E-Briefing Detailed Version
(Covering 15 April 2011 – 31 May 2011)

Current matters

Appointment of new Chair CLLS

Alasdair Douglas has commenced as the new Chair of the CLLS (effective 15 June 2011). As the CLLS press release stated (at http://www.citysolicitors.org.uk/FileServer.aspx?oID=1012&lID=0):

CITY OF LONDON LAW SOCIETY APPOINTS NEW CHAIRMAN

Alasdair Douglas, former senior partner of City solicitors, Travers Smith, is to become the next chairman of the City solicitors' representative body, the City of London Law Society, succeeding David McIntosh. The CLLS speaks for law firms which employ 14,000 solicitors in the City and Canary Wharf and have a turnover of £12bn annually.

The new chairman will have to steer through a period of major change as the legal market opens up in October this year to outside investors. "Few City firms will float or take in outside capital to begin with, but over time this will change. We'll also see unexpected new entrants backed by outside capital. How long before significant change happens is anyone's guess. The challenge will be to ensure that the brand - English solicitors – continues to be valued here and abroad and is not devalued as ownership is spread more widely" said Mr Douglas.

Key to the success of City lawyers since the mid-1980s has been the choice of English law for international deals. "More than fifty percent of cross border deals around Europe are now done using English law and my sense is that the same is true in Asia. Common law gives flexibility and certainty and we compete with New York to be the market standard for international business deals. I am keen that we are the number one choice of law in the international market." said Mr Douglas.

London's international success is reflected in the case load of the English Commercial Court where three quarters of claims brought involve overseas parties. Half of these cases have no link to England other than choosing to resolve disputes there. Likewise, in international arbitration, a recent survey carried out by Queen Mary College, University of London, found that more respondents used English law than New York, Swiss and French law combined.

The CLLS will have work to do to maintain the leading position of English law, as the EU Commission is pushing for the introduction of a competing EU legal system for contract law. Mr Douglas said "Imposing a new system would drive legal and related business away from London to New York or, perhaps, Switzerland. Major international transactions and dispute resolution need legal certainty most of all and a decade of uncertainty as new law settles down is not something that anyone would choose."

As a declaration of how seriously its members regard fighting the City's corner internationally, as well as influencing domestic issues which affect their sector, the CLLS has appointed its first chief executive, David Hobart. Mr Hobart, who began his role as Chief Executive in May after 7 years as chief executive of the Bar said: "I look forward to taking every opportunity to enhance the influence of the City's solicitors. They constitute a uniquely skilled and experienced community that will play a central role here and abroad in furthering our national economic ambitions."

David McIntosh, stepping down after seven years as chair said, "I am extremely pleased with the recruitment of Alasdair and David as Chairman and Chief Executive respectively. I firmly believe that they will continue to advance the Society's role on behalf of all its members, including the majority of the UK's leading commercial law firms."

EU Contract Law Proposals

Recent developments/expected future developments with regards to the European Contract Law project have included/include:

12 April 2011: The Legal Affairs Committee of the European Parliament voted to support a report which supported "setting up an optional instrument (OI) for European Contract Law". (See http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A7-2011-0164+0+DOC+PDF+V0//EN&language=EN for the report.)

3 May 2011: As mentioned in the previous e briefing, in early May the Commission published a "feasibility study" on the contract law issue, which included a 189 article draft code. (See http://ec.europa.eu/justice/policies/consumer/docs/explanatory_note_results_feasibility_study_05_2011_en.pdf for document text). The document was produced by the Commission's Expert Group, and stakeholder comments on the document have been called for by 1 July 2011. The CLLS is currently preparing its response to this document. The Commission's website also states "This study is currently being analysed by the Commission as to whether and how it can serve as a starting point for a political follow-up initiative on European contract law." (http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/683)

24 May 2011: The House of Commons European Committee debated the contract law issue. See http://www.publications.parliament.uk/pa/cm201012/cmgeneral/euro/110524/110524s01.htm for Hansard.

3 June 2011: Vice-President Reding (Commissioner for Justice) gave a speech at the University of Leuven regarding the initiative. (See http://ec.europa.eu/commission_2010-2014/reding/pdf/speeches/speech_leuven_en.pdf for the speech.)

8 June 2011: A plenary session of the European Parliament adopted the Legal Affairs Committee's own-initiative report (mentioned above). (See http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2011-0164&language=EN for the details of the Parliament's vote).

19 October 2011: The Commission's Work Programme (for May to end December 2011) has forecast 19 October as the date for the release of a "Proposal for a legal instrument on an optional European Contract Law". The Commission apparently intends to rely on Article 114 of the TFEU. http://ec.europa.eu/atwork/programmes/docs/forward_programming_2011.pdf).

Submissions

Professional Representation Committees

Professional Rules and Regulation Committee

The Professional Rules and Regulation Committee recently responded to the SRA Consultation "Alternative Business Structures Fee Structure". (See http://www.sra.org.uk/sra/consultations/abs-fee-structure.page for the consultation document and http://www.citysolicitors.org.uk/FileServer.aspx?oID=989&lID=0 for the response).

