E-Briefing Long Version
(Covering 1 September 2011 – 31 October 2011)

Current matters

EU Contract Law proposals

The CLLS is continuing its dialogue with the European Commission and other stakeholders regarding the Commission's European contract law proposals.

To date, the CLLS has responded to a number of consultations on this issue, most recently in June when it submitted a response to the Commission's Expert Group's "Feasibility Study" (the Expert Group's document included a 189 article draft code). The CLLS questioned whether the Commission's proposals in this area were useful, appropriate or justified. More broadly, along with a number of other stakeholders, the CLLS has expressed a number of additional concerns about the Commission's European contract law proposals including the method by which the proposals have been introduced and consulted upon, and the uncertainty surrounding a number of aspects of the proposals.

Since the CLLS's submission was made, the Commission has (on 11 October 2011) released a "Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law". (See http://ec.europa.eu/justice/newsroom/news/20111011_en.htm for the proposed regulation and other accompanying documentation.) Furthermore, the Commission also recently released an accompanying impact assessment document (http://ec.europa.eu/justice/contract/files/1_en_impact_assesment_111011.pdf). As the Commission's 11 October press release stated, "[t]he Commission's proposal now needs approval from EU member states and the European Parliament".

Going forward, the CLLS will continue to work with a number of stakeholders on this issue, and the CLLS Chair Alasdair Douglas has joined a Ministry of Justice stakeholder group on this issue. The CLLS is also following with interest the Law Commission's study "on the legal consequences for the United Kingdom if an optional European contract law were to be created along the lines of the Expert Group's draft, in relation to business-to-consumer contracts.. [and] business-to-business contracts..."

Joint Legal Education & Training Review of the SRA

The CLLS Training Committee has been involved with the Joint Legal Education & Training Review of the SRA. A briefing note regarding this issue is available on the CLLS website (see http://www.citysolicitors.org.uk/Default.aspx?sID=968&lID=0 for the briefing document, and associated documents). As the note states:

> David Edmonds, the Chair of the Legal Standards Board, announced a comprehensive review of the education & training of the "legal workforce" in the 2010 Upjohn Lecture. (There has been nothing quite like this since the Ormrod Report in 1971.) The three regulators agreed between themselves and with the LSB that they would run the Review.
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> ….The project itself will fall broadly into two parts: (a) scoping the current and likely future legal services sector to 2020, and (b) identifying the key skills and training needs within the sector, making recommendations for legal education and training accordingly.

Submissions

Company Law Committee

The Company Law Committee recently responded to the Financial Reporting Council's paper on "Cutting Clutter. Combating clutter in annual reports". (See http://www.frc.org.uk/about/cuttingclutter.cfm for the consultation paper and http://www.citysolicitors.org.uk/FileServer.aspx?oID=1072&lID=0 for the response.)

As the FRC's consultation website stated:

> Clutter in annual reports is a problem, obscuring relevant information and making it harder for users to find the salient points about the performance of the business and its prospects for long-term success.
>
> The report provides preparers of annual reports with practical aids for reducing clutter, giving ideas for how disclosures might look without the clutter, and factors to consider when planning the annual report process.
>
> However, it's not just preparers that can cut clutter. All of those involved in regulating, reviewing, preparing and using annual reports have to change their behaviours if we are to remove clutter and improve corporate reporting. The Government will be consulting further on the framework of narrative reporting. The FRC will coordinate its work with that. We also seek further debate on how materiality should be applied to financial statement disclosures.

The foreword to the paper went on to state:

> Clutter in annual reports generates debate. All agree that a problem exists: most say that someone else is the cause and that they need to change first. As regulators our actions, and the way others respond to them, also contribute to the clutter we often see in annual reports and accounts. Clutter undermines the usefulness of annual reports and accounts by obscuring important information and inhibiting a clear understanding of the business and the issues that it faces. We are committed to being a catalyst for change – to move from debate to action, and to being an active participant in the change process to ensure that our actions are proportionate and targeted so reducing clutter, not adding to it, wherever possible.
>
> Cutting clutter cannot be achieved just by taking a red pen to a late printer's proof. Making a significant and permanent change has to be addressed at the planning stage for the next annual report through a clear idea of the desired outcome and how change will be achieved. A good time to start this process is at the debriefing meetings reflecting on the current year's annual reports, which for many companies will be taking place over the next few months.
>
> The Government, the FRC and many others have called for improvements to companies' narrative reports. The debate continues on exactly how such reports should be restructured. But whatever is decided our aim must be to make the text clear and clutter free.
>
> This publication contains a number of aids for reducing clutter which we hope will be used to start making change a reality. The FRC intends to follow through on this initiative in a number of ways, for example by working with the Government on its review of narrative reporting.

