family matters) or jurisdictional matters.
>
> Moreover, as part of networking and business development activities, partners and lawyers in our member firms may have loose, informal understandings and/or arrangements with intermediaries such as investment banks, brokers and accountants for the mutual referral of opportunities, which may or may not result in legal work.
>
> Such referrals are not characterised by payment in return for referral of business. Nor do they involve other non-monetary arrangements linked to the introduction of clients, such as the provision of free or below-cost services in exchange for the referral of other business. Given the fluidity of these arrangements and the absence of any payment of referral fees or other monetary benefit to the referrer, we think that they should be expressly outwith the proposed disclosure regime for referral arrangements.
>
> **Consultancies**
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> Separately, our member firms may have consultancy arrangements with lawyers, which may include provisions for payment to the consultant on the introduction of work. Typically, these are one-off arrangements with individuals who are otherwise practising on their own account. Under the Solicitors Code at present, referrals between lawyers (as defined in the Code) are excepted from the regulatory requirements of Rule 9 of the Code. The overseas aspects are also potentially relevant. In some instances, the lawyer may well be in an overseas jurisdiction and operating through a one man company so the referrer is strictly a non-lawyer company,

1 Except where indicated

though in substance it is the lawyer making the referral as part of a regulated legal practice, so it would be appropriate for it to be treated as such. In some overseas jurisdictions referral fees with lawyers or non-lawyers are normal and a requirement to disclose arrangements which are otherwise entirely lawful, over an above the normal duty of disclosure owed to clients, puts us at a disadvantage to competitors from other countries.

While we can see no objection in principle to the disclosure to a client on the inception of a matter that such a consultant may receive a fee in relation to the work in question, we doubt that there is any client benefit in the publication by the approved regulator of the consultancy agreement in its entirety as proposed in Recommendation Two in Chapter 7 (Recommendations for improving transparency and disclosure).

Bulk-buying/central procurement

There are other referral-type arrangements which we believe should be expressly excluded from the disclosure requirements. These include where a framework agreement facilitating the call-off of legal services by participants on agreed terms is in place. These arrangements may involve the payment of a fee by the legal provider to the party which has put in place the framework. Bulk or central-buying arrangements also exist for the call-off by purchasers of legal services, where a rebate may be due to the central-buying agency, calculated by reference to the volume of business delivered. Here, the individual purchasers of legal services will already be aware that they are purchasing pursuant to the central-buying arrangements. By way of example this arrangement is operated, at clients' insistence, for certain work for the UK government where one department is the coordinator for procurement of legal services and receives a fee in respect of all work done for various government departments under the arrangement. We can see no client benefit in the publication of the agreements in question, and indeed the client(s) may object to our doing so.

(13/01/11) The PR&RC also took the lead in responding to the SRA's consultation "The Architecture of Change Part 2 - the new SRA Handbook - feedback and further consultation". (See http://www.sra.org.uk/sra/consultations/OFR-handbook-October.page and http://www.citysolicitors.org.uk/FileServer.aspx?oID=908&lID=0 for the response.) The Associates Forum, Land Law Committee and Training Committee all contributed to the response. A summary of the consultation paper is set out in the September-October 2010 e-briefing at http://www.citysolicitors.org.uk/FileServer.aspx?oID=875&lID=0).

As the CLLS response stated:

This submission provides specific, in depth commentary on the various sections of the Draft SRA Code of Conduct (the "new Code"), namely:

(a) The five sections of the new Code (as set out in Annex C of the consultation paper):
    a. You and your client (Annex A of this document)
    b. You and your business (Annex B of this document)
    c. You and your regulator (Annex C of this document)
    d. You and others (Annex D of this document)
    e. Application, waivers and interpretation (Annex E of this document);
(b) The new Code as it relates to land transactions (see Annex F of this document); and
(c) The Solicitors' Code of Conduct 2007 (the "current Code") and the new Code as they relate to overseas practice (see Annex G of this document).

The submission also comments on the SRA Authorisation Rules for Legal Services Bodies and Licensable Bodies (as set out in Annex F1 of the consultation document) .. ..and provides a response to some of the questions contained in the consultation paper as they relate specifically to legal education and training.

In the commentary we have sought to address the key issues arising from the consultation. As to the implementation timetable itself, we trust that the SRA will ensure that it does not curtail proper consideration (and further consultation if necessary) of the points raised in this and other responses.

At points in this submission we refer to issues we raised in our 20 August 2010 response to the SRA consultation "The Architecture of change: the SRA's new Handbook", which we refer to here as our "August Response".

The CLLS also supports the Bird & Bird LLP 10 November 2010 submission to this consultation in relation to COLP and COFA related matters, a copy of which accompanies this response.

2. Specialist Committees

2.1 Company Law Committee

(19/01/11) The Company Law Committee recently responded to the BIS consultation "A Long-Term Focus for Corporate Britain A call for evidence" (See http://www.bis.gov.uk/assets/biscore/business-law/docs/l/10-1225-long-term-focus-corporate-britain.pdf for the consultation paper and http://www.citysolicitors.org.uk/FileServer.aspx?oID=915&lID=0 for the response).

The consultation was a call for evidence focusing on the relationship between markets and corporate behaviour. The paper considered the legal framework underpinning the relationship between companies, their directors and shareholders; the role of company directors and the impact that markets may have on company behaviour; the nature of the investment community in the UK, including the investment chain and diversity of investment strategies; and how the relationship between directors and shareholders plays out in two specific areas: directors' pay and takeovers.

The joint submission responded to the following specific questions:

1: Do UK boards have a long-term focus – if not, why not?

2: Does the legal framework sufficiently allow the boards of listed companies to access full and up-to-date information on the beneficial ownership of company shares?

3: What are the implications of the changing nature of UK share ownership for corporate governance and equity markets?

4: What are the most effective forms of engagement?

5: Is there sufficient dialogue within investment firms between managers with different functions (i.e. corporate governance and investment teams)?

6: How important is voting as a form of engagement? What are the benefits and costs of institutional shareholders and fund managers disclosing publically how they have voted?

7: Is short-termism in equity markets a problem and, if so, how should it be addressed?