As the consultation document stated:

> Overview
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> 1. The SRA is applying to become a Licensing Authority for alternative business structures (ABS) under the Legal Services Act 2007 (LSA). The assumption under the LSA is that existing Authorised Regulators will apply to become licensing authorities as this will bring both experience and efficiency to the regulation of ABS.
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> 2. The principle that the SRA has adopted, after consultation, to the development of the regulatory framework for ABS is that consumers of legal services, whether from traditional firms or ABS, should enjoy the same levels of service and regulation. Therefore regulation and regulatory process should be as consistent as possible within the statutory scheme.
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> 3. The advantage of this approach is that new organisations and their clients can benefit from access to an experienced regulator at little additional cost, and current providers who may change structure and become an ABS have continuity of regulation. It also allows for efficiency, keeping costs down for the regulated community and so consumers.
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> 4. The starting assumptions for development of a fee structure for ABS therefore are firstly that the ongoing cost of regulation of an ABS will be broadly the same as the cost of regulation of an equivalent traditional firm, and secondly that the same general principles can underpin the fee structure for both.
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> 5. This paper also proposes that contributions by ABS firms to a single Compensation Fund should be calculated on the same basis as for traditional firms.
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> 6. The introduction of firm based regulation for traditional firms in 2009 led to the adoption of a new fee structure for such firms in 2010, after extensive consultation. That fee structure was developed with ABS in mind. The general principles adopted

were as follows and the SRA believes that these principles should also apply to the fee structure for ABS:

The fee structure should:

Be fair to fee payers

Be efficient and economical to administer

Ensure a predictable income to meet the costs of regulation

Be stable - charges should not vary considerably year on year

Be as simple as possible – to enable the regulated community to predict likely fees

Be based on data that can be verified

Ensure that – wherever possible – costs of particular processes that are not of general application should be borne by those making such applications on, as far as possible, a cost recovery basis

Take some account of ability to pay, in particular, in relation to small and new businesses – fees should not be a deterrent to new entrants.

As the response stated:

Question 1

The proposed approach assumes, first, that the cost of regulation of an ABS will be broadly the same as the cost of regulation of an equivalent traditional firm and, secondly, that the same general principles can therefore underpin the fee structure for both. Whilst it is reasonable to assume that certain of the costs should be the same, we believe that there are significant points of distinction where the ABS is part of a larger business entity and therefore that the second element of the fee structure – charging the "firm" element by reference to turnover – will have to be reviewed.

We would add the following. As you know, the fees charged bear no relation to the actual cost of regulation and we therefore urge you to give more priority to developing a risk based/level of supervision fee structure. We appreciate that the SRA does not have unlimited resources and that it has a number of other projects which require attention, but would suggest that you announce a date by which you will move to a risk-based fee structure in order to bring focus to what we regard as an important matter.

Question 2

In your paragraph 6, whilst we would agree that the fee structure should not act as a barrier to new entrants to the legal market and reflect ability to pay, as you will know, the current fee structure already takes into account ability to pay.

We do not think it should follow that new entrants should automatically benefit from that "ability to pay" discount. The discount built in to the banded turnover rates was introduced in order that the owners of large firms – high turnover being the proxy for ability to pay - subsidise the cost of regulating others with a lower turnover (mainly small high street firms). Whilst the ability to pay element might be justified where those others, such as small high street firms, are genuinely less able to pay, it cannot be justified where the recipients of the subsidy are large, well-capitalized businesses. It would not be acceptable to our members to be asked to subsidise businesses which are well-able to pay fees (which would include a number of the entities which have announced their intention to become ABSs). We would therefore ask that you look at ability to pay in a more sophisticated way than simply by looking at turnover. We would suggest that you

will have to devise another proxy or proxies for ability to pay where turnover is not a proper indicator. We hope that the following example helps to highlight our concern.

Bank B, with a market capitalisation of £35bn, sets up a retail legal services subsidiary, Company B, to provide wills and conveyancing services. Company B takes on premises and a substantial number of staff. It spends heavily on marketing and in its first year has expenditure of, say £100m. Its turnover in the first year is minimal, say, £1m. Bank B can finance the deficit by injecting capital of £99m, or by lending £99m to Company B or by guaranteeing £99m external borrowings by Company B. In all cases, Company B and the larger business group of which Company B is part has the ability to pay and we believe that the expenditure of that company is a much better proxy of ability to pay than income.

A second example would be where Company B charges well below market price or does work for free to gain market share and therefore has a low turnover, subsidised by injections of capital, etc., from its parent.

Turnover in both examples may well come in later years, but we do not believe that paying the proper level of fees in later years can be used to justify our members being asked to subsidise the early years of trading for Company B on the basis that Company B cannot afford to pay fees.

We would add that all existing firms are meeting the set-up costs of the ABS structure and framework of regulation at the SRA and understand that ABSs will not be asked to contribute through application fees to the costs incurred to date. They will simply be asked to pay fees covering actual application costs and the periodic fees going forward which will not take into account the sunk costs. The ABS structure is therefore heavily subsidised already in favour of new entrants and we believe that this point adds weight to our request that actual or estimated turnover alone is not used to measure fees for substantial new entrants.