In addition, as proposed in its recent Effective Company Stewardship consultation, the FRC would like to create a 'financial reporting lab' where constituents can get involved by developing and testing ideas (without liability) to enable greater innovation. We welcome comments on this paper. We plan to hold a meeting with interested parties in the autumn to share experiences and to identify best practice as it develops.

Cutting clutter will not happen overnight. But the benefit in the longer term will be significant – reducing the time, energy and cost of preparing unnecessary disclosures and increasing clarity for investors.

The consultation paper was organised under three major headings, namely:

- Investigating clutter
- Barriers to cutting clutter
- Addressing common areas containing clutter

The Committee's submission stated generally that:

We welcome the opportunity to comment on the FRC's consultation paper, *Cutting Clutter - combating clutter in annual reports*. Please note that in doing so we have not taken account of the proposals made in the BIS consultation, *The Future of Narrative Reporting*, issued on 19 September 2011.

We first make some general points on the paper and then comment on its three recommendations.

General Points

1. We think it important to start by considering the purpose of the annual report and the users for whom it is prepared. It fulfils a statutory requirement for a company to prepare such a report; it acts as a reference document for shareholders and potential investors, for analysts and the public; and it may also include, on a voluntary basis, additional material which a company wishes to communicate to other stakeholders (such as CSR reports). Each purpose will make different demands on the report and those who prepare it.

2. Much in an annual report that may be regarded as clutter is required to be there to comply with law, regulation or accounting standards. The preparers of reports do not have a discretion to exclude such material or to include it in a document or website which is not part of the annual report. Such changes can only be made by legislators, regulators and accounting standard setters and we note that large parts of the FRC paper is effectively addressed to them.

3. The annual report has for a number of years been used as a repository for an ever increasing number of disclosures which government or regulators deem necessary. Even in a period when it is generally recognised that annual reports are over-long and increasingly opaque, new disclosures are still being added – for example, the requirement in the FRC's 2010 UK Corporate Governance Code for discussion of a company's business model; the proposed disclosures on gender diversity from the Davies Report and the FRC; the proposed disclosures on the audit process in the FRC's 2010 *Effective Company Stewardship* consultation and its proposed expanded audit report commenting on the completeness of the audit committee report.

Each such disclosure may have merit in itself, but collectively they do not lead to a clutter-free document.

4. The annual reports of some UK companies may need to comply with regulation in other jurisdictions and efforts to cut clutter may be constrained by those additional requirements.

5. We would also note that a company must treat all of its shareholders equally in the provision of information. All shareholders have the right to receive the same information about the company at the same time, and it is for each shareholder to decide whether they wish to make use of that information. It is not for a company to pre-empt a shareholder's rights in this regard by withholding the information.

6. We understand that some companies no longer produce summary reports or abridged annual reviews because of the increased use of electronic communications. The use of such communications does not, however, appear to have had any effect in reducing clutter or the length of reports.

The submission then went on to comment in more detail on the specific parts of the consultation paper.

Financial Law and Litigation Committees

The Financial Law and Litigation Committees recently responded to the Ministry of Justice's consultation paper "Proposed EU Regulation creating a European Account Preservation Order to facilitate cross-border debt recovery in civil and commercial matters - How should the UK approach the Commission's proposal? Consultation Paper." (CP 14/2011) (See http://www.justice.gov.uk/downloads/consultations/eu-cross-border-debt-recovery-consultation.pdf for the consultation paper. See http://www.citysolicitors.org.uk/FileServer.aspx?oID=1063&lID=0 for the Financial Law Committee's response and http://www.citysolicitors.org.uk/FileServer.aspx?oID=1065&lID=0 for the Litigation Committee's response.)

As the introductory section of the consultation paper stated:

Introduction

1. The European Commission has published a proposed Regulation creating a European Account Preservation Order (EAPO) to facilitate cross-border debt recovery in civil and commercial matters. This consultation paper seeks views on whether it is in the UK's national interests to be a party to this Regulation, i.e. whether the UK should opt in to the proposal or not and/or be party to the forthcoming negotiations. The Commission's proposal can be found at:

   http://ec.europa.eu/justice/civil/files/comm-2011-445_en.pdf

   This paper also seeks views on specific provisions contained in the proposal which will be used to inform the UK's position on whether it should participate in the Regulation or not. Negotiations will commence in early September.