8: What action, if any, should be taken to encourage a long-term focus in UK equity investment decisions? What are the benefits and costs of possible actions to encourage longer holding periods?

12: What would be the effect of widening the membership of the remuneration committee on directors' remuneration?

13: Are shareholders effective in holding companies to account over pay? Are there further areas of pay, e.g. golden parachutes, it would be beneficial to subject to shareholder approval?

14: What would be the impact of greater transparency of directors' pay on the:

- linkage between pay and meeting corporate objectives
- performance criteria for annual bonus schemes
- relationship between directors' pay and employees' pay?

15: Do boards understand the long-term implications of takeovers, and communicate the long-term implications of bids effectively?

16: Should the shareholders of an acquiring company in all cases be invited to vote on takeover bids, and what would be the benefits and costs of this?

17: Do you have any further comments on issues related to this consultation?

(20/01/11) The Company Law Committee also responded to the EC (DG Internal Market) consultation "Legislation on legal certainty of securities holding and dispositions" (see http://ec.europa.eu/internal_market/consultations/docs/2010/securities/consultation_paper_en.pdf for the consultation document and http://www.citysolicitors.org.uk/FileServer.aspx?oID=912&lID=0 for the response). The Regulatory Law Committee also contributed to the response. The Financial Law Committee responded separately to this consultation (see below). The EC document represented a further public consultation on enhancing the safety and efficiency of post-trading arrangements across Europe, and covered options for a possible legislative approach. As the CLLS response stated:

> The Company Law Committee's purpose is to represent the interests of those members of the CLLS involved in company law and related regulation. Accordingly, this response responds only to those questions which primarily give rise to company law issues. The CLC has however seen in advance the response from the CLLS Financial Law Committee, and wishes to support the views expressed in that response.
>
> We support a functional approach to the harmonisation of member states' laws in this area in a way which does not interfere with the property laws of Member States or who an issuer has to recognise as the legal holder of its securities. In our view, in the interests of legal certainty the principle that in Member States where an issuer is only required to regard the registered holder as the legal holder of its securities, that approach must be maintained and should be made clear.

The submission also responded to the following questions:

> 1. Objectives
> *Q1: Do you agree that the envisaged legislation should cover the objectives described above? If not, please explain why. Are any aspects missing (please consider also the following pages for a detailed description of the content of the proposal)?*
>
> 3. Account-held securities
> *Q5: Would a principle along the lines described above provide Member States with a framework allowing them to adequately define the legal position of account holders?*
>
> 14. Determination of applicable law
> *Q27: Would a Principle along the lines described above allow for a consistent conflict of laws regime? If not: Which part of the proposal causes practical difficulties that could be addressed better*
>
> 15. Cross-border recognition of rights attached to securities
> *Q30: Would a general non-discrimination rule along the lines set out above be useful? Have you encountered problems regarding the cross-border exercise of rights attached to securities?*
>
> 16. Passing on information
> *Q32: Is the duty to pass on information adequately kept to the necessary minimum? Is it sufficient? If applicable, would there be any (positive or negative) repercussion of such a Principle on your business model? Please specify.*
>
> 17. Facilitation of the ultimate account holder's position
> *Q34: If you are an investor, do you think that a Principle along the lines described would make easier any cross-border exercise of rights attached to securities, provided that technical standardisation progresses simultaneously? If not, please explain why.*

22. Glossary
Q43: Do the terms used in this glossary facilitate the understanding of the further envisaged Principles? If no, please explain why.

2.2 Competition Law Committee

(03/11/10) The Competition Law Committee recently published a Discussion Paper on UK Competition Reforms
(See http://www.citysolicitors.org.uk/FileServer.aspx?oID=917&lID=0)

As the document stated:

Summary

Amalgamating the OFT and the Competition Commission

- Amalgamation clearly brings efficiency benefits - avoiding duplication of effort both for the competition authorities and the parties making submissions to them.
- it would also be desirable to try to preserve some of the benefits of the current system, e.g.: (i) enabling a "fresh pair of eyes" to review a case, avoiding confirmation bias; and (ii) giving business people the opportunity to be heard directly by the senior decision-makers (as happens currently with hearings before Competition Commission "members").
- Possible solutions might involve:

  Within the merged organisation, ultimate decision-making to rest with a small body of experienced, independent-minded individuals (an "Executive Panel") to whom businesses would have access. This would not replicate the old CC: the new Panel members would need to be continuously available for cases; they would be fewer in number (to build up a body of consistent decision-making); and crucially they would be supported by the staff °f the single competition authority (avoiding duplication in administrative and premises costs).

  In merger control: an enhanced right of appeal (on the merits, not just judicial review grounds) for the merger parties to challenge a prohibition decision before the CAT - this would be a powerful "check and balance", and discipline, for a single merged authority.

  In market investigations: shorter timetables (for example, no more than six months for the initial "market study" phase) to be introduced following amalgamation and greater procedural fairness to be achieved either through the Executive Panel proposed above, or through enhancing appeal rights to the CAT.

  In regulatory pricing determinations: Ofcom cases should be brought into line with the other regulatory regimes, removing the two-stage appeals process of going first to the CAT and then to the CC.

Mandatory merger notification

- There are advantages and disadvantages to moving to a system of mandatory merger notification.

  Advantages of a mandatory system include: (i) greater transparency (less risk that potentially anti-competitive mergers would avoid scrutiny); and (ii) removing the difficulty of dealing with an already-completed merger which is then found to be anti-competitive.

  Disadvantages of a mandatory system include that: (i) it creates unnecessary regulatory burdens, on business and on the regulators, of examining innocuous mergers; (ii) it is wholly contrary to the "self-assessment" approach applicable since 2004 for competition prohibition cases; and (iii) it adds unnecessary cost.

- The supposed problem of dealing with completed anti-competitive mergers seems to us exaggerated. The competition authorities have strong powers to prevent business integration that could prejudice the possibility of undoing completed anti-competitive mergers - through hold-separate measures. These seem to the Committee to work in

general although the scope and terms of the undertakings requested could benefit from more focus and further refinement. Further this problem has to be balanced against the regulatory and private costs of a pre-clearance regime catching more benign mergers, but also with a narrower jurisdiction missing some mergers that should be looked at.