To conclude, we believe that unless the turnover element is reviewed to take into account the issue raised above, the existing structure will have a negative impact on larger traditional firms through their being asked to subsidise others, based on a measure of ability to pay which throws up a false result.

Question 3

Our concern is that whilst all turnover in traditional law firms is captured in the existing fee structure, there is considerable scope for ABSs which are part of larger businesses to distort their turnover. We would therefore ask you to set out how you would propose to ensure that all relevant turnover will be captured. The areas which immediately occur to us as having potential to cause problems are cross-subsidizing services and bundling of services, some of which are, and some of which are not, legal services.

For example, Company B in the earlier example could offer a “free” will writing service if the consumer opens a bank account with its parent, Bank B. Bank B could meet Company B’s expenses in providing the service in the ways mentioned in the example above or could pay a fee to Company B per will. It would not matter to the group how the deficit in Company B is met, as the intercompany amounts would cancel out on consolidation. If no fee were to be paid, there would be no fee payable to the regulator. We believe that, where there is a choice on how to meet the deficit, any commercial organisation would choose to meet it in a way that gives rise to least cost and so would be unlikely to choose payment if it meant higher fees being charged.

On bundling services, an example might be where a will, probate and funeral were offered for an all-inclusive price. How would the cost of the will, probate and funeral be spread over the legal services? Another example might be a mortgage lender offering free conveyancing - how would the interest rate on the loan be divided up, if at all, between the lending and conveyancing services?

We appreciate that it will require a degree of sophistication not present in the current fee structure to stop those with the ability to pay from avoiding an appropriate level of fees. We consider that the turnover test by itself is inadequate and will therefore have to be supplemented in some way. We believe that fairness in this context trumps simplicity and therefore that this point must be addressed properly.

One possible solution that occurs to us would be to have a mechanism for setting a minimum fee where turnover is not considered to be a suitable proxy for ability to pay. The fee could reflects the size of the legal services business measured not by reference to turnover but, say, by reference to expenses (including, importantly, shared costs such as brand advertising) with a suitable profit multiplier to give a figure equivalent to turnover in a traditional firm on which the fee could be based.

Questions 4 and 5

The same point made in answer to Question 3 will apply where there is cross-subsidizing of services or free services in MDPs.

Questions 6, 7 and 8

See the point above in relation to turnover as a proxy for ability to pay, as applied particularly in start-up situations.

Estimated turnover (or a more sophisticated proxy where necessary) would seem to be a sensible approach in the examples where this is suggested.

Question 9

No, a more sophisticated proxy for ability to pay is required in the interests of fairness.

Question 10

We believe that the business models of (1) use of large numbers of unregulated staff, both in ABSs and traditional firms, doing regulated work under supervision by a small number of regulated persons and (2) regulated persons doing unregulated work should be looked at over time to determine whether the advent of new business structures places an unfair fee burden on firms where there is a very high level of regulated staff in relation to the turnover. It may be that a risk-based/level of supervision fee structure will supersede the need to consider this question.

Representational Committees

Financial Law Committee

The Financial Law Committee recently responded to the Insolvency Service "Consultation on Reforms to the Regulation of Insolvency Practitioners". (See http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/con_doc_register/IPConsult.pdf for the consultation document and http://www.citysolicitors.org.uk/FileServer.aspx?oID=994&lID=0 for the response.)

As the consultation paper stated:

Executive Summary

(i) This consultation is being published in response to the Office of Fair Trading (OFT) study into the market for corporate insolvency practitioners. The report was published in June 2010 and made a number of recommendations to Government.

(ii) It is vital that the market for insolvency functions properly, not just for those directly affected by proceedings but also for the economy as a whole. Customers need to have confidence in the regime as this is linked closely with availability of credit. The regulatory framework underpinning the market should promote competition and build confidence in the system. The OFT study was initiated following concerns from a range of parties, including IPs, that the current system was overly complicated and did not build trust in the profession.

(iii) The study recognised that the market works well in the majority of cases - but not all. The report highlighted the weak position of unsecured creditors, in particular in cases where secured creditors get paid in full and unsecured creditors are left to influence the remainder of the insolvency process. The OFT found that the current regulatory framework does not assist the unsecured creditor to exert influence over the process and the office-holder.

(iv) We welcome the robust analysis carried out by the OFT and are supportive of the majority of the recommendations of the report, which makes three broad suggestions for change to address the problems associated with the weak position of unsecured creditors:

- Establishing an Independent Complaints Body;
- Setting clear objectives for the regulatory regime; and
- Detailed amendments to particular regulations.

(v) Although focused on the corporate insolvency market, most of the recommendations extend to the market for personal insolvency as the regulatory framework is the same.

(vi) This consultation seeks views on whether, and if so how, to implement the recommendations presented by the report. The consultation sets out different options to do this and asks specific questions regarding the proposals,

(vii) The costs of reform will depend on the policy options chosen, and as this is at an early stage of policy development we do not have a preferred suite of measures. However, we estimate a net benefit of £46 million for a feasible set of policy choices. All the financial impacts of the proposals are set in the impact assessment at annex B. This sets out estimates of costs and benefits, which will be tested with stakeholders as part of the consultation process.