2. Although in the main this consultation follows the Code of Practice on Consultation issued by the Cabinet Office, the Lord Chancellor and Secretary of State for Justice has decided that a shorter consultation period than the Code provides is appropriate as the UK is required to make a decision as to whether to opt in to the proposals or not, and must make that decision within three months of publication of the proposals.

3. An impact assessment has been completed and indicates that the following groups are likely to be affected:

   - the judiciary;
   - the legal profession;
   - financial institutions holding bank accounts etc. which may be frozen by an order;
   - claimants (whether businesses or individuals) who are seeking a court judgment or other means of confirming their claim (or who have obtained such a confirmation) and wish to obtain an EAPO to freeze the defendant's bank account to the amount of that debt because they believe a defendant is likely to frustrate enforcement.

- defendants (whether businesses or individuals) who are or will be subject to legal proceedings against them who may find their bank accounts subject to an EAPO.

4. It is probable that the proposals will lead to additional costs for some sectors and individuals. The Ministry of Justice has prepared an impact assessment, separate from this consultation. Comments on the impact assessment would be particularly welcome.

5. We would welcome responses to the following questions:

Q1. Is it in the national interest for the Government, in accordance with Protocol 21 on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice annexed to the Treaty on the Functioning of the European Union, to opt in to negotiations on the Commission's proposed Regulation? Please explain the reasons for your decision.

Q2. What are your views on the specific issues raised in this paper concerning the proposal being made by the European Commission?

Q3. Do you agree with the impact assessment? If not, please explain why.

Q4. Are there any other specific comments you may wish to make?

As the Financial Law Committee's response stated:

This response raises serious concerns that the proposals in their present form carry a real risk of:

- irremediable injustice to defendants,
- serious damage to businesses and individuals, and
- over-riding of the interests of secured creditors and of banks with set-off and netting rights.

In addition, the proposals do not deal fully with the risks to financial and securities trading systems and markets and create new legal uncertainties, as well as seeking to impose the costs of the legislation's methodologies and uncertainty on the banking sector.

They would require substantial changes to the way business is conducted, would seem calculated to discourage cross-border trade and do not work effectively with the present discretionary remedies to protect defendants against whom equivalent orders are now made by the English courts – in particular because it does not appear certain that discretionary relief can be granted by the receiving court under the new regime and this may result in defendants being bankrupted as a result of one of these orders and being deprived of their rights of defence.

While we would welcome a properly safeguarded simplification of the systems for preservation of assets pending judgment and the enforcement of judgment debts, in cases where such measures are truly necessary, we believe that in their present state these proposals are claimant friendly to the point where they fail to balance the interests of the defendant and dependants of the defendant (employees, customers and family of individuals) with those of the claimant and are not fit for purpose.

Reluctantly, therefore, we conclude that the risks to UK businesses and citizens are such that the UK should exercise its right to opt out of this legislation. The UK should, of course, press its reasons for doing so and be prepared to opt in if sufficient safeguards and clarity are introduced into the proposals.

Although the remit of this Committee is concerned primarily with the wholesale financial markets and serious issues in relation to these are raised below under the heading "Problems from a bank's perspective", we deal first with the problems for a defendant against whom an EAPO is made. These will fall on businesses large and small and on individuals. We believe that they will fall most severely on smaller businesses and individuals, which are most at risk of having their entire financial resources frozen and whose borrowings may be put into default and made immediately repayable as a result of one of these orders, however unjustified its issue may have been. There is no provision to enable them to release funds to pay the legal costs of defending themselves and

> the position on the protection of the viability of English businesses and of the homes and livelihoods of affected individuals seems singularly uncertain.
>
> We cannot see how the EU authorities can regard this proposal as consistent with EU duties to protect the rights of defendants arising under both EU law and the ECHR, since it sets no minimum standards of protection and would allow the chance of interaction between originating and receiving state rules to remove all protections for the defendant.

