E-Briefing Long Version
(Covering 1 November 2011 – 31 December 2011)

Current matters

Common European Sales Law ("CESL") proposal

On the European contract law front, as mentioned previously, the European Commission (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). In order to be adopted, the Draft Regulation must be approved by the European Parliament and the Council of Ministers.

On 10 November the Law Commission and the Scottish Law Commission published a joint document entitled "An Optional Common European Sales Law: Advantages and Problems. Advice to the UK Government" (See http://www.justice.gov.uk/lawcommission/docs/Common_European_Sales_Law_Advice.pdf). The advice contained an in-depth analysis of the proposal, and identified the proposal's most problematic issues as being "whether the CESL should be confined to cross-border sales; language; the right to terminate; damages for distress and inconvenience; telephone selling; and doorstep selling."

On 7 December the House of Commons considered the issue (http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm111207/debtext/111207-0001.htm#11120739000005).

The CLLS is continuing to work closely with the MoJ and other stakeholders on this issue.

Submissions/documents

Corporate Crime & Corruption Committee

The **Corporate Crime & Corruption Committee** recently submitted a response to the House of Lords Justice and Institutions Sub-Committee Call for Evidence regarding its Inquiry into EU Criminal Procedure. (See http://www.parliament.uk/documents/lords-committees/eu-sub-com-e/CriminalJustice/criminaljusticecfore.pdf for the Call for Evidence and http://www.citysolicitors.org.uk/FileServer.aspx?oID=1101&lID=0 for the submission.)

As the Call for Evidence stated:

> There is now a growing body of EU legislation in the field of criminal justice, including measures in the areas of criminal procedure with which our inquiry is concerned. Perhaps the most high profile is the European Arrest Warrant, but there are also measures in relation to the status of victims, on mutual assistance in gathering evidence and on pre-trial bail. The Commission and Member States have made a number of proposals since

the new arrangements for an area of freedom, security and justice set out in the Lisbon Treaty have come into force.

The Sub-Committee on Justice and Institutions has scrutinised individual measures as they have been proposed and retains under scrutiny a number of recent proposals. It has also undertaken inquiries into criminal justice policy. The Sub-Committee now seeks to assess this developing area of EU policy insofar as it relates to particular areas of EU competence.

Scope of the inquiry

In terms of EU competence, the inquiry is limited to the following areas, broadly those referred to in Article 82(2) of the Treaty on the Functioning of the EU (TFEU) –

- investigation of offences,
- evidence,
- pre-trial procedure,
- procedural rights of suspects and defendants,
- the position of victims of crime.

…In relation to those areas of policy, the inquiry will focus on three broad themes…:.

(1) Is an EU system of criminal procedural law desirable?
(2) Does EU legislation in the areas within scope add value?
(3) The impact of the UK opt-in

The response answered the specific questions contained in the Call for Evidence, and also stated generally:

A. Introduction

(i) Individuals.

Criminal procedure rules in the UK already provide comprehensive safeguards for the rights of citizens who are subject to UK rules and there is no need for the UK to have additional procedural rules. We have gold plated legislation resulting from EU Directives, for example, our anti money laundering regime is one of the [strictest] in the world. However, in other Member States where criminal protections for the accused and/or the victims may not be as robust, having a “minimum” EU standard could be beneficial -- especially for British citizens who travel to or live in other Member States.

(ii) Corporate Crime

2.1 Establishing EU criminal procedural rules in corporate criminal law may be beneficial. While natural persons are less likely to move across borders to benefit from more lenient criminal laws/procedures, a corporate body may evaluate the laws of various jurisdictions and may choose to establish its principle place of business (or do business in) only jurisdictions that have more lenient criminal laws/procedures and sanctions or in jurisdictions that do not effectively enforce relevant laws.

2.2 The EU Paper “Towards an EU Criminal Policy” states that one of the goals of EU-wide law is to “reduce the degree of variation between the national systems and to ensure that the requirements of ‘effective, proportionate, and dissuasive’ sanctions are indeed met in all Member States.” Reducing variations between Member States will create a more level playing field for businesses that operate in different jurisdictions and may prevent corporations from jurisdiction shopping.

Financial Law Committee

A working group of the CLLS **Financial Law Committee** recently produced "A Guide to the questions to be addressed when providing opinion letters on English law in financial transactions". A copy of the guide can be downloaded here: http://www.citysolicitors.org.uk/FileServer.aspx?oID=1095&lID=0. As mentioned in the document, the Guide suggests the questions which a law firm practising English law should consider addressing when seeking or providing an opinion letter under English law in a financial transaction, and explains the key considerations which might be relevant in answering them.