- If there were a move to a mandatory notification regime, it would make sense to review both the UK jurisdictional thresholds, and also whether the vague and broad concept of "material influence" would still be an appropriate test for scrutinising a transaction. We doubt that it would be practicable to have uncertain thresholds (share of supply) or concepts (material influence) in relation to a mandatory pre-clearance regime without there being a hugely unnecessary scrutiny of benign mergers at a huge cost to industry and business. While if there were only relatively brightline tests (turnover and decisive influence/de facto control as in the EU) a number of problematic mergers would fall outside of scope.

"Public interest" test for merger assessment

- If the merger control criterion in the UK were to be changed from "substantial lessening of competition" to a broader "public interest" test, various potential problems would need to be addressed:

  A competition test offers greater predictability for business.

  A broader test would be out of line with normal practice across the EU and globally - with the risk that Britain would be seen internationally as an unfavourable environment for business transactions.

There are real questions (highlighted by the *E.ON/Endesa* case (2006)), about whether a wider public interest test would be compliant with EU law.

- There needs to be some flexibility in the system to allow for exceptional circumstances. This already exists by virtue of the Enterprise Act 2002 s58.

Competition Act 1998 - OFT enforcement

- There are real concerns about the system for investigating infringements of the competition prohibitions (currently by the OFT under the Competition Act 1998) - including principally

There is no separation of powers, and limited procedural safeguards: a single body, with huge powers, including the power to impose quasi-criminal penalties, is simultaneously investigator, prosecutor and judge.

OFT procedures are extremely protracted in duration.

- A possible solution on procedural safeguards would be to have the Executive Panel, referred to above, within a single combined competition authority - with the OFT "prosecuting" a Statement of Objections before the Panel members.

- A possible way of dealing with the long duration would be to impose a two- or three- year time limit on the OFT's ability to issue a Statement of Objections, subject to the possibility of the CAT issuing an extension in exceptional circumstances.

Competition Act 1998 - sector regulators' powers

- There are signs that the system of concurrent Competition Act powers in the hands of sector regulators does not work well - their powers are used to only a limited extent, and there is scope for inconsistency in the way the Competition Act is applied.
- However, there are dangers in abolition of these powers - if sector regulators were deprived of Competition Act powers, they are likely to make greater use of *ex ante* regulatory powers.
- Possible solutions include

  More transparent coordination between sector regulators and the OFT.

The Competition Law Committee also responded to several OFT consultations, including:

- (08/11/10) "A guide to the OFT's Competition Act 1998 investigation procedures - a consultation paper" (See http://www.oft.gov.uk/shared_oft/consultations/oft1263con.pdf for the consultation paper and http://www.citysolicitors.org.uk/FileServer.aspx?oID=914&lID=0 for the response.) The consultation document invited views on guidance that the OFT proposes to publish regarding how it conducts its investigations under the Competition Act 1998.

  As the CLLS response stated:

> **2. General Comments / Additional Guidance**
>
> Settlement
>
> The guidance does not adequately deal with the settlement process. Apart from a brief mention in paragraph 11.2, settlement is not dealt with at all.
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> The CLLS is of the view that it is very important to set out the procedure for settlement as fully as possible. This will help companies when making the decision whether or not to go down this route. In our view, the more transparent the settlement process, the increased likelihood that companies under investigation will be willing to explore this as an option.
> In addition to providing an overview of the complete settlement process, specific issues that we believe should be addressed are:
>
> - timing for settlement - the process does not necessarily have to start after the SO (e.g. the BA case);
> - the likely obligations to be imposed on a company seeking settlement;
> - the importance of having a clear, objective and factual basis for settlement so that the case does not have to be re-opened if new evidence comes to light. Guidance on what level of evidence is necessary to meet this threshold would be useful;
> - relatedly, what happens when the OFT uncovers new facts/evidence that make admissions already made by settlement companies unsustainable (drawing on the OFT's experience in the Dairy investigation).
>
> As settlement is an 'investigation outcome' it may be best dealt with in Section 10.
>
> Inspection of OFT file
>
> Paragraphs 11.19 to 11.22 dealing with inspection of the OFT's file do not give specific guidance on what materials will be included in the file. An overview of the types of documents that would typically be included in the file would be helpful.
>
> Guidance on the content of the OFT's file is particularly relevant where there are parallel civil and criminal investigations. In particular, we believe that the OFT needs to give clear guidance as to whether exculpatory evidence coming to light as a result of a criminal investigation will be put on the OFT's civil file. This type of guidance is particularly needed in the light of the Criminal Procedures Investigation Act, which requires the disclosure of exculpatory evidence to defendants and also contains restrictions on the further disclosure of this evidence. In principle, it must be unfair if exculpatory evidence that exists in the criminal case is not disclosed to parties to the civil proceedings.
>
> The CLLS appreciates that the preparation of a non-confidential version of the file is both burdensome and time-consuming for the OFT. Thought might be given to imposing confidentiality rings on the parties' advisers and allowing them access to all the material on the file. Specific requests could then be made by advisers where they wished to disclose a document to their clients and only at that stage would the need arise to produce a non-confidential version of the document.
>
> Interim proceedings

The CLLS would welcome more detailed guidance on the circumstances in which the OFT would be prepared to take interim measures.
In particular:

- What level of evidence must the OFT have before it will impose interim measures on parties despite the investigation not being complete?
- How quickly into an investigation will the OFT be prepared to impose interim measures?
- Has the OFT's recent experience on the LME case changed its approach to the suitability and effectiveness of interim measures? Would it be prepared to give an early indication as to whether a case might be appropriate in terms of priorities for an application for interim measures?

Leniency

The consultation document contains no guidance on how the OFT will verify the accuracy of evidence provided as part of a leniency application. The CLLS believes that it is imperative that evidence provided as part of leniency is subject to careful scrutiny, in particular when it comes to individual accounts and witness statements. We would therefore welcome information on how the OFT scrutinises leniency evidence.

Non-disclosure of Statement of Objections

Paragraph 12.6 states that formal complainants and other interested third parties receiving a non-confidential version of a SO must not disclose the document to anyone else. However, the OFT does not say how it will impose this requirement. Will the OFT require the recipients to enter into confidentiality undertakings?