The response went on to make further comments under the following headings:

> Problems from a defendant's perspective
>
> Problems from a bank's perspective
>
> General issues

The Litigation Committee's response stated generally that:

> The Committee's view is that the UK should not exercise its power under article 3 of Protocol Number 21 to the Treaty on the Functioning of the European Union to take part in the adoption and application of [the] Commission's proposal regarding an EAPO. For reasons explained below, the Committee considers that the Proposal in its current form is fundamentally flawed.
>
> Instead of opting in to the Proposal at this stage, the Committee considers that the UK should seek to influence the negotiations on the Commission's proposal to the extent that it is able to do so. If those negotiations produce a regulation that fairly balances the interests of creditors and defendants, that does not impose too heavily on banks, and that is workable in practice, the UK should opt in at that stage. However, the UK should not opt in to the Commission's Proposal now in the hope that the negotiations over the Commission's proposal will lead to a satisfactory outcome but with no guarantee that they will in fact do so.
>
> …As we have said, the Committee considers that the flaws in the Commission's proposal are such that the UK should not opt in to the Commission's proposal at this stage. The threats to UK businesses and banks arising from the proposal in its current form are such that the UK should not take the risk of opting in to the proposal in the hope that the draft regulation will be sufficiently improved in the course of the legislative process. The UK should only opt in if that legislative process does in fact significantly improve the regulation.

The response also dealt with a number of specific concerns that the Committee had regarding the proposal.

(It is understood that the UK Government has subsequently decided not to opt in to the proposed regulation for the time being.)

Planning & Environmental Law Committee

The Planning & Environmental Law Committee recently responded to the DCLG consultation on the Draft National Planning Policy Framework (See http://www.communities.gov.uk/documents/planningandbuilding/pdf/1951747.pdf for the consultation paper and http://www.citysolicitors.org.uk/FileServer.aspx?oID=1075&lID=0 for the response.)

As the DCLG webpage for the consultation stated:

> We have published the draft National Planning Policy Framework for consultation. This is a key part of our reforms to make the planning system less complex and more accessible, and to promote

sustainable growth. We are keen to hear views from all interested parties on the draft and how it might be improved.

And as the consultation paper itself stated:

Topic of this consultation: This consultation seeks your views on the draft National Planning Policy Framework. The Framework will replace the current suite of national Planning Policy Statements, Planning Policy Guidance notes and some Circulars with a single, streamlined document.

Scope of this consultation: We are seeking views on the content and format of this new Framework.

As the response stated:

Introduction

In broad terms, we welcome the proposed National Planning Policy Framework as a breath of fresh air and support the objective of providing simple and clear national policy with the intention of allowing people and communities back into planning. We further support the proposal to sweep away unnecessary restraints on development whilst restating and strengthening necessary protections such as for rural areas.

However, we have identified several areas of concern where we are of the opinion, from a legal perspective, that the draft policy requires revision and enhancement and we comment on these below and in our responses to the consultation questions.

General observations

First, we would make some more general observations:

- We have an overall concern that there is imbalance in coverage between certain areas of policy covered by the draft framework: for some aspects there is a great deal of detail but on other, arguably more important, subjects the policy framework is remarkably brief. It will be important for practitioners, in particular, not to attempt to suggest that relative importance is implied by the quantity of the policy wording relevant to the area in question.

- We are also concerned that the objectives underlying the framework could be challenged by a failure by those within the planning system, i.e. the planning professionals, and by the general public to understand and to adapt to the new approach. Over the last 20 years, all parties, but planning practitioners in particular, increasingly have debated the detailed nuances contained within policy guidance and in the resultant planning inspectors' decisions and court judgments whilst planning legislation and regulations have been trawled over, examined and amplified. If the approach which we believe underpins the National Planning Policy Framework is to work in reforming, even revolutionising, the planning system every current stakeholder involved with the planning system must understand, appreciate and apply the policy framework as laying down broad themes and a general direction of travel and support this new approach by applying such themes to development proposals in an appropriate and timely manner. If this is not done the current evils in the system will not only be repeated but will be multiplied and many of the savings identified in the Impact Assessment will be illusory.

- Closely connected with the above concern is the need for national and local government to acknowledge that implementation of the policy framework will require a highly motivated planning profession well trained both in the new approach and in assisting and supporting lay members of the public including the community bodies in playing their roles of involvement at the local level. This will be particularly challenging at a time of economic restraint but investment in training and supporting planning professionals working within government will be essential in ensuring the delivery of this new approach and the achievement of the envisaged resultant economic growth.

