**E-Briefing Long Version**
**(Covering 1 January 2012 – 29 February 2012)**

## Current matters

*Call for Evidence - Common European Sales Law*

The Government has issued a Call for Evidence about the impact, possible costs and benefits of the European Commission's proposed Regulation for a Common European Sales Law.

A copy of the call for evidence and associated documents (including a document looking at the potential impacts of the CESL proposals) can be found here: https://consult.justice.gov.uk/digital-communications/common-european-sales-law

As the website states:

> The Call for Evidence seeks evidence about the European Commission's proposed Regulation for a Common European Sales Law.
>
> The Government has issued this Call for Evidence with the aim of obtaining evidence/views from UK interests to develop its future position on the proposed Regulation.
>
> The Call for Evidence also seeks, where possible, specific statistical data and potential costs, benefits and risks of operating an alternative EU contract law regime for cross-border sales alongside national domestic laws in this area.
>
> The proposed Regulation will apply in business-to-consumer and business-to-business contracts where one of the parties to the contract is a Small or Medium Enterprise.

The CLLS is currently considering the Call for Evidence document.

## Submissions/documents

*Company Law Committee*

The Company Law Committee recently responded to the ESMA consultation paper entitled "Draft technical standards on the Regulation (EU) xxxx/2012 of the European Parliament and of the Council on short selling and certain aspects of credit default swaps" (ESMA 2012/30). (See http://www.esma.europa.eu/system/files/2012-30_0.pdf for the consultation paper and http://www.citysolicitors.org.uk/FileServer.aspx?oID=1135&lID=0 for the response.) The Committee responded to the various questions in the consultation document.

*Competition Law Committee*

The Competition Law Committee recently responded to the OFT consultations "Applications for leniency and no-action in cartel cases: OFT's detailed guidance on the principles and process" and "OFT's guidance as to the appropriate amount of a penalty: A consultation on OFT guidance".

See http://www.oft.gov.uk/shared_oft/consultations/oft803con.pdf and http://www.oft.gov.uk/shared_oft/consultations/oft423con.pdf for the consultation papers and http://www.citysolicitors.org.uk/FileServer.aspx?oID=1126&lID=0 for the response.

The first consultation concerned a proposal to amend the OFT's guidance on the handling of applications for leniency and no-action letters in cartel cases under the Competition Act