E-Briefing Long Version
(Covering 16 July 2011 – 31 August 2011)

Company Law Committee

The Company Law Committee recently responded to the EC consultation "The EU corporate governance framework". (See http://ec.europa.eu/internal_market/consultations/2011/corporate-governance-framework_en.htm for the consultation paper and http://www.citysolicitors.org.uk/FileServer.aspx?oID=1035&lID=0 for the response.)

As the consultation paper stated:

> The purpose of this Green Paper is to assess the effectiveness of the current corporate governance framework for European companies in the light of the above.
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> Corporate governance is traditionally defined as the system by which companies are directed and controlled and as a set of relationships between a company's management, its board, its shareholders and its other stakeholders. The corporate governance framework for listed companies in the European Union is a combination of legislation and 'soft law', including recommendations and corporate governance codes. While corporate governance codes are adopted at national level, Directive 2006/46/EC promotes their application by requiring that listed companies refer in their corporate governance statement to a code and that they report on their application of that code on a 'comply or explain' basis.
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> **….** To identify the issues most relevant to good corporate governance in the EU and to prepare this Green Paper, the Commission conducted interviews with a sample of listed companies from different Member States and different economic sectors, with different levels of capitalisation and different shareholding structures. It also held meetings with corporate governance experts and with representatives of the investor community and of civil society. Some relevant issues had already emerged in the context of the Green Paper on Corporate Governance in Financial Institutions and remuneration policies adopted in June 2010. For example, shareholder engagement matters not just to financial institutions, but to companies generally. However, financial institutions are a special case, because of the particular challenges faced in ensuring effective risk management and the systemic risks they may pose to the financial system. So the solutions envisaged in the June 2010 Green Paper may not be relevant to EU companies in general. Accordingly, this Green Paper addresses the following three subjects which are at the heart of good corporate governance:
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> - The board of directors…□□□
> - □Shareholders…
> - How to apply the 'comply or explain' approach which underpins the EU corporate governance framework….

As the response stated:

> We welcome the Green Paper and its recognition that financial institutions are a special case and the solutions appropriate for them in a corporate governance context are not necessarily appropriate for other listed companies. We also welcome the Commission's desire to consider how to encourage more shareholders to take an interest in the longer-term performance of companies, whilst recognising that shareholders are free to choose their approach to investment.
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> We also welcome the recognition that corporate governance guidelines formulated for larger listed companies are not always appropriate for smaller listed companies and unlisted companies. We think further thought should be given to which corporate governance principles are appropriate to smaller listed companies and some unlisted companies. We agree with the observation in this context (see page 4) that putting excessive burdens on listed companies could make listing less attractive (which could be contrary to the interests of ultimate investors) but do not believe that the need to avoid too great a differential between regulation of listed and unlisted companies is a good reason to increase regulation for unlisted companies - rather it should be a matter of ensuring that the level of regulation for listed companies is proportionate and not excessive.

The Company Law Committee also recently responded to the ESMA consultation “ESMA’s technical advice on possible delegated acts concerning the Prospectus Directive as amended by the Directive 2010/73/EU” (See http://www.esma.europa.eu/data/document/11_141.pdf for the consultation paper and http://www.citysolicitors.org.uk/FileServer.aspx?oID=1050&lID=0 for the response.)

As the consultation paper stated:

> The purpose of this consultation document from ESMA is to seek comments on the technical advice that ESMA proposes to give to the European Commission on a number of possible delegated acts. On Tuesday 25 January 2011, the European Commission published its request to ESMA for advice on possible delegated acts concerning the Prospectus Directive as amended by Directive 2010/73/EU. The Mandate to ESMA sets out the areas on where the Commission is requesting advice in sections 3, 4 and 5. ESMA has been asked to deliver its advice on sections 3.1 and 3.2 by 30 September 2011 and has also decided to deliver its advice on the areas included in section 3.3 by 30 September because of the importance of the areas concerned.
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> In order to deliver its advice to the Commission, ESMA has decided to split its advice giving this first advice on possible delegated acts concerning the Prospectus Directive responding to sections 3.1, 3.2 and 3.3 of the Commission Mandate by 30 September 2011. In order to finalise the advice by the due deadline, ESMA considers it necessary to conduct a shortened consultation on these sections of the Mandate in order to deliver robust advice to the Commission.