(vii) We will carefully consider all responses received and where it is decided that changes will be made, we will consider the extent to which legislation (primary and secondary) will be required.

As the response stated, *inter alia*:

The [Financial Law] Committee strongly opposes the proposal to increase the prescribed part, which they consider would **not** contribute to achieving better control of the fees of insolvency practitioners; and, more importantly,

1. Would have potentially severe and adverse consequences on the cost and availability of working capital loans to business, especially SMEs and increase the burdens on the proprietors of these businesses. It may also affect willingness to lend to UK incorporated borrowers on best terms and/or make it more difficult to attract inward investment through UK incorporated subsidiaries.

2. Potentially have serious adverse effects in relation to financial collateral requirements in wholesale markets and on the attractiveness of the UK as a location by such market activity.

3. Affect the legitimate expectations of current proprietors of floating changes in an expropriatory manner.

4. Generally create additional uncertainty about the UK regulatory regime for financial institutions, by making lending on the most commonly used form of security more risky.

This proposal having been put forward apparently without an appreciation of its significance in relation to the current economic situation and it's conflict with the established policy of HMG to promote bank lending, while ensuring that bank lending carried out on a prudent basis, we urge that, in order to avoid market uncertainty, an early announcement is made either:

- that there will be no change to the prescribed part; or, at least,

- that any changes to the prescribed part will not affect pre-existing charges and that no changes will be made to the prescribed part that would have adverse effects on the availability or cost of borrowing for companies or which would adversely affect the operation of the financial markets.

This seems to us the minimum essential to avoid adverse consequences arising from the review itself.

The Financial Law Committee also responded to the British Institute of International and Comparative Law "Cross-Border Assignment Questionnaire". (See http://www.biicl.org/files/5342_biicl_assignment_study_-_empirical_questionnaire.doc for the questionnaire and http://www.citysolicitors.org.uk/FileServer.aspx?oID=982&lID=0 for the response.)

As the questionnaire stated:

This Questionnaire has been prepared by the **British Institute of International and Comparative Law (BIICL)** for circulation to **representatives of business and the legal profession** concerning their activities involving the assignment of debts and other rights with a cross-border element. In particular, this Questionnaire is addressed to (but not limited to) those involved in factoring or securitisation transactions or in transactions backed by security or collateral over debts and other contractual rights with a connection to two or more States, countries or legal systems.

BIICL has been appointed by the **European Commission to conduct a Study into the effects on third parties of assignments, with a focus on the law applicable to such assignments.** At present, the EU Member States have different approaches to these questions, and the Study will consider (among other questions) whether a harmonised rule

> is necessary and whether any such rule should distinguish between transactions of different kinds. In order to make recommendations to the Commission, **it is essential that account should be taken of the needs and views of operators of different kinds within different sectors.**

The Committee's submission responded in detail to the specific questions posed.

Litigation Committee

The Litigation Committee recently responded to the Judicial Office for England and Wales' document "A Consultation on the Use of Live, Text-Based Forms of Communications from Court for the Purposes of Fair and Accurate Reporting". (See http://www.judiciary.gov.uk/media/media-releases/2011/courtreporting for the consultation document and http://www.citysolicitors.org.uk/FileServer.aspx?oID=986&lID=0 for the response.)

As the consultation paper stated:

> **1. The Consultation Process**
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> 1.1 On 20th December 2010, the Lord Chief Justice issued Interim Practice Guidance titled "The Use of Live Text-Based Forms of Communication (Including Twitter) from Court for the Purposes of Fair and Accurate Reporting". The effect of the Interim Guidance was to clarify the circumstances in which judges may allow use of mobile electronic devices to transmit text-based communications directly from the courtroom for the purpose of reporting the proceedings.
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> …1.2 When issuing the Interim Guidance, the Lord Chief Justice said that he would conduct a full consultation regarding the use of live, text-based communications from court. This paper sets out the considerations taken into account when the Interim Guidance was framed, and outlines issues which need to be considered before a final policy is determined.
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> 1.3 The focus of the Interim Guidance, and of this consultation, is the use by the media of live, text-based forms of communication for the purposes of fair and accurate reporting. The media are presumed to be familiar with the requirements of the Contempt of Court Act 1981 to engage in "fair and accurate" reporting, in a manner which respects any applicable reporting restrictions and the relevant Press Complaints Commission Code of Practice.
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> 1.4 The consultation invites responses in relation to the courts of England and Wales. It does not relate to the courts in Northern Ireland or Scotland. Nor does it relate to the Supreme Court, which has produced its own policy on the matter[1], in the light of the fact that appeals heard before it do not involve interaction with witnesses or jurors, and that it is rare for evidence to be introduced which may then be heard in other courts.
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> 1.5 Following the consultation, consideration will be given as to what, if any, further guidance or rules may be required, and what the nature of those changes will be. For example, in relation to the criminal courts, it may be possible for the Lord Chief Justice to amend the Consolidated Criminal Practice Direction, or request the Criminal Procedure Rule Committee to amend the Criminal Procedure Rules accordingly. In relation to the civil courts, the Civil or Family Procedure Rule Committee may be invited to make rules of court governing the use of live, text-based communications from court, or the Master of the Rolls or President of the Family Division may be invited to consider issuing practice directions on the matter.