Decision-making Process

The guidance is very short on precisely how the decision-making process works and who the decision-maker(s) is/are at each stage. We believe it is important that this is spelt out. It is clearly vital that parties know who the ultimate decision-maker(s) is/are so that they can ensure that their representations, written or oral, are addressed to them.

- (20/12/10) "Land Agreements: Guidance on the application of competition law following the revocation of the Land Agreements Exclusion Order" (see http://www.oft.gov.uk/shared_oft/consultations/OFT1280.pdf for the consultation paper and http://www.citysolicitors.org.uk/FileServer.aspx?oID=926&lID=0 for the response.)

As the consultation paper stated:

This consultation seeks the views of interested parties on the draft guidance by the OFT on the application of competition law to land agreements. This guidance is intended to assist firms in understanding how the law on anticompetitive agreements applies to land agreements in the UK. In particular, this guidance sets out a framework for assessing agreements that restrict the way in which land may be used, or how a right over land may be exercised.

SUMMARY OF KEY ISSUES

…2.5 This guidance explains the framework for assessing the restrictions contained in land agreements in light of the UK law prohibiting anticompetitive agreements. There is not an exhaustive list of which types of restriction infringe the Chapter I prohibition and which do not. The prohibition needs to be interpreted and applied in the context in which each land agreement is implemented.

…2.8 …This guidance does not cover the practical consequences for a land agreement of being void and unenforceable, which are a matter of contract law.

As the CLLS response stated:

Question 1

Practical guidance

1.1. Our view is that, as drawn, the draft guidance is not sufficiently clear or practical for its intended target audience (namely real estate practitioners, property companies, investors in real estate and occupiers), and it would benefit from quite radical re-ordering - in particular, to give increased prominence to some of the helpful comments and examples which are currently somewhat buried in the text. By way of example: -

(i) the guidance states[4] that the OFT expects that only a minority of restrictions will be anticompetitive. By extension, this recognises that a small minority of land agreements will be anticompetitive. The Committee is of the view that the guidance should clearly state, at the outset, that the OFT expects the vast majority of land agreements to be non-problematic and explain the key factors that will indicate to real estate lawyers and their clients when there may be a need to seek expert competition advice;

(ii) the Committee welcomes the examples on pages 42 et seq. of the draft guidance, which are helpful practical illustrations of how Chapter I of the Competition Act 1998 ("Chapter I") will apply to land agreements. We would suggest, however, that these (and additional examples) appear early on in the main body of the guidance and are also used to illustrate more clearly how to approach individual aspects of the analysis, such as market definition.

Impact of the revocation

1.2. We are concerned that the full impact of the revocation of the Land Agreements Exclusion Order (in particular on existing agreements which may contain problematic provisions), and the fact that the revocation takes effect in under 4 months' time, have not yet been appreciated by the property sector. The Committee is aware that there are substantial concerns that:

(i) the revocation will lead to significant uncertainty regarding the enforceability (or otherwise) of land agreements (pending the actual practical impact of the revocation), and this could have a chilling effect on new transactions in the property sector; and

(ii) it is simply not practicable for the property sector to review all existing land agreements - in some cases, these may have been entered into decades ago.

1.3. The Committee appreciates that the OFT has been given a tight time frame within which to publish its guidance. However, given the limited time available before the revocation takes effect, we would urge the OFT to prioritise issuing finalised guidance as soon as possible following expiry of the consultation period.

1.4. Whilst the Committee recognises that this is not the OFT's responsibility, the Committee notes that there is inconsistency between the transitional arrangements for the revocation of the Land Agreement Exclusion Order and those in the Groceries Market Investigation (Controlled Land) Order 2010 ("the Controlled Land Order"); with the latter, for example, allowing "exclusivity arrangements" entered into by large grocery retailers to be enforceable for a period of five years. The short transitional period before the revocation of the Land Agreements Exclusion Order has therefore placed land agreements that are outside the scope of the Controlled Land Order in a worse position than those covered by it.

1.5. The Committee would suggest that the OFT considers discussing with BIS whether, in light of the potential impact of the revocation on property

transactions and the related finance sector, BIS would be prepared to consider introducing a UK block exemption regulation for land agreements - for example, to extend the transitional period before the revocation takes effect and/or identify "safe harbours" for certain restrictions in existing and future agreements (such as a "safe harbour" duration for exclusivity arrangements where specified market share thresholds are satisfied).

- (28/01/11) "Draft guidance on Company Directors and Competition" (See http://www.oft.gov.uk/OFTwork/consultations/closed-awaiting/company-directors/ for the consultation document and http://www.citysolicitors.org.uk/FileServer.aspx?oID=919&lID=0 for the response.) The consultation document provided further guidance for directors on their duties under competition law. Specifically, the OFT stated in the document that it was seeking to explain what level of competition law knowledge it expects directors to have and what steps it believes are reasonable for directors to take to detect and prevent infringements of competition law.

  As the CLLS response stated:

  Introduction

  The Competition Law Committee ("the Committee") of the City of London Law Society ("CLLS") welcomes the OFT's new draft Guidance on *Company Directors and Competition* (OFT1277) and is pleased to have the opportunity to submit comments in response to the consultation. We consider that the provision by the OFT of practical guidance on the application of competition law to directors is important in view of the serious impact which disqualification has on a person's business and professional prospects.

  We begin by setting out some general comments, and then very briefly respond to the three specific questions that the OFT has put to consultees.

  General

  We had previously made some critical comments about the OFT's earlier draft guidance and urged the OFT to be far more specific in the advice that it gives, both in relation to the categories of director and non-director at risk of disqualification under the competition law regime, and in relation to the practical steps that can or should be taken to guard against those risks.

  Our overall concern however is in providing this detail, the OFT may have overstepped the mark and effectively created a set of positive directors' duties which are outside the remit of its powers under the *Company Directors Disqualification Act 1986*. In particular, the competition law knowledge expected of directors (especially commercial directors) and referred to in the Guidance is too high and the steps for detection and prevention expected of both executive and non-executive directors are unreasonable.

  Furthermore, the Guidance ignores the fact that directors have other responsibilities and face competing demands for their attention aside from managing competition law risks.