As the response stated:

> We understand that there is a very short timescale to produce the delegated acts to allow implementation of the Amended Prospectus Directive. However we are concerned that the current process appears to result in a larger number of short consultations rather than allowing time for a full discussion of the key issues. It would be very helpful to have a clear timeline for the period to the July 2012 implementation date. As a large part of the work relating to summaries seems to be required to take account of the Commission’s work on Packaged Retail Investment Products (PRIPs) we query whether that work should be completed before this work is undertaken.

The response then went on to address some of the specific questions contained in the consultation document.

In addition, the Takeovers Joint Working Party (comprising the City of London Law Society Company Law Committee and the Law Society of England and Wales' Standing Committee on Company Law) recently responded to the European Commission questionnaire "Study on the application of the Directive 2004/25/EC on takeover bids" (the "Study"). (See http://www.citysolicitors.org.uk/FileServer.aspx?oID=1060&lID=0 for the response.) The Working Party gave views on areas of particular relevance rather than responding to the questionnaire in full, and commented generally that:

> It is worth noting that many of the requirements of the Directive were already contained in the rules of the UK Takeover Code prior to the Directive coming into force and its implementation in the UK. As a result, the regulation of takeovers in the UK did not significantly change as a result of the Directive.
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> The Working Party is not aware that the Directive (and its implementation) has given rise to any significant difficulties in the UK nor is it aware of any parties who argue that they have been significantly prejudiced or disadvantaged by its provisions. This therefore indicates that the regime is working as it is currently drafted. If, following the Study, it is proposed that changes be made to the Directive, those changes may upset the delicate balance that has been achieved between creating a level playing field and allowing Member States and supervisory authorities to regulate takeovers at a national level in line with their company law and with sufficient flexibility to make decisions based on the facts of a particular case. Any changes may therefore result in the Directive being less rather than more effective.

In particular, the Takeover Directive must accommodate, and should not override, each Member State's company law. It is right therefore that it leaves Member States to determine for example which threshold should be reached before an offeror is able to exercise squeeze out rights and the percentage of voting rights that confer control.

It is also important in the view of the Working Party that supervisory authorities have flexibility to make decisions based on the facts in any particular situation. For example, whether or not parties are acting in concert must be decided on the facts in the particular situation and supervisory authorities therefore need to be able to make a decision based on those facts, rather than having to fit the facts into a prescribed set of rules or prohibited practices contained in a Directive.

We understand that the supervisory authorities meet under the auspices of ESMA and that this forum provides an opportunity for those authorities to discuss practices and any problems that may arise. We support this approach.

Planning & Environmental Law Committee

The Planning & Environmental Law Committee recently responded to the Department for Communities and Local Government Issues paper "How change of use is handled in the planning system" (see http://www.communities.gov.uk/publications/planningandbuilding/changeuseissues for the consultation paper and http://www.citysolicitors.org.uk/FileServer.aspx?oID=1053&lID=0 for the response).

As the issues paper summary stated:

As part of the Plan for Growth, the Government announced that there would be a review of how change of use is handled in the planning system. The key aim of this review is to look at the scope for further liberalisation and how we might remove the barriers to change of use to help facilitate growth. This paper is the first stage of that review and is intended to promote discussion and serve as an invitation to interested parties to submit evidence of any issues with the operation of the current system and areas for possible change.

The submission responded in detail to the questions in the paper, and stated generally:

Introduction

We welcome the opportunity to respond to the Department's issue paper. We set out below our responses to the 10 questions raised by the issues paper. However, we wish to make the following general observations:

In our experience the reform of the Use Classes, undertaken between 1985 and 1987 by the then Conservative government, proved to be a resounding success and achieved in respect of the planning system the objectives which were envisaged by the 1985 Government White Paper "Lifting the Burden".

On the other hand, changes since 1987 have often been the result of single issue knee-jerk responses. For example, the use of seaside hotels during winter months for housing homeless and unemployed people was a driver in 1994 for the removal of hostel use from within Use Class C1. Equally, the reorganisation of Use Class A3 in 2005 arguably can be traced back to community opposition to one or two high profile proposals for the reuse of redundant public houses for fast food operation. As supporters of a planning system which imposes the minimum restraints necessary so as to facilitate economic growth and the proper use of land, we are cautious about changes in the planning system which do not reflect the concerns of, and appropriate demands from, the community itself. A liberal use class regime cannot prosper if the community does not support the consequences.