2. Introduction

….2.5 The central issue to be considered by this consultation, … is how the courts should take account of [recent] technological and cultural developments in reporting, in a way which protects freedom of speech, the right to a fair trial and maintains the statutory requirement that reports of legal proceedings must be fair, accurate and in good faith.

3. The Interim Guidance

…3.2 There is no statutory prohibition on the use of live, text-based communications from court (see paragraph 10 of the Interim Guidance); the power to regulate such activity derives from the Court's jurisdiction to control what takes place in the courtroom to prevent disruption. The purpose of this consultation is to consider the approach the courts should take to live, text-based communications, pursuant to those powers and within the existing legislative framework. Changes to the legislative framework and the policies which underlie it (for example reporting restrictions, the prohibition on photography in the courts) are, therefore, beyond the scope of this consultation, and responses are not invited in relation to those or related issues. The policy and legislation for such matters are the responsibility of the Government, not the judiciary. This consultation paper relates solely to those matters which are the responsibility of the judiciary.

3.3 At the outset of considering what [is] the courts' approach to this issue, it is necessary to identify whether there is a legitimate demand for live, text-based communications from court.

3.4 The paragraphs that follow set out specific questions for consideration.

As the response stated:

Question 1: Is there a legitimate demand for live, text-based communications to be used from the courtroom?

We believe there is a legitimate demand and agree with the points made in the consultation paper that times have changed and technology has advanced.

…*Question 2: Under what circumstances should live, text-based communications be permitted from the courtroom?*

Such communications should be permitted unless they disrupt the Court process and interfere with the proper administration of justice.

…*Question 3: Are there any other risks which derive from the use of live, text-based communications from court?*

Not in our view. The key issue is harm to the legal process, either through disruption or, more seriously, substantive damage to the process of a fair hearing (as in the abortion of a criminal trial). All the risks identified in the consultation paper have these as their common denominators.

Without disruption or harm it is difficult to see why such forms of communication should not be permitted. The process of justice must be visible, and accessible, and it must be visible and accessible in compliance with the technological standards of the day.

….*Question 4: How should the courts approach the different risks to proceedings posed by different platforms for live, text-based communications from court?*

As the consultation paper records, justice must be seen to be carried out in public, and the public, including journalists, are entitled to comment on legal process as they wish, within the law and subject to the overriding principle of not causing harm.
"Editorial control" (whatever that may mean) should not form part of the deliberation on the permitted use of communications of this kind.

…Question 5: How should permitting the use of live, text-based communications from court be reconciled with the prohibition against the use of mobile phones in court?

Subject to the overriding principle of not causing disruption or harm to the judicial process, there is no further warrant for the ban on the use of mobile phones in Court.

…Question 6: Should the use of live, text-based communications from Court be principally for the use of the media?

No. There is every reason why the facility of such communications should be extended to persons other than the media, including legal representatives and their clients who are the users of the Court service.

The Committee also responded to the European Commission Staff Working Document "towards a coherent European approach to collective redress" SEC (2011) 173 final. (See http://ec.europa.eu/justice/news/consulting_public/news_consulting_0054_en.htm for the consultation document and http://www.citysolicitors.org.uk/FileServer.aspx?oID=986&lID=0 for the response.)

As the consultation paper stated:

1. INTRODUCTION
1.1. Collective redress as a possible instrument to strengthen the enforcement of EU law
…3. With the enlargement of the European Union, the number of cases requiring enforcement has increased substantially because of the larger territorial scope of application of EU law. This has accentuated the need for a more decentralized enforcement of EU law. It has also brought on the agenda the issue of whether further mechanisms of private enforcement should be added to the current system of EU remedies in order to strengthen the enforcement of EU law.
…However, where the same breach of EU law harms a large group of citizens and businesses, individual lawsuits are often not an effective means to stop unlawful practices or to obtain compensation for the harm caused by these practices: Citizens and businesses are often reluctant to initiate private lawsuits against unlawful practices, in particular if the individual loss is small in comparison to the costs of litigation. As a result, continued illegal practices cause significant aggregate loss to European citizens and businesses.

…6. … mechanisms of collective redress could be considered to remedy the current shortcomings in the enforcement of EU law.

1.2. What is meant by "collective redress"?
7. EU citizens and businesses should be able to take action when harmed by a breach of any EU legislation creating substantive rights. When citizens and businesses are victims of the same breach committed by the same company, bundling of their claims in a single collective redress procedure, or allowing such a claim to be brought by a representative entity or body acting in the public interest, could simplify the process and reduce costs. "Collective redress" is a broad concept encompassing any mechanism that may accomplish the cessation or prevention of unlawful business practices which affect a multitude of claimants or the compensation for the harm caused by such practices.