  We welcome the parallel Guidance *How your Business can Achieve Compliance* that the OFT has also published for consultation. We found it quite a useful and concise summary of the competition rules, without undue legal detail, and do not have any specific comments on its content.

  In relation to both draft Guidance documents, we felt that the presentation could benefit from improvement given the audience at which both are principally directed. In order to make the documents more director-friendly we would have expected to see more tabular summaries/illustrations/diagrams rather than plain text. For instance, why cannot the examples of the knowledge directors are assumed to have, and the knowledge they cannot be expected to have, be set out in a table with two columns? The documents would thereby have much greater impact.

We welcome the clear statement at paragraph 3.6 on the importance of the distinction between executive and non-executive directors for the application of competition law, including competition disqualification orders (CDOs). We agree with the OFT's approach in placing higher expectations on executive directors as they can generally be expected to have a more detailed understanding of, and familiarity with, the way in which their companies operate on a day-to-day basis. However, we feel that the OFT has sought to impose a far higher standard of competition knowledge on non-executive directors and places too great a burden upon them with regard to the steps they are required to take to achieve compliance.

We consider that the OFT has properly identified the two main factors (essentially the director's role in the company and the size of the company) which ought to be taken into account in determining the relevant degree of responsibility of an executive director and hence greater risk of being subject to a CDO. Generally speaking we take the view that paragraphs 3.8 ff. do give helpful guidance on the key factors to be taken into account, and that, as a result, directors would be able to ascertain where they stand. However, we would like to see further guidance on this, and, in particular, it would be useful if the OFT were to expressly set out the other areas within a company that it considers to be "at risk".

Conversely, however, non-executive directors do not generally get involved in day-to-day company decisions, even including pricing decisions, and they cannot be expected to probe in detail as to how pricing and other such decisions have been reached. Nor should they be expected to adopt a suspicious attitude to every single commercial decision of the company and require evidence of competition law compliance at every turn.

We agree that it is reasonable for the OFT to recommend that non-executive directors take responsibility for asking appropriate questions of the company's executives, to ensure that appropriate compliance methods have been adopted to prevent and detect breaches of competition law (paragraph 3.7). However, the suggestion that a non-executive director who failed to ask such questions could be made subject to a CDO goes far beyond what in our view the law was intended to achieve, and beyond what is reasonable or necessary as an effective deterrent for encouraging compliance.

In our view, the standard that the draft Guidance imposes on non-executive directors to avoid a CDO is excessively high and is disproportionate having regard to the underlying statutory provisions. A court would be reluctant to make a CDO against a non-executive director unless there was present some other damning element, over and above the failure to make themselves aware of the non-compliance, making them unfit to be a director, such as evidence they were present at meetings where price fixing or commercial information exchanges were discussed and they failed to raise queries.

Although we have no objection to the OFT describing the guidance at paras. 5.16 ff. as a form of recommended best practice, and to recommend that even non-executive directors should read the parallel Guidance *How your Business can Achieve Compliance*, we suggest that the Guidance should make it clear that, for non-executive directors, CDOs will be the exception rather than the rule.

There is potentially a third class of directors, namely 'compliance' directors. At paragraphs 4.9 and 5.15 the OFT specifically confirms that compliance directors are not expected to have any greater responsibilities or deemed knowledge of the law or their company's activities than any executive director, which seems reasonable to us as an approach. *However, a cross-reference to paragraph 4.9 and the more detailed guidance at paras. 5.12 ff. might be helpful at this point.*

2.3 Construction Law Committee

(28/01/11) As mentioned previously, responses to the European Commission's Green Paper on policy options for progress towards a European Contract Law for consumers and businesses (See http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0348:FIN:en:PDF for the

consultation document and
http://www.citysolicitors.org.uk/FileServer.aspx?oID=922&lID=0 for the response.) were due on 31st January 2011. (A summary of the Green Paper is set out in the previous e-briefing. See
http://www.citysolicitors.org.uk/FileServer.aspx?oID=875&lID=0 for details.)
The Construction Law Committee led the CLLS response to the Green Paper. The response followed the CLLS response to the prior MOJ Call for Evidence on this issue and said that while the CLLS was happy for the Results of the Expert Group to be published, it did not believe that any of the Green Paper's other policy options were useful, appropriate or justified. This was stated to be especially the case given the fact that the Green Paper presented little or no statistical evidence or analysis to justify a need for action.

As the CLLS response stated:

> EXECUTIVE SUMMARY
>
> Whilst the CLLS are happy for the Results of the Expert Group to be published they do not believe that any of the other options put forward by the Green Paper are useful, appropriate or justified, given the paucity of statistical evidence and analysis identifying any problems or any need for action.
>
> There is evidence that small and medium enterprises ("SMEs") who choose not to engage in cross-border trade within the European Union (the "EU") are more influenced by factors other than the legal system prevalent in different Member States, such as cultural and linguistic differences and transport costs.
>
> The very competence of the EU to act on this matter is doubtful. Even if divergent national laws could be shown to deter trade, it would be difficult to show that any of the options in the Green Paper would actually reduce such effect. This means that Article 114 of the Treaty on the Functioning of the European Union ("TFEU") (formerly Article 95 of the EC Treaty ("TEC")) cannot be relied upon to provide a legal basis for enacting any of the options put forward by the Green Paper. It is also difficult to justify competence for action in this area under other legal bases in the treaties. Thus, even if any action is initiated by the Commission, there is a strong chance that this will be challenged before national and European courts, raising unnecessary uncertainties and costs, particularly if a proper analysis of a need for action has not been carried out beforehand.
>
> Evidence also indicates that many companies prefer their international dealings to be governed by English law rather than the law of any other legal system.3 A new instrument would dilute the effect of English law as a gateway for attracting trade into the EU and may be more likely to benefit the economies of New York or Switzerland whose law might increase in popularity. The loss of trade and revenue for the EU and for businesses providing legal and related services may in fact exceed any supposed benefits from the creation of a competing legal system, while limited resources would be exhausted by the unnecessary costs and uncertainties of developing and applying new laws.
>
> There could be particular difficulties for Europe's financial centres and for legal certainty. In particular, the proposals are wholly unsuited for major financial transactions where legal certainty is an imperative. Concerns that this might become a mandatory law, would lead to a flight to non-EU jurisdictions for choice of law and dispute resolution. It is notable that while an EU jurisdiction's legal system, English law, is probably the most popular in international transactions, New York and Switzerland provide strong competition. Even an optional law would be seen as a "slippery slope" towards enforced abandonment of Member States' own systems of contract law, and ultimately other laws and would damage Member States' attractiveness for choice of law and jurisdiction. We believe that it would damage the EU if the institutions were to seek themselves to contract on the terms of the proposed optional law. It is simply not suitable for major commercial transactions, matching neither the legal certainty of common law systems nor that provided by civil law systems with specific commercial codes.
>
> At a social level, we would note that a system of law is part of the cultural fabric of a nation or state. The optional proposal would require all Member States to have an alternative legal culture. More extreme proposals require that all Member States abandon completely their own