In addition, whilst noting the Government's commitment to localism and the localism agenda in particular, localism surely ought to be the driver for wider freedoms rather than local restrictions. If localism is merely about restrictions, it will support the critics' view that it is entirely anti-development rather than being a liberating force.

Regulatory Law Committee

The Regulatory Law Committee also recently responded to the EC consultation on "a new regime for Venture Capital". (See http://ec.europa.eu/internal_market/consultations/2011/venture_capital_en.htm for the consultation paper and http://www.citysolicitors.org.uk/FileServer.aspx?oID=1047&lID=0 for the response.)

As the consultation document stated:

> The fragmentation of markets for venture capital is an issue that requires immediate action. This is why the present consultation focuses on the creation of an Internal Market for venture capital. As announced in the Communication on the Single Market Act, the immediate priority is to enlarge the geographical base in which venture capital funds can raise and invest capital. In light of the circumstances described below, the creation of a single market for venture capital is the immediate priority to be dealt with in this consultation…. … The Commission's goal is to achieve a real internal market for venture capital funds in the EU and reduce tax barriers to the greatest extent possible. In this way venture capital funds would benefit from economies of scale and specialised sectoral expertise would emerge.

As the response stated:

> We have restricted our comments to matters which are within our scope as lawyers who advise on the promotion of these kinds of fund. We are not commenting on wider policy issues.
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> We understand that the proposal has been developed to facilitate the cross-border operations of venture capital funds to add to the overall supply of capital for growth oriented firms. It will of course be the case that there are funds which invest in venture and enterprise situations which will fall within the scope of the Alternative Investment Fund Managers Directive ("AIFMD"). This proposal is therefore, we understand, directed at the smaller funds who will not automatically be in the scope of the AIFMD but who will have the ability to opt in to it, but this is not clear and we can see that there could be value in using the new Directive to take larger funds out of scope of the AIFMD if they have the relevant investment policy profile.
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> We have the following comments:
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> 1. The consultation document states that the Commission committed itself to considering the adoption of new rules, ensuring that by 2012 venture capital funds established in any Member State can operate and invest freely throughout the EU. There are a number of references which refer to the proposed procedure as entitling a venture capital manager to provide its services, raise and invest capital on the basis of an EU passport. We are not aware of any laws that would require a venture capital fund, no matter whether it is established and/or managed within or outside the EU, or indeed that would require any other investor of any kind, to have a licence or permission in order to invest in European companies. Any such requirement would have extremely wide implications, going far beyond venture capital funds. We assume that the reference is not intended to imply this, but we would encourage the Commission to ensure that its future references to this proposal make it clear that the passport concept applies to the ability to raise funds, not invest them.
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> 2. We see the proposal as capable of adding value to those firms who wish to take advantage of the passport, provided that the cost of doing so does not become excessive. However we regard it as critical that those firms who are out of scope of the AIFMD remain able to make use of national private placement regimes, even if they are eligible to apply for the passport under the new proposal. The proposed regime needs to operate as an additional option, rather than as an exclusive possibility, where fund raising is concerned, in order to provide firms with real value and flexibility.
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> 3. The proposal refers in a number of areas to "professional investors". We have expressed concerns on a number of occasions to the effect that the MiFID definition of professional investor is not appropriate to private equity or venture capital investment. The quantitative tests simply make no sense in the context of these types of investment, even the largest funds do not invest in ten transactions a quarter, every

four quarters. In the UK venture capital sector "business angel" investors have proved extremely important sources of SME funding. The UK has a regime which has been specifically designed to permit marketing promotion of investment opportunities to sophisticated and high net worth individuals. It has been a successful means by which such individuals have been able to invest in funds (and also directly in SMEs). We attach as an Annex to this letter the statutory provisions to which we refer. If the Commission is really serious about encouraging the flow of money into funds designed for investment in SMEs, it will not ignore the fact that there are many individuals (often themselves successful entrepreneurs) who wish to be able to participate in such investments.