…1.4. Towards a coherent European approach to collective redress

10. Given the diversity of existing national systems and their different levels of effectiveness, a lack of a consistent approach to collective redress at EU level may

undermine the enjoyment of rights by citizens and businesses and gives rise to uneven enforcement of those rights. A coherent European framework drawing on the different national traditions could facilitate strengthening collective redress (injunctive and/or compensatory) in targeted areas. In any event, such a framework should contain common principles which any possible EU initiatives on collective redress in any sector would respect. The objective is to ensure from the outset that any possible proposal in this field, while serving the purpose of ensuring a more effective enforcement of EU law, fits well into the EU legal tradition and into the set of procedural remedies already available for the enforcement of EU law.

11. Within the European Commission, work has been undertaken for several years to develop European standards of compensatory collective redress in the field of consumer and competition law. The Commission adopted a Green Paper on anti-trust damages actions in 2005 and a White Paper in 2008. In 2008, the Commission also published a Green Paper on consumer collective redress. Stakeholders' positions on many issues are known: most consumer organisations are in favour of EU-wide judicial compensatory collective redress schemes, whereas many representatives of industry fear the risks of abusive litigation. However, stakeholders have also warned against an inconsistency between the different Commission initiatives on collective redress, which pleads for more coherence.

12. The Commission is therefore launching a horizontal public consultation "Towards a more coherent European approach to collective redress". The purpose of this consultation is, inter alia, to identify common legal principles on collective redress. The consultation should also help to examine how such common principles could fit into the EU legal system and into the legal orders of the 27 EU Member States. The consultation also explores in which fields different forms of collective redress (injunctive and /or compensatory) could have an added value for improving the enforcement of EU legislation or for better protecting the rights of victims. The resulting set of principles should guide any possible initiative for collective redress in EU legislation.

2. POTENTIAL ADDED VALUE OF COLLECTIVE REDRESS FOR IMPROVING THE ENFORCEMENT OF EU LAW

13. Careful consideration must be given as to whether and in which areas an EU initiative would bring added value for improving the enforcement of EU law and whether there are alternative routes to fill possible gaps in the current system. In this context, the recent developments in EU legislation outlined above would be taken into account. It should also be considered whether any current shortcomings can be remedied by extending the existing possibility of obtaining injunctive relief to areas other than consumer protection. In addition, it would be explored whether the role of national public bodies (like the Ombudsman) and/or private representative organisations in the enforcement of EU law could be strengthened, in line with existing national models.

14. Any new initiative would also have to comply with the principles of subsidiarity and proportionality laid down in Article 5 of the Treaty on the Functioning of the European Union. Certain mechanisms of injunctive collective redress are already in place in all Member States with regard to consumer matters, while several Member States know other forms of collective redress (including compensatory redress) to varying degrees. It would need to be considered whether and how action at EU level would be necessary in these circumstances to ensure the effective enforcement of EU law. In addition, any action at EU level should address the specific cross-border dimension of collective redress (injunctive and/or compensatory).

…3. GENERAL PRINCIPLES TO GUIDE POSSIBLE FUTURE EU INITIATIVES ON COLLECTIVE REDRESS

15. Based on the outcome of previous consultations, a first set of common core principles can be identified which could guide any possible EU initiatives for collective redress (injunctive and/or compensatory). These include: (1) the need for effectiveness and efficiency of redress; (2) the importance of information and of the role of representative bodies; (3) the need to take account of collective consensual resolution as a means of alternative dispute resolution; (4) the need for strong safeguards to avoid abusive

litigation; (5) availability of appropriate financing mechanisms, notably for citizens and SMEs; (6) the importance of effective enforcement across the EU. These principles could apply to all forms of collective redress (injunctive and/or compensatory) although some might be more relevant for compensatory collective redress.

3.3 The need to take account of collective consensual resolution as alternative dispute resolution
…Consideration should be given how the recourse to alternative dispute resolution (ADR) can be facilitated in situations of multiple claims. It should also be explored whether and in which policy areas resorting to collective consensual resolution of the dispute could become a legal requirement before going to court.
…An initiative on ADR which deals with individual and collective ADR in consumer matters is under preparation.

…3.4 Strong safeguards against abusive litigation
21. Any European approach to collective redress (injunctive and/or compensatory) would have to avoid from the outset the risk of abusive litigation. Many stakeholders have expressed concern that they wish to avoid certain abuses that have occurred in the US with its "class actions" system. This system contains strong economic incentives for parties to bring a case to court even if, on the merits, it is not necessarily well founded. These incentives are the result of a combination of several factors, in particular, the availability of punitive damages, the absence of limitations as regards standing (virtually anybody can bring an action on behalf of an open class of injured parties), the possibility of contingency fees for attorneys and the wideranging discovery procedure for procuring evidence. The Commission believes that these features taken together increase the risk of abusive litigation to an extent which is not compatible with the European legal tradition.

As the response stated:

Overview

We believe that each Member State is best placed to develop its own approach to collective redress. This will enable Member States to address specific issues which may apply in their own jurisdictions. We consider that it is premature and over-ambitious to seek a more prescriptive EU-wide approach at the present time. If there are substantive issues which merit an EU-wide approach, the better course is to address the issues through the substantive issue (as was done, for example, in relation to the Transparency Directive) rather than putting the procedural approach first.