systems of contract law (radically in the case of common law countries). This cuts across principles of preservation of cultural identity and of subsidiarity enshrined in the Treaties. Finally there is no economic impact assessment. This is not the time to embark on the education of all the EU's lawyers and establishing a European Commercial Court, yet these steps would be essential with the proposed optional instrument, as well as more extreme alternatives. Even with those steps it would be many decades before any modest degree of legal certainty and consistency would emerge for the new system. The costs, financial in terms of training and dispute cost and in time to resolve disputes, appear, even without detailed analysis, to far outweigh any supposed benefits. It could also, coupled with other moves in the legal field (European arrest warrants, proposed EU attachment orders etc.) unnecessarily add to the anti-EU feeling engendered by the current financial crisis.

So far as the consumer acquis is concerned, harmonisation measures (eg the Directive on Unfair Terms in Consumer Contracts) already in place and the proposals presently being debated are the right way to enhance consumer confidence and have a firm basis in the Treaties. It is a policy matter whether there are any circumstances where small businesses would benefit from being afforded some of the protections afforded to consumers.

..... CONCLUSION

The CLLS do not believe that in times of austerity scarce resources should be devoted to this issue until a proper study has been made that supports the argument that the economic advantages of implementing any of the proposed options outweighs the economic costs of implementation. In particular, a full and complete cost-benefit analysis of this project should be carried out in order to properly assess the impact of the proposals set out in the Green Paper or any other measures that may be considered by the Commission or the EU.
If further consideration is to be given to the issues referred to in the Green Paper, it is also imperative that in addition to academic lawyers, practising lawyers with extensive international contract experience be involved. In addition, to date there has been relatively little involvement of lawyers from a common law background. Given that the potential proposals will have a greater impact on common law jurisdictions than civil law jurisdictions, it is imperative that this imbalance be addressed. It is also important that economists and business organisations be involved in any further consideration of the issues referred to in the Green Paper.

In addition, below are the URLs of other organisations that have made submissions on this issue.

Consultation papers:

MOJ Call for Evidence
http://www.justice.gov.uk/consultations/call-for-evidence-180810.htm

EC Green Paper
http://ec.europa.eu/justice/news/consulting_public/0052/consultation_questionaire_en.pdf

Responses:

CCBE:

Response to EC Green Paper:
http://www.ccbe.org/fileadmin/user_upload/NTCdocument/EN_210111_CCBE_respo1_1296568000.pdf

Law Society:

Response to MOJ Call for Evidence
http://international.lawsociety.org.uk/files/LSEW_FINAL_Contract-Law-Response_5_12_10_0.pdf

Response to EC Green Paper:
http://international.lawsociety.org.uk/files/LSEW_European%20Contract%20Law%20Response_31_01_2011.pdf

MOJ:

Response to EC Green Paper:
http://www.justice.gov.uk/consultations/docs/eu-contract-law-call-for-evidence-response.pdf

2.4 Financial Law Committee

(21/01/11) As above, in addition to the Company Law Committee, the Financial Law Committee also responded to the EC consultation “Legislation on legal certainty of securities holding and dispositions” (see http://ec.europa.eu/internal_market/consultations/2009/securities_law_en.htm for the consultation document and http://www.citysolicitors.org.uk/FileServer.aspx?oID=916&lID=0 for the response).

As the CLLS response stated:

> Preliminary comments
>
> 3. We welcome the broad objectives of the proposed legislation and in particular support the aim of promoting an international set of core harmonised rules based on, and compatible with, those of the Unidroit Geneva Convention on Substantive Rules for Intermediated Securities (the "Geneva Securities Convention"). There are, however, a number of points on which the proposals are unclear or seem to be inconsistent with the Commission’s stated purposes. In particular we consider that:
>
> (a) The proposal in Principle 9 to afford an inferior priority to interests created under a control agreement is unnecessary and inappropriate.
>
> (b) The proposal in Principle 4 relating to the passing on of costs of a buy-in is unnecessary and inappropriate and likely to cause systemic risk and have a serious adverse impact on the efficiency and integrity of EU securities holding and settlement.
>
> (c) The proposals on "ultimate account holders" will need to be considered further and appropriately amended to avoid a conflict where domestic company law (as in the case of the UK) requires the issuer to recognise only the registered holder of securities as the legal holder and also to avoid a conflict with current practices in European bond markets. In addition, Principles 16 and 17 relating to the passing of information and the facilitation of the "ultimate account holder" raise not only questions of operational feasibility but legal concerns (which will need to be addressed) in the numerous cases where the issuer, one or more account providers or the ultimate investor is outside the EU (the proposals also omit to provide who is to bear the costs).
>
> (d) The proposed conflict of law rule does not provide the degree of ex ante legal certainty that is required for the efficient and effective operation of the EU markets.
>
> (e) The imposition of strict liability on account providers will result in increased costs for EU account providers, and ultimately the users of their services, and potentially a reduction in the scope and nature of the services that EU account providers are willing to provide to account holders.
>
> 4. Given the importance of this area to EU investors, financial institutions and financial markets, we suggest that it is especially desirable that the Commission should follow the principles of good regulation by ensuring that its proposals are evidence-based, proportionate and based on proper impact assessment and analysis of costs and benefits. We consider that substantial additional work will be needed to adapt the measures and to assess impact in order to meet these standards as regards the matters specified in paragraph 3 above and a number of other points referred to in our detailed comments below. As a general comment, we are concerned at the extent to which the Commission envisages proposals that would override market forces and freedom of contract. The current arrangements for the holding of securities through intermediaries have evolved through the operation of normal commercial forces. This is in large part because they enable investors to benefit from the efficiency and convenience of centralised professional administration of their investment portfolios while at the same time, by

leaving the precise details of the service provided by their intermediary to be settled by agreement, allowing them some choice in balancing the extent of their detailed involvement in monitoring of information and the exercise of rights against the cost of facilitating this. The Consultation Document appears to contemplate, to a very significant extent, imposing a “one size fits all” regime, but without any evidence or explanation of why it is regarded as essential to do this.