The questions considered in the Guide are:

> What opinions are required, who should provide them and who may rely on them?
>
> What professional conduct rules must be observed when deciding whether to provide an opinion letter and, if it is appropriate to do so, to whom should the opinion letter be addressed?
>
> What other issues need to be considered when a law firm is requested to provide an opinion letter to a third party?
>
> What is the purpose of an opinion letter?
>
> What is the proper role of the opinion provider?
>
> What general considerations apply when preparing an opinion letter?
>
> What approach should be taken in an opinion letter on factual issues?
>
> What is the proper scope of an opinion letter on legal issues?
>
> To what extent does the scope of an opinion letter differ in a cross-border transaction?
>
> How should differences in opinions practice be reconciled in cross-border transactions?
>
> To what type of legal entity does the opinion letter relate?
>
> What is best practice as to the form of opinion letters?

Planning & Environmental Law Committee

The Planning & Environmental Law Committee recently responded to the DCLG consultation "Community Infrastructure Levy: Detailed proposals and draft regulations for reform". (See http://www.communities.gov.uk/publications/planningandbuilding/cilreformconsultation for the consultation paper and http://www.citysolicitors.org.uk/FileServer.aspx?oID=1106&lID=0 (covering note)

and http://www.citysolicitors.org.uk/FileServer.aspx?oID=1107&lID=0 (questionnaire response) for the response.)

As the consultation paper stated:

> The Planning Act 2008 established powers to create a Community Infrastructure Levy in England and Wales. The Community Infrastructure Levy regulations 2010 made the first use of these powers and came into effect in April 2010. The regulations allow a charging authority to levy a charge on the owners or developers of land that is developed so that they contribute to the costs of providing the infrastructure needed to support the development of the area.
>
> The Government set out proposals to reform the Community Infrastructure Levy in the Localism Bill. The changes would require local authorities to pass a meaningful proportion of receipts to the neighbourhoods where the development that gave rise to them took place, clarifies that receipts may be spent on the ongoing costs of providing infrastructure to support the development of the area and provides more local choice over how to implement a charge
>
> The aim of this consultation is to seek views on the detailed implementation of the Government's proposals, including on the draft regulations.

As the note enclosing the questionnaire response stated:

> We thank the DCLG for the opportunity to comment on the proposed CIL amendments and attach our response to the questionnaire. We have not made comments where we feel the issues are points of policy or practical application only.
>
> We have also reviewed the draft regulations and have no comments apart from the general concern raised in reply to question 3.
>
> Broadly, we concur that it will provide greater clarity and transparency if the precise percentage of CIL receipts to be passed to local councils is specified within the regulations. However, there is a concern that relying on a fixed per household cap to address the balance of monies to be retained by the charging authority for expenditure on infrastructure which would support the new development may not give sufficient flexibility. Section 59A should be amended to include a mechanism allowing a smaller percentage of receipts to be passed across if circumstances require more monies for infrastructure to support new development and local councils agree to a reduction in receipts.

Professional Rules and Regulation Committee

The Professional Rules & Regulation Committee (PR&RC) recently responded to the SRA's "financial protection review" consultation. (See http://www.sra.org.uk/sra/consultations/financial-protection-review.page for the consultation paper and http://www.citysolicitors.org.uk/FileServer.aspx?oID=1105&lID=0 for the response.)

As the consultation paper stated:

> Consultation on the implementation of the changes to indemnity insurance and compensation arrangements announced in April 2011
>
> Purpose and scope of this consultation
>
> 1.1 This consultation paper represents the next stage of the SRA's financial protection review; the implementation in October 2012 of the changes to the arrangements for

compulsory professional indemnity insurance (PII) announced in the SRA's Policy Statement in April 2011.

1.2 A copy of the April 2011 policy statement is attached at Annex A. That document sets out the steps leading up to its publication, including the independent review undertaken by Charles River Associates (CRA) and the SRA's comprehensive consultation paper issued in December 2010. The policy statement set out the SRA's conclusions following that public consultation.

1.3 For details of the SRA's policy, and the options on which consultation has already taken place and which formed the basis for the policy, reference should be made to these previous documents. The main changes for implementation are

- the closing of the assigned risks pool (ARP) as a provider of policies of qualifying insurance from 30 September 2013 (with the exception of the continued provision of run-off cover incepted before that date);
- the introduction, from October 2012, of a requirement that all policies of qualifying insurance make provision for extension by 90 days at the end of the insurance period if the insured firm has not taken out a new policy of qualifying insurance;
- changes to the Authorisation Rules to control the work that may be undertaken by firms during that 90-day period;
- provisions for the funding of the ARP in 2012/13 to be provided by both the regulated community and the qualifying insurers; and
- provisions to remove the role of the ARP in 2012/13 for making payments in respect of uninsured firms and move this responsibility to the Compensation Fund.

The consultation paper contained the following questions.

Question 1. Do you have any comments on the SRA's decisions, set out in the policy statement, which form the basis for the changes which we are now consulting on?.

Question 2. Do you have any comments on changes proposed to the QIA and SIIR?

Question 3. Do you have any comments on the changes proposed to the SRA Authorisation Rules?

Question 4. Do you have any comments on the changes proposed to the SRA Compensation Fund Rules?