Concern that a lack of clarity will frustrate the reform objectives

It is absolutely essential that the framework, when implemented, is capable of delivering the positive improvements which Government envisages and which Ministers have explained particularly to the general public during the consultation period.
The dangers arising from misunderstandings as to the intentions behind the policy framework, due in many cases to ambiguities and a simple lack of clarity and proper explanations in the detailed wording, have been demonstrated by the considerable public interest in, and heated public debate over, some key areas in the consultation draft. If the policy framework results in legal wrangles and delays, let alone a material increase in applications for judicial reviews as local planning authorities struggle to make proper and unchallengeable decisions under the framework then this extremely worthwhile reform will not only fail but actually make an imperfect system moribund.

Main areas of concern

Our detailed comments are set out in response to the detailed consultation questions which responses are annexed to this document. However, the main areas of concern relate to:

1. **Delivering Sustainable Development**

Whilst we appreciate the difficulties in producing a definition of sustainable development which will satisfy all key stakeholders, the absence of a clear and concise definition would result in the policy's cornerstone being left in a state of uncertainty.

2. Transitional arrangements

We believe that it will be essential to transition the move from the existing suite of policy documents to the policy framework carefully if uncertainty, inconsistency and other difficulties are to be avoided.

In addition a number of PPSs and PPGs contain detailed technical guidance on a number of issues. For example, PPG14 (Development of Unstable Land), PPG24 (Planning and Noise) and PPS25 (Development and Flood Risk) contain detailed technical guidance. It will be very difficult for decision makers, whether local planning authorities, planning inspectors or the Secretary of State to reach informed decisions without having recourse to such technical guidance.

3. Financial incentives

Express mention of financial incentives should be included in the policy framework particularly in light of the Government's emphasis on the New Homes Bonus being a central driver to deliver more housing. Equally, the policy framework needs to emphasise that planning permissions and allocations should not be bought and sold. Development which is fundamentally unacceptable should never be approved simply because of financial considerations.

4. Town Centre impact

Concern has been expressed that the presumption in favour of sustainable development could undermine the primacy given to the town centre first approach in planning policy. Therefore, it would be helpful to clarify in the policy framework that the town centre first policy test must be applied whenever relevant and that the application of the presumption in favour of sustainable development will never mean that development to which the town centre policies apply can be consented without observing the sequential and impact tests.

5. Brownfield/ranking of land used first for development

Whilst we appreciate that the economic growth agenda may demand the flexibility to allow, in limited circumstances, the development of, say, a greenfield site in preference to a previously developed land it is clear from the public response during the consultation period that there is a need to emphasise that the starting point everywhere, and not just within the Green Belt, is to use previously developed land first in order to ensure public support for this reform.

6. Heritage issues

> As with the inherent tension between economic growth demanding unbridled development and communities' natural expectation of retaining the well appreciated status quo, heritage issues go to the heart of the people's involvement with and love of their community. On heritage issues arguably the draft policy is too inflexible and instead should emphasise that decision makers need to weigh in the balance what will be gained by the new development and what will be lost.
>
> **Glossary**
>
> Finally a small but, we would suggest, a significant point on the detail in the framework. It is absolutely essential that the framework is clear and concise and easily understood by the local communities who are to be empowered under the Localism agenda . However, as planning decisions will be made in the light of the policy contained in the framework it is essential that certain key words, phrases and concepts are defined with some precision e.g. "previously developed land". In the consultation draft it is unclear where words or phrases are defined in the Glossary. In the May 2011 proposals this was achieved by footnotes which were attractive and easily understood. On the other hand if a Glossary is to be retained we recommend that defined words or phrases are identified in the text, for example by use of italics, thereby directing the reader to the Glossary.

The Committee also recently responded to the Defra "Consultation on a Draft National Policy Statement for Hazardous Waste" (See http://www.defra.gov.uk/consult/2011/07/14/hazardous-waste/ for the consultation paper and http://www.citysolicitors.org.uk/FileServer.aspx?oID=1076&lID=0 for the response.)

As the website for the consultation stated:

> The Hazardous Waste National Policy Statement (NPS) sets out the strategic need and justification of Government policy for the provision of Nationally Significant Infrastructure Projects (NSIPs) for hazardous waste. This will be used to guide decisions on development consent. The purpose of the consultation is to give stakeholders the opportunity to comment on the draft NPS and the framework it sets for those planning decisions. The deadline for response is 20 October 2011.

As the consultation document went on to state:

> Seven different types of facility are covered by the NPS. The results will be used to ensure that the policy as outlined in the NPS is both clear and correct. The consultation covers the generic impacts of the NPS, which apply to any Nationally Significant Infrastructure Projects (NSIPs). In addition there are some specific criteria set out for each of the types of facility covered.