2.5 Insolvency Law Committee

(06/12/2010) The Insolvency Law Committee recently responded to the Insolvency Service consultation on the Insolvency Rules. (See http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/consolidation/consolidationhome.htm for the consultation document and http://www.citysolicitors.org.uk/FileServer.aspx?oID=929&lID=0 for the response.) As the consultation paper stated, the Insolvency Service plans to "put a new set of Rules into force (in October 2012) to replace the 1986 Rules. Our lawyers have now completed around a third of the drafting but before finalising the remainder we would like to engage with stakeholders and invite feedback not only on the proposed structure of the new Rules, but also more generally on the value of having them." The paper noted stakeholder concerns regarding the transitional costs resulting from the possible re-numbering of existing provisions, but said the Service did not intend to delay putting the new Rules in place. It further mentioned that the benefits of a rewrite of the Rules would include "consolidation", "drafting clarity", the possibility of introducing a better Rules structure as well as policy change, the opportunity to review the use of the prescribed forms, and the chance to introduce "essential amendments" (i.e. to make a number of corrections, the need for which have become apparent since the April 2010 amendments were put into force.) The paper also stated that the Service would also consider whether it should just amend the existing 1986 Rules to deal with the essential amendments.

As the CLLS response stated:

> This letter has been prepared by the CLLS Insolvency Committee, whose purpose is to represent the interests of those members of the CLLS involved in insolvency, in response to your letter to stakeholders dated 28 October 2010 inviting views upon whether work the Insolvency Service have been undertaking to re-write the Insolvency Rules should be continued or whether the Service should the more limited alternative option of correcting errors which have become apparent since the April 2010 amendments were made.
>
> The Committee’s members do not regard either option as representing the highest priority. The Committee attaches more importance to addressing aspects of the 1986 Rules which affect the substantive rights of creditors but which do not work in their present form. For example, by:
>
> - Removing the uncertainty as to administration set-off (as identified in the Financial Markets Law Committee paper of November 2007: http://www.fmlc.org/papers/Issue108(nov07).pdf and in their letter of 9 November 2010);
> - Clarifying the rules on post-administration trading of claims;
> - Reformulating the rules regarding administration expenses;
> - Introducing a method for bondholders to be able to form part of a formal creditor committee in circumstances where the bondholder trustee is the only creditor of record; and
> - Clarifying the timing of any bar date for the filing of unsecured claims and the consequences of late filing.

(There are other important matters going beyond the present scope of the 1986 Rules, for example the question of recognition of English schemes of arrangement and the valuation principles applicable to schemes and pre-packs.)

The Committee is also conscious of the increasingly incoherent position resulting from the rules applicable to special administration regimes having been based on different versions of the 1986 Rules as from time to time amended - a problem which would be exacerbated by the adoption of a new set of rules unless all the special regimes were brought into line concurrently.

As regards question 2, we doubt the implicit premise that a new set of rules would itself be free from an ongoing process of amendment as problems are from time to time encountered.

Finally, on the more specific question concerning prescribed forms, the Committee would like to register its support for the retention of the forms. Although they limit flexibility, they ensure that the recipient knows what is being received and can more easily check whether the information being provided is complete. The forms are already in soft copy format and can be scanned and emailed as necessary for electronic delivery; this has not been an issue, for example, in the case of Companies House prescribed forms. The Committee is not convinced that the alternative suggestion of acceptable templates would offer advantages over the present system outweighing the potential disadvantages for recipients.

2.6. Regulatory Law Committee

(8/12/10) The Regulatory Law Committee responded to Chapter 6 (regarding the Spector judgement) of FSA CP10/22 (Quarterly consultation No.26). (See http://www.fsa.gov.uk/pages/Library/Policy/CP/2010/10_22.shtml for the consultation paper and http://www.citysolicitors.org.uk/FileServer.aspx?oID=909&lID=0 for the response.)

As the consultation paper stated:

Amendment to the Code of Market Conduct following the ECJ's decision in the *Spector* case (MAR)

Introduction
6.1 Following the European Court of Justice's (ECJ) decision on 23 December 2009 in the *Spector* case,23 we propose to amend the FSA's Code of Market Conduct (in the Market Conduct sourcebook (MAR)), by deleting MAR 1.3.4 E.

6.2 In the *Spector* case the ECJ was asked to interpret Article 2 of the Market Abuse Directive (MAD), which prohibits insider dealing. Article 2(1) of MAD states that: 'Member States shall prohibit [certain] persons…who possess inside information *from using* the inside information by acquiring or disposing of… financial instruments to which that information relates...' (our emphasis).

6.3 The UK implemented this article in section 118(2) of the Financial Services and Markets Act 2000 (FSMA), which describes one type of market abuse behaviour as being: 'where an insider deals, or attempts to deal, in a qualifying investment or related investment *on the basis of* inside information relating to the investment in question ...' (our emphasis).

6.4 One question the ECJ considered was whether the reference in Article 2 of MAD to 'using' meant that a separate element of 'use' had to be proved, or whether the mere fact that a person traded while possessing inside information meant the information had been 'used' for these purposes.

6.5 In summary, the ECJ found that the fact that a person who holds inside information trades in financial instruments to which that information relates implies that the person has 'used that information', but that is without prejudice to the person's rights of defence and, in particular, the right to rebut that presumption.

6.6 We believe that the wording of section 118(2) remains consistent with the ECJ's decision in the *Spector* case and does not need to be amended.