The hearings and consultations to date on this question reinforce the lack of uniformity of among Member States in their approach to collective redress. Indeed, this was evident at the most recent public hearing on 5 April 2011, where there were times when it was hard to discern much more than a collection of disparate views being expressed, quite legitimately, by various interest groups.

The response went on to deal with some of the specific questions in the consultation paper.

Regulatory Law Committee

The Regulatory Law Committee responded to the Treasury Consultation "A New Approach to Financial Regulation: Building a Stronger System". (See http://www.hm-treasury.gov.uk/consult_finreg_strong.htm for the consultation document and http://www.citysolicitors.org.uk/FileServer.aspx?oID=983&lID=0 for the response.)

The consultation document set out elements of the Government's financial regulation plans, including:

- Changes to the Bank of England and the creation of the Financial Policy Committee as the macro-prudential authority;
- The roles, responsibilities and governance of the PRA and the CPMA;
- The issue of market regulation;
- The coordination of the regulatory bodies in a potential crisis; and
- The next steps for the reform programme, including public consultation, legislative passage, and operational implementation by the Bank and FSA.

The document presented a range of issues and questions for consultation. It also stated that "The Government will, on the basis of this consultation and continuing policy development by the Treasury, present more detailed proposals – including draft legislation – for further consultation early in 2011. As indicated in the Queen's Speech in June, the Government will bring forward legislation to implement its reform programme in the first session of the Parliament, with a view to securing Royal Assent within two years."

As the response stated:

> **1. GENERAL**
>
> We are not commenting on every question raised in the Consultation and have set out our comments below with reference to the question numbers concerned. We highlight in this section two areas of general concern, the first relates to the day to day operation of the new authorities, the second to the proposed change in approach on certain matters involving regulatory decisions
>
> As explained in our previous comments we have not questioned the policy of creating a new regulatory infrastructure as this is clearly settled, but a structure involving more than one regulator carries clear risks of lack of effective coordination and related cost and uncertainty for firms. The implementing legislation must set a clear framework within which the authorities must operate and co-operate, to provide the markets and firms with the efficient and cost effective regulation that they need. If the U.K. is to remain a leading jurisdiction for the location of financial services firms then it must provide them with clear, effective and efficient processes for authorisations, variations of permission, approved person approvals and change of control consents, as well as fair processes in enforcement cases. Firms that have a choice as to whether to locate here (with the resulting jobs, tax revenue etc.) take into account the local processes when determining whether to base their head office in the U.K. or set up elsewhere in Europe and simply passport into the U.K. We know this from our own practices. The impact of the new structure on firms must be capable of being clearly described, so that firms know what to expect, who to deal with, and what time frames will apply. The proposals in the Consultation do not go far enough to ensure that this will be the result. We suggest below that there should be express duties to cooperate, a shared services function and identical rules where both regulators are implementing the same European laws, or making rules which cover the same territory. As far as European laws are concerned it is essential to avoid a position where different regulators appear to interpret the same rules in a different way, as in other Member States there will be one authoritative source.
>
> We have already expressed to you our serious concerns about the proposals in relation to various changes in the provisions relating to enforcement and similar matters, such as refusals to approve individuals. We are strongly opposed to the proposals in their current form, as explained in our comments on the specific questions below. We highlight in this general section the concerns we have on the proposal to publish warning notices. We consider that it is unjustified, unfair and unnecessary. If the Government proceeds with it then it will need to make significant changes to the entire framework within which they are produced. At present warning notices are highly selective as to their content, omit relevant material which does not assist the "prosecution" case and they are issued before

the firm or individual has had access to the material which the FSA has in its possession or an opportunity to challenge what the notice says.

The suggestion that warning notices should be made publicly available is not justified. If the regulator has a case then it will appear in due course. In our experience, even when a warning notice is followed by a Decision Notice, the content is often materially different. As a recent public example has shown, premature publication of information about an investigation can have a devastating irreversible impact that is particularly unfair if the investigation concludes with no action. The same could happen with publication of warning notices-not every warning notice results in a Decision Notice. We urge HM Treasury to revisit these proposals, which also have a potentially damaging effect on confidence in the U.K. and on the reputation of the U.K. as a place to carry on business. We are of course supportive of an effective and appropriate enforcement process, it is essential that firms and individuals who break the rules are subject to proper sanction and, where appropriate, publicity, but the current proposal is not required to meet that objective.

The Committee also responded to the FSA consultation on guidance on the Remuneration Code. (See http://www.fsa.gov.uk/pages/Library/Policy/guidance_consultations/2011/11_09.shtml for the consultation paper and http://www.citysolicitors.org.uk/FileServer.aspx?oID=997&lID=0 for the response.)

As the consultation paper stated:

Summary of the key issues

- Template for assessment of compliance with Remuneration Code (for firms in proportionality Tier 2)

- Template for assessment of compliance with Remuneration Code (for firms in proportionality Tiers 3 and 4)

These templates are designed as tools for firms in Tier 2 and Tiers 3 and 4 respectively to document their remuneration policies, practices and procedures.