The response answered some of the specific questions in the consultation paper, and stated generally that:

> This consultation and the questions posed by it raise operational and practical policy issues in relation to how the Infrastructure Planning Commission ("IPC") should consider applications for consent for nationally significant hazardous waste infrastructure.
>
> Due to the focus of the Consultation on non-legal issues, we have not responded to all of the questions raised.

Regulatory Law Committee

The Regulatory Law Committee responded to the HMT document "Review of the Money Laundering Regulations 2007: the Government Response". (See http://www.parliament.uk/deposits/depositedpapers/2011/DEP2011-0920.pdf for the consultation paper and http://www.citysolicitors.org.uk/FileServer.aspx?oID=1056&lID=0 for the response.)

As the consultation paper stated:

Introduction

This is the Government response to the 2009/10 Review of the Money Laundering Regulations 2007 (the Regulations). It includes a series of consultative proposals to amend the Regulations. The review followed a commitment made in 2007 to carry out this process two years after the introduction of the Regulations. It has been informed by a Call for Evidence and by a large number of sector specific meetings with interested parties.

The objective of the review was to assess the extent to which the implementation of the Regulations reflects the principles of effectiveness, proportionality and engagement in practice. Chapter 1 of this document explains the background to the review in detail.
Chapter 2 explains the arrangements for the consultation on the proposed changes to the Regulations.

This document then addresses a range of operational or procedural issues involving supervision and enforcement, guidance; and the use of simplification or facilitation measures like reliance and equivalence.

In chapter 3 the Government response and proposals for consultation on changes to the Regulations are given, following a summary of the information and views received. The changes proposed are to ensure that the regime delivers as intended, stays up to date, and is effective and proportionate.

In chapters 4 to 9, a more detailed Government response is given to the main themes of the comments received to the Call for Evidence, following a short summary of the those views. They are in each of the following areas:

- Chapter 4 The risk-based approach;
- Chapter 5 Simplification and deregulatory provisions;
- Chapter 6 Customer due diligence;
- Chapter 7 Guidance;
- Chapter 8 Supervision; and
- Chapter 9 Engagement.

Responses about the customer experience were made in relation to many of these areas and are discussed, accordingly, in each.

There is a summary list of the consultation questions in Annex C.

Money laundering and terrorist finance

The Regulations address the threats from money laundering and terrorist finance. For brevity reference is generally made in this paper to ‘money laundering’ or to the anti-money laundering (AML) regime, but that term should be understood as embracing terrorist financing.

As the response stated:

We wish to take the opportunity to comment mainly on some of the more general issues mentioned rather than on the specific consultation questions. These comments are based on our experience of advising clients who are subject to the Money Laundering Regulations 2007.

The Government Response reflects that there are concerns that the risk based approach is not as fully supported as it might be by supervisors, and by supervision and enforcement policies. We certainly agree that there is a widespread lack of understanding as to both what a risk based approach is, and as to what a firm must do to have a satisfactory risk based approach. There is a significant industry now devoted to advising firms on their procedures (and indeed on finding faults in existing procedures) and it is not at all clear that the result is either a "risk based approach" or an approach which makes a substantive difference to the ultimate objective of detecting potential money laundering.

We believe that the Government should be actively encouraging the Joint Money Laundering Steering Group to produce further guidance on the risk based approach. We also think it has to be more generally accepted by supervisors and those responsible for enforcement that a risk based approach involves judgement, and that whilst that judgement must be reasonable and based on reasonable information, it is a judgement. Therefore another reasonable person might have formed a different judgement. Those charged with exercising these judgements have a heavy responsibility which in our experience they take seriously, they should not be at risk of personal jeopardy if subsequently someone decides that they would have formed a different judgement. Firms need to be able to recruit senior high calibre staff to take the responsibility for making these judgements and this is becoming more difficult as employees with appropriate skills reject the personal risks associated with regulatory hindsight being applied to judgements they have formed. There is a real risk that the effect will be to create a less risk based approach, a more formulaic approach, and that the highest quality staff will simply not be willing to take on the roles which expose them to personal liability. We believe this is an issue to which the Government needs to give serious attention. (We note in passing that the attempted prosecution of a money laundering officer of a City firm a few years ago was not helpful. In that case it was widely considered that the individual concerned had clearly done his best in very difficult circumstances and the belated dropping of the prosecution recognised this.)