4. We also think that the Commission should review the definition of an SME. There is a general concern that the definition can be interpreted as if all SMEs owned by fund(s) managed by the same manager should be aggregated, with the result that none of them qualifies as an SME. The term is of course already used in the AIFMD but it is clear from the overall context of the AIFMD that the definition cannot be applied with this full' meaning, when that term is used in the AIFMD, as it would deprive the provisions of the AIFMD which refer to SMEs of any real effect. We think that would also be so in this case. However we believe that there is a more general issue and it would be appropriate to clarify the definition, as in other contexts this gives rise to potential disadvantages for SMEs which are owned by venture capital funds. This of itself can be a disincentive to investment or accepting investment from such funds.

The Regulatory Law Committee also recently responded to Chapter 8 of the FSA Quarterly consultation paper No.29 (CP11/11). (See http://www.fsa.gov.uk/pages/Library/Policy/CP/2011/11_11.shtml for the consultation document and http://www.citysolicitors.org.uk/FileServer.aspx?oID=1061&lID=0 for the response). The chapter proposed amendments to the Perimeter Guidance manual (PERG) in relation to property investment clubs and land investment schemes, and stated:

Introduction

8.1 This chapter proposes amendments to the Perimeter Guidance manual (PERG) in relation to property investment clubs and land investment schemes.

8.2 Recent litigation has revealed the need to make it clear that informality in agreements is not a barrier to an arrangement amounting to a collective investment scheme. In considering whether a property investment club or land investment scheme may be a collective investment scheme, we focus on the substance of how the scheme is actually operated.

8.3 We also think that this would be a good opportunity to clarify a number of issues, including that:
1) investors in collective investment schemes do not need to be holding an interest in the underlying property of the scheme;
2) in relation to land investment schemes in particular, seeking planning permission for, or marketing of, the land as a whole are features of management in the same way as actually obtaining such permission or disposing of the land; and
3) it is irrelevant who the original owner of the land is.

8.4 We intend to issue the proposed guidance using our powers under section 157(1) (Guidance) of the Financial Services and Markets Act 2000 (FSMA). The proposed text of the amendments is set out in Appendix 8.

As the response stated:

The Committee wishes to provide feedback specifically on the proposal in Chapter 8 and Appendix 8 of the Consultation on the proposed new PERG 11 guidance relating to land investment schemes
We understand that the proposed changes to PERG 11 have been prompted by the successful winding-up petition in relation to *Sky Land Consultants PLC.* We think this case should be expressly referenced in the proposed guidance; in particular it would be of benefit to firms, investors and their advisers to understand the context in which the existing guidance has been modified.

We consider the judgment adds a great deal of clarity to the law in a notoriously difficult area and welcome the FSA's proposal to reflect the judgment in PERG 11. Though the case and the proposed guidance relate specifically to land investment schemes, we consider that the principles covered in that judgment will have broader relevance, and it is critical, therefore, to ensure that the guidance reflects accurately the points of law that were addressed.

In some respects, however, the draft guidance goes further than the judgment and makes some questionable propositions of law.

The document also dealt with some of the specific elements in the proposed guidance, and also stated that:

….Many of the comments made in *Sky Land* can usefully be applied outside the area of land investment schemes to schemes more generally. Although there is already a cross-reference to PERG 11 in the short general discussion of the collective investment scheme activities in PERG 2.7.12, the cross-reference might usefully highlight that some of the principles expressed in PERG 11 are equally applicable to other types of collective investment schemes.

Revenue Law Committee

The Revenue Law Committee recently responded to the HMRC consultation document "Capital allowances for fixtures". (See http://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?_nfpb=true&_pageLabel=pageLibrary_ConsultationDocuments&propertyType=document&columns=1&id=HMCE_PROD1_031314 for the consultation paper and http://www.citysolicitors.org.uk/FileServer.aspx?oID=1051&lID=0 for the response.)

As the consultation document stated:

This consultation is about the rules for capital allowances on fixtures.
At Budget 2011, the Government announced that it would consult on introducing a requirement, in Finance Bill 2012, that businesses must pool their expenditure on fixtures in a building, within a short period of acquiring the building, in order to qualify for allowances (the 'mandatory pooling' proposal).

This consultation document contains detailed proposals for implementing this policy, including related administrative requirements. The proposals are aimed at preventing allowances from being given more than once on the original cost of a fixture.

The Government wishes to consult about these proposals in the wider context of the fixtures rules more generally, and respondents should feel free to comment on ways in which those rules should be improved.