Question 5. Do you have any comments on this proposal? (Credit ratings of qualifying insurers, paragraph 5.2)

Question 6. Do you have any comments on the issues raised in paragraphs 6.1 and 6.2?

The submission responded to the questions, including question 1, in relation to which it stated:

Following the previous consultation, and the decisions that have now been taken, our only comments are:

1. It was clear that the Assigned Risks Pool could not continue in its present form, particularly in light of comments from the qualifying insurers.

2. We could see the practical difficulties that there would have been introducing a replacement for the ARP before 30 September 2013, and see the reasons for the reduction on the cover provided by the ARP to six months from October 2011.

3. It seems a fair proposal that the insurer of the expiring policy must provide a further 90 days' cover if the insured does not obtain a new policy. Balancing the public interest with that of insurers, as well as the profession, it is appropriate that the exposure for that 90 day extension be borne by the insurer of the expiring policy. That insurer decided to accept the risk in the previous year and, by definition, has been unwilling or unable to agree terms with the insured for a further year.

4. Although the ARP has to date been provided by the qualifying insurers, that cost has been passed on to the profession through higher premiums, which will have included not only Insurance Premium Tax but also additional costs. The profession will now bear the costs of uninsured claims directly through the Compensation Fund after 1 October 2013, which may result in some savings.

5. The proposed funding for the ARP in 2012/13 seems an acceptable balance between the qualifying insurers and the profession, with the first contribution consisting of the sums left in the Solicitors Indemnity Fund.

Regulatory Law Committee

The **Regulatory Law Committee** recently responded to the FSA Guidance consultation on Simplified advice. (See http://www.fsa.gov.uk/pubs/guidance/gc11_22.pdf for the consultation paper and http://www.citysolicitors.org.uk/FileServer.aspx?oID=1096&lID=0 for the response.)

As the consultation paper stated:

1 Introduction

1.1 A well-functioning retail advice market needs different delivery mechanisms in order to be fully effective for the broad range of potential investors. There could be benefits from a well-designed, low-cost method of meeting consumers' straightforward investment advice needs. The challenge is to ensure that such methods will deliver good outcomes for those consumers.

1.2 Some firms and trade associations have been designing and piloting simplified advice processes, and have talked to us about the issues they have faced. To assist the industry in its wish to offer simplified advice services, this Guidance Consultation Paper provides additional guidance on certain aspects of the regulatory regime.

As the response stated:

The Committee's response is limited to the section of guidance headed "Professional Standards" and in particular, firms' employees whose role it is to support the firm's clients through its simplified advice process, but who it is not intended should make personal recommendations. For ease of reference, we have referred to such persons as "**facilitators**" throughout this response. The Committee's specific concern relates to the second sentence of the description of Option 3 (Individuals who do not give personal recommendations) at paragraph 4.50, which states:

"Even if the support of the individual would be viewed as generic advice when considered in isolation, the combination of the generic advice and the recommendation of a particular financial instrument by the simplified advice process may well mean that the individual is viewed as giving regulated advice."

As presently phrased, the guidance would appear to suggest that there is a significant risk that, if a firm opts for the Option 3 approach, the relevant facilitators would be performing the controlled function of giving regulated advice for which approval (and appropriate qualification) would be required.

There are of course concerns about the possibility that such a person might stray from providing information about the system, and thus in effect subvert its outcome. Should the facilitator stray into the giving of advice, then he could be dealt with under the provisions that allow the regulator to sanction a person performing controlled functions without approval, and the firm would also be liable for allowing that to happen. The firm will in any event take responsibility for the advice given by the process, and for the training of facilitators, and systems to monitor facilitators performing this role and ensure that they only give generic advice, information, support and reassurance.

We can understand why the FSA might favour the "cleaner" approaches in Options 1 and 2 over Option 3. However, the Committee is of the view that Option 3 should provide a workable alternative for firms, although they take some risk in doing so - specifically in relation to the human factor of the unqualified adviser making judgments on the suitability of one or more particular products, straying from his role in providing support, information and reassurance about the system into the realms of regulated advice.

The guidance in relation to Option 3 should also be read in light of the FSA's perimeter guidance in PERG 8.26.2 and 8.26.3. On that basis, provided the facilitator does not make any personal recommendation, and makes it clear that he is not doing so, then, as with the case of the decision tree, it is the firm (and the simplified advice process) that would be making the personal recommendation in cases where a facilitator only provides generic advice (e.g. "pay off your debts", "hold enough for an emergency", "consider retirement planning").

It does not seem appropriate or proportionate to seek to make the facilitator personally responsible for the outcome delivered by the firm's process. That process is after all designed by a qualified adviser who will, along with the firm, take personal responsibility for any unsuitable outcomes delivered by the process itself. It is also not entirely clear what policy imperative drives this piece of the guidance, nor what particular scenario might be driving the FSA's concern.

If the guidance remains in its current form, without further explanation or examples, then for all practical purposes it rules out option 3, rather than merely highlighting the risks firms would take on in adopting it.

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