6.7 However, MAR 1.3.4 E sets out our opinion that if the inside information was the reason for, or a material influence on, the decision to deal, this indicates that the person's behaviour is 'on the basis of' inside information. This evidential provision suggests we would need evidence of a person's intention, as a separate element, to prove insider dealing.

6.8 In light of the ECJ's decision in the *Spector* case, our view is that it is not necessary to provide evidence of a person's intention to prove insider dealing. We therefore think it is appropriate to delete MAR 1.3.4 E. This amendment would be made using our power under section 119 of FSMA. The text of the proposed amendment can be found in Appendix 5.
Q21: Do you agree that MAR 1.3.4 E should be deleted in light of the ECJ decision in the *Spector* case?

As the CLLS response stated:

We wish to make some specific observations on the FSA's proposal in Chapter 6 of the Quarterly Consultation Paper (CP1Q/22) to amend the Code of Market Conduct **("CMC").**
We do not consider that the discussion in Chapter 6 of the CP, and the proposed change to the CMC, goes far enough to:

- reflect fully the implications of the **Spector** judgment; and
- give guidance on the practical effect of those implications for market participants.

The discussion and the proposed amendment also fail to take account of the pre-MAD provisions relating to "relevant information not generally available" **("RINGA").**
Given the significant issues raised by the proposed changes we consider that the FSA should carry out a fuller consultation.

The paper also considered:

- The implications of *Spector*
- Legitimate Use
- The RINGA provisions of the CMC

The Regulatory Law Committee also responded to FSA CP 23 "Decision Procedure and Penalties manual and Enforcement Guide review 2010" (See http://www.fsa.gov.uk/pubs/cp/cp10_23.pdf for the consultation paper and http://www.citysolicitors.org.uk/FileServer.aspx?oID=930&lID=0 for the response).
As the consultation paper stated:

Purpose

1.1 The aim of this Consultation Paper (CP) is to seek views on the amendments we are proposing to make to ensure that the Decision Procedure and Penalties manual (DEPP) and the Enforcement Guide (EG) continue to contain accurate and up-to-date statements of our approach to enforcement. In addition, the CP meets the public commitment we made in July 2007, when we first published DEPP and EG, to review those materials at least annually and to consult on all changes to EG even though, unlike DEPP, it does not form part of our Handbook and is not therefore subject to Handbook consultation requirements.

1.2 This CP also seeks views on our proposed imposition of a new rule in the General Provisions module (GEN) relating to the payment of financial penalties.

Key changes

1.3 We are proposing to impose a new rule in GEN that an authorised firm must not pay a financial penalty imposed on a present or former employee, director or partner of the firm or an affiliated company. This rule will not apply to sole traders.

1.4 We also propose to make the following changes to DEPP and EG:

- Include in EG our policy for publishing decision notices.
- Amend our policy for reviewing published notices and press releases.
- Apply the settlement discount scheme to the length of periods of suspension.
- Adopt a penalties policy and decision maker for using our enforcement powers under the Cross-Border Payments in Euro Regulations 2010 (the 'Cross-Border Regulations').

- Adopt a decision maker in relation to giving statutory notices under various parts of the Financial Services and Markets Act 2000 (FSMA).
- Describe the new enforcement powers we have been given under legislation other than FSMA.
- Update our existing policies to ensure they are consistent with recent amendments to FSMA or other legal developments.
- Make minor clarifications to ensure EG and DEPP give a clear statement of our enforcement policy.

As the response stated:

We wish to make the following comments on the FSA's proposed approach to publishing decision notices.

Publication of decision notices in different contexts

As a general point, the CP seems to us to suggest that the FSA deems it appropriate to consider decision notices and final notices together as if they are different versions of the same thing. We do not consider that approach as appropriate, or consistent with the FSA's duties as a public authority; decision notices and final notices should be considered in the context of their own characteristics, and the relevant policy propositions should properly consider their differing natures. Similarly the CP does not consider whether, in the context of the extension to section 391, when the FSA will publish brief details about a case instead of a decision notice (as has happened historically in relation to authorisation/approval final notices) as being the appropriate "information about the matter" to fulfil its duties.

When considering what is "appropriate" in our view in each case the FSA must have regard to usual public law considerations of natural justice and reasonableness. In particular the policy to publish decision notices where a matter is referred to the Upper Tribunal does not take account of the distinction between notices (i) in a disciplinary context; and (ii) relating to authorisations or approvals and it would seem that no consideration has been given to what information it might be appropriate to publish in those different contexts. For example, we would expect more information to be published in the disciplinary context than in the context of an application or approval when, in the latter case, it may not be appropriate to publish any information at all (on the basis that the person concerned may not yet be conducting any business).

Limits on publication

The FSA's duty to publicise such information from a decision notice or final notice as it considers appropriate is subject to a prohibition on publication if either it would be unfair to the person against whom action has been taken or where it would be prejudicial to the interests of consumers. This point is not fully addressed in the proposed changes to the Enforcement Guide. In addition to protecting consumers it is necessary to consider fairness to the individual and/or firm concerned. Even in the case of a disciplinary decision notice publication of a decision notice could be highly prejudicial without serving any consumer protection purpose, unless there is some concern that the applicant may be acting unlawfully pending a Tribunal decision.

Notice of discontinuance

We disagree with the FSA's suggestion that it is sufficient to merely publish a notice of discontinuance on its website in relation to successful Tribunal applications in relation to which a decision notice was published. We believe that it would be more appropriate for the decision notice and discontinuation notice to be overtly linked on the FSA website so that it is clear the two notices are related. Indeed where the Tribunal application has been successful there is a clear case for removing the decision notice.

Press releases

It is suggested that press releases will often accompany the publication of a decision notice or a final notice. It is not made clear in the CP, why the FSA believes that additional degree of publicity is appropriate (contrast, for example, in the context of authorisations in which it has historically been rare for such a press release to be made).

Removal of notices and press releases

We would welcome further elaboration, in paragraph 6.10 of the proposed amendments to the Enforcement Guide, as to the circumstances in which the FSA might conclude that it will remove a notice from the FSA's website before a period of six years has lapsed. The word "usually" conveys no idea as to what might be "unusual".

Robert Leeder
Policy & Committees Coordinator
CLLS