As the response stated:

General comments

We would agree with the Government's view as expressed in the consultation document that the requirement introduced in 1996 to look back at all previous fixtures allowances claims in determining a new buyer's maximum allowable expenditure has, over time, led to significant evidential problems.

We are however unconvinced that these problems require a policy response on the scale contemplated. In particular, if the burden of proof of the history was clearly and unambiguously placed on the taxpayer (as is arguably the case at the moment in any event), we believe that the issues of "late claims" which are addressed by the proposal for mandatory pooling could be fully addressed. We would note that where a building has been held by a tax exempt entity which does not claim allowances, even the mandatory pooling approach will not greatly assist HMRC in resisting a taxpayer who asserts that there has been no previous allowances claim in respect of fixtures such as would limit its own claims going forward, as any previous claim may be so long ago that all the problems identified in the consultation document would still arise.

> We would also note that the question of whether a given asset is or is not a fixture is often an extremely difficult one. If a progressively more restrictive regime is introduced for fixtures as against loose plant and machinery, it is likely to lead to more extensive (and hence resource-consuming for both HMRC and taxpayers) debates about whether particular assets are or are not fixtures. This has frequently proved a difficult issue in other cases (most notably stamp duty land tax, where historically, for instance, until practice was relaxed, it was common for machinery to be unbolted from its mountings for a few minutes while contracts were signed). To date this has not been too much of an issue in the context of allowances.
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> Finally, we would note the recent report of the Oxford University Centre for Business Taxation which concluded that the UK had the least competitive regime for depreciation relief in the G20, and that looked at in the round this was acting as a significant counterbalance to the competitive benefits achieved by the reductions in the headline rate of corporation tax. Given the Government's stated aim to have the most competitive corporate tax system in the G20, we would suggest that further restrictions to the capital allowances regime should be approached with extreme caution.

The document then went on to address some of the specific questions in the consultation paper.

The Revenue Law Committee also recently responded to the HMRC Consultation Document "High Risk Tax Avoidance Schemes". (See <http://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?_nfpb=true&_pageLabel=pageLibrary_ConsultationDocuments&propertyType=document&columns=1&id=HMCE_PROD1_031311> for the consultation document and <http://www.citysolicitors.org.uk/FileServer.aspx?oID=1054&lID=0> for the response). As the Executive Summary of the consultation document stated:

> HMRC's *Spotlights* publication on its website provides a 'consumer protection' role by helping customers to avoid unwittingly entering into avoidance arrangements that HMRC will challenge. It does this by identifying the types of arrangements and specific schemes that HMRC is likely to challenge.
> Despite *Spotlights*, a small but significant number of customers continue to use high risk tax avoidance schemes. These are avoidance schemes that use contrived arrangements to seek tax advantages in circumstances where they are not intended to be available and which HMRC believes do not deliver to users the tax advantages advertised by those who promote them. Only promoters and users of such schemes will be affected by these proposals.
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> In many cases users of high risk tax avoidance schemes can obtain an advantage over the majority of HMRC's customers who do not use such schemes. They do this by enjoying possession of the tax underpaid, as a consequence of using the scheme, until such time as the dispute is resolved in HMRC's favour, which may take several years.
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> The Government proposes to tackle this behaviour by taking a power to describe ("list") in regulations high risk tax avoidance schemes. Users of a listed scheme would be required to disclose its use to HMRC. Users would be subject to an additional charge when the tax underpaid as a result of using the scheme was eventually paid. The charge would be set at a rate that would remove the cash flow benefit of using the scheme. Users would be able to protect themselves from incurring the additional charge by paying the tax in dispute upfront.

The response dealt with the specific questions contained in the paper, and stated generally that:

> We understand that, in summary, the proposals aim to deter the implementation of schemes that do not achieve the desired tax advantage they purport to achieve and instead seek to obtain a cash-flow advantage for the relevant taxpayer. We note from the outset that such arrangements are usually not implemented for cash-flow reasons, as the cost of implementing such schemes (including the cost of any penalties or interest) is usually high and the current level of interest rate does not provide an incentive to incur such high costs of implementation (as explained below).

In any event, we consider the stated objective of nullifying any cash-flow advantage obtained where a taxpayer effects arrangements within the scope of the proposals is not achieved by the proposals. This is particularly the case given the current level of interest rates, since there is seemingly little or no cash-flow advantage to be obtained by those who utilise a scheme within the scope of the proposals.

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