We note the statements (see page 6) that refer to difficulties some firms have reported in complying with beneficial ownership requirements and politically exposed person requirements when dealing with large publically owned companies. We think that this is because of a misunderstanding as to what the law requires when the customer is regulated or listed. This confusion is in our experience a relatively recent development which has arisen out of the increasing regulatory focus on dealings with politically exposed persons.

Regulation 13 of the Money Laundering Regulations 2007 clearly states that a relevant person is not required to apply customer due diligence measures (unless he suspects money laundering or terrorist financing) where he has reasonable grounds for believing, inter alia, that the customer is a credit or financial institution or a company whose securities are listed on a regulated market subject to specified disclosure obligations. Customer due diligence for this purpose means identifying the customer and identifying the beneficial owner and obtaining information on the purpose and nature of the business relationship. So where the customer is such an entity this diligence is not required.

It is our understanding from the definition in the Regulations that a politically exposed person (including its close associates) would be an individual, and so would not fall within Regulation 13 and be subject to the possibility of simplified due diligence. We believe that any confusion is because a politically exposed person could be a shareholder or director of an entity to which simplified due diligence may be applied. However, by definition, the politically exposed person in such a case is not the customer, this is the regulated or listed entity, which by definition has already been scrutinised by an external body and is subject to ongoing scrutiny. It seems to us that regulation 13 is absolute, and permits simplified due diligence in this case. Indeed any other conclusion would deprive Regulation 13 of any use. We believe it would be extremely helpful if the Government were to explain this, or were to ask the JMLSG to do so.

We welcome the Government's recognition that Regulation 14 expressly refers to enhanced due diligence "on a risk sensitive basis" and we would encourage the Government to produce, or to encourage the JMLSG to produce, further more precise guidance on this as, again, we see extensive (and largely formulaic) checks being "required" in order for a firm to feel that it can demonstrate appropriate diligence.

We appreciate that these issues were not specifically further raised in the consultation, but we thought that this was an appropriate moment at which to raise them to support the Government in its efforts to have an effective anti-money laundering regime, under which both firms and supervisors understand what is expected.

In response to the specific list of consultation questions we would comment on the following:

1. Should the existing criminal sanctions be wholly or partly repealed?

We support the repeal of these sanctions. The Money Laundering Regulations are essentially about the requirements for procedures and administration, the Proceeds of Crime Act ("POCA") is

the appropriate place for the creation of substantive criminal offences for firms associated with money laundering (including, for regulated firms, the failure to report offence). We think that this is more than adequate cover, in particular a firm with inadequate controls would be at risk of committing the POCA offences.

2. Should a debt purchaser be able to rely on CDD previously performed by the seller?

We support any proposal that this should clearly be the case, the liability for imperfect CDD should rest with the seller.

Revenue Law Committee

The Revenue Law Committee recently responded to the HMT document "Consultation on Controlled Foreign Companies (CFC) reform: detailed proposals" (See http://www.hm-treasury.gov.uk/consult_controlled_foreign_companies_reform.htm for the consultation document and http://www.citysolicitors.org.uk/FileServer.aspx?oID=1069&lID=0 for the response.)

As the website for the consultation paper stated:

> This consultation includes detailed proposals for how the new CFC regime will operate. They build on the CFC proposals included in the Corporate Tax reform: Delivering a more competitive system document and the interim improvements introduced in Finance Bill 2011 to bring together the various changes into a modernised CFC regime.
>
> These proposals reflect outcomes from extensive consultation with business and other interested parties, including several working groups. The Government has decided to publish as much detail as possible to allow sufficient time to consult further on design of the new regime ahead of publication of draft legislation in autumn 2011.

As the consultation paper stated:

Subject of this consultation	The reform of the Controlled Foreign Companies (CFC) rules. This is a key reform needed to improve the UK's tax competitiveness whilst ensuring that the UK tax base is adequately protected.
Scope of this consultation	This consultation includes detailed proposals for how the new CFC regime will operate, including a Tax Impact Assessment.
Previous engagement	Formal consultation on the CFC reform was held on proposals published in November 2010 as part of the wider consultation on Corporate Tax Reform (please see Annex J for a summary of responses). These proposals have been developed to reflect the outcome of the extensive consultation with businesses and other interested parties.

The response made a number of detailed comments on the various sections of the consultation paper.