The templates set out the principal questions that we are likely to ask if we carry out a review of the firm's remuneration policies. It would be good practice for firms to use the template as it provides our expectation of the level of detail which should be included.

- Guidance on the rule on guarantees (SYSC19A.3.40R)

This document provides guidance regarding the rule on guarantees, in particular whether prior approval or notification to the FSA is required.
Guidance is set out in the context of the type of award and the status of the recipient (Code Staff or non-Code Staff).

- Guidance on the rule on retained shares or other instruments (SYSC19A.3.47R(2))

This document provides guidance on the rule requiring shares or other instruments paid out as part of variable remuneration to be subject to an appropriate retention policy.

The guidance sets out the FSA's expectations with respect to the retention period as well as our views regarding the tax aspect.

- Frequently Asked Questions on the Remuneration Code

This document sets out our responses to a list of FAQs. Some of the responses are a clarification of existing policy, while others represent new guidance. The latter are marked with a [G] for easy reference.

As the response stated:

General Comments

Generally, we welcome the Guidance as a means of assisting firms in finalising their policies and procedures in relation to the FSA's Remuneration Code (the "Code"). We do, however, have concerns in respect of two aspects of the guidance.

Guaranteed Variable Remuneration

We urge the FSA to reconsider its guidance on the application of the restriction on guaranteed variable remuneration to non-Code Staff, and to Code Staff who satisfy both the conditions in SYSC 19A.3.34R (the "de minimis exclusion"). The draft guidance goes further than is necessary properly to implement CRD3 and is too prescriptive. There is insufficient differentiation between the four categories identified in the FSA's table and the draft guidance renders the de minimis exclusion all but meaningless.

Whilst we agree with the guidance in SYSC 19A.2.3G that firms should consider applying the restriction on a firm-wide basis, it should bite on a particular award to a member of non-Code Staff, or Code Staff qualifying for the "de minimis exclusion", only to the extent that the particular award or a series of similar awards is inconsistent with sound and effective risk management. This should be capable of being assessed by each firm on a periodic basis in a manner proportionate to its size, internal organisation and the nature, scope and complexity of its business. In many firms, particularly those whose business does not involve them putting their own capital at risk, awards to these categories of staff may not have any impact on the firm's risk profile.

Staff in categories 3 and 4 are by definition not capable of having a material impact on the firm's risk profile. Staff in category 3 (non-Code Staff not qualifying for the de minimis exclusion) could be modestly paid but have greater than 33% of their total remuneration in variable pay. Staff in category 4 (non-Code Staff who do qualify for the de minimis exclusion) is likely to include all of the firm's middle-office, back-office, administrative and support staff, including receptionists for example.

The draft guidance, if adopted, would leave many firms in an invidious position for the following reason. Whilst, in our experience, most firms have designed and implemented their remuneration policies and practices having had full and careful regard to the rules and guidance which came into effect on 1 January 2011, some of them have made hiring and retention decisions in H1 2011 consistent with their own policies, but which would be called into question by the new draft guidance. In particular, many firms have had regard to the guidance in SYSC 19A.2.3G and reached conclusions about its proportionate application to their own business.

We have the following specific suggestions which would help to conform the draft guidance to the position which many firms have reasonably adopted in light of the FSA's rules and earlier guidance:

- in category 3 (non-Code Staff not qualifying for the de minimis exclusion), the reference to the use of sign-on awards in "a low percentage of new hires" should be deleted;

- in category 3, the sentence which begins "As above..." suggests that retention awards to staff in this category are acceptable only in the event of a restructuring -that sentence should be deleted;

- in category 3, but especially in category 4, the FSA should not impose an obligation to document all awards - it may be proportionate for firms to do this in some cases but not all;
- in category 3 and 4, numbers of awards alone should not call into question compliance with the general requirement. There would need to be a more sophisticated assessment of the impact on these practices on the firm's risk profile.

We see these changes as the minimum necessary as, in our view, the restriction on guaranteed variable remuneration for non-Code Staff is not consistent with the proportionality overlay at all and the guidance on categories 3 and 4 should therefore be deleted in its entirety.

Overseas Code Staff

The FAQ guidance states that for Code Staff who are based abroad the Remuneration Code will apply in relation to their entire remuneration, rather than in relation to the proportion which is earned in connection with their work for the UK firm. This will be the case unless the firm can conclude that the individual is not a material risk-taker in relation to the UK firm within the scope of the Code.

This position is not required in order properly to implement CRD3. It is disproportionate to the regulatory risk and creates perverse disincentives to effective corporate governance.

In cases where a firm concludes that overseas-based staff do have a material impact on risk, it makes the UK anti-competitive because a firm deciding where to establish its EU headquarters will not wish to make the whole remuneration of senior management subject to disclosure.

We continue to believe that the correct approach would be to accept that the member of staff is Code Staff but to recognise that only part of his or her remuneration is "paid, provided or awarded in connection with employment by [the] firm" (SYSC 19A.2.5R).

If you have any suggestions regarding the format of this document, please email Robert.Leeder@citysolicitors.org.uk

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