The Committee also recently responded to the HMT's consultation on the Patent Box (See http://www.hm-treasury.gov.uk/consult_patent_box_stage2.htm for the consultation document and http://www.citysolicitors.org.uk/FileServer.aspx?oID=1057&lID=0 for the response.)

As the website for the consultation stated:

(a) Background

The Government is committed to introducing a preferential regime for profits arising from patents, known as a Patent Box. This will allow companies to apply a 10% corporation tax rate to profits attributed to patents.

The Patent Box will encourage companies to locate the high-value jobs and activity associated with the development, manufacture and exploitation of patents in the UK. It will also enhance the competitiveness of the UK tax system for high-tech companies that obtain profits from patents.

In November 2010 the Government published a wider Corporate Tax reform consultation which included a wide-ranging review of the taxation of intellectual property.

(b) Consultation

This consultation builds on that initial review and provides a detailed explanation of how the Government proposes to implement the Patent Box, and seeks views on the proposed design of the regime.

The Patent Box provides an additional incentive for companies in the UK to retain and commercialise existing patents and to develop new innovative patented products.

This will encourage companies to locate the high-value jobs associated with the development, manufacture and exploitation of patents in the UK and maintain the UK's position as a world leader in patented technologies; recognising that multinational groups have a choice over where they locate ownership, development and exploitation of patents.

The response made a number of detailed comments on the various sections of the consultation paper.

Training Committee

The Training Committee recently responded to the SRA consultation "Realignment of the Higher Rights of Audience Regulations in relation to higher rights of audience and the aims of the Qualified Lawyers Transfer Scheme" (See http://www.sra.org.uk/sra/consultations/hra-realignment-with-qlts.page for the consultation document and http://www.citysolicitors.org.uk/FileServer.aspx?oID=1073&lID=0 for the response.)

As the relevant page of the SRA website stated:

Background

The Higher Rights of Audience Regulations were introduced in April 2010. One of the policy objectives on implementing the 2010 Regulations was to simplify the routes to gaining the qualification so that it could only be obtained after passing an assessment. The SRA's submission to the Ministry of Justice stated:

"There will be only one route to qualification and it will be based on an assessment of advocacy skills."

The aims of the regulations are

- to provide an assurance to consumers, the judiciary and other stakeholders that solicitor advocates have been assessed as competent to advocate in the higher courts,
- to protect the client and public interest, and
- to ensure the effective administration of justice and the rule of law.

The 2010 Regulations allow for lawyers from other jurisdictions to apply to the SRA for the higher rights of audience qualification on the basis of an equivalent qualification in that jurisdiction. This provision was carried over from the previous regulations, the Solicitors Higher Courts Qualifications Regulations 2000.

Consultation question

The current drafting of the Higher Rights of Audience Regulations 2010 enables internationally qualified lawyers to seek recognition of their international (or intra-UK) higher rights qualifications by providing the SRA with evidence of their practical experience and qualifications gained outside of England and Wales.

The SRA's aim is to close this option, for the following reasons:

- the 2010 Regulations were intended to introduce assessment as the only method of gaining the qualification to ensure robust regulation of the higher rights qualification,
- this option for international candidates is inconsistent with the Qualified Lawyers Transfer Scheme Regulations which, again for the regulatory reasons of being able to robustly assess and maintain entry standards, has replaced the experience requirements,
- it potentially makes it easier for internationally qualified lawyers to qualify for higher rights of audience, than domestically qualified candidates,
- all international (i.e. not EEA) candidates who are eligible under the 2010 Regulations will be solicitors of England and Wales (having qualified under QLTR or QLTS), therefore it is logical to treat them in the same way as any other qualified England and Wales solicitor,
- it is inconsistent with the robust regulatory approach to advocacy of the Quality Assurance Scheme for Advocates (QASA).

Question: Do you agree that the SRA should treat all applicants for higher rights of audience in the same way? This would mean that all candidates have to take the same assessments to gain the higher rights of audience qualification.

As the response stated:

We know from the Consultation that the current drafting of the Higher Rights of Audience Regulations 2010 enables internationally qualified lawyers to seek recognition of their international (or intra-UK) higher rights qualifications by providing the SRA with evidence of their practical experience and qualifications gained outside of England and Wales. As a result, the SRA propose to shut down this option.

The Response of the Training Committee to the single question in the Consultation Paper of "Do you agree that the SRA should treat all applicants for higher rights of audience in the same way?" is that we do.

Robert Leeder
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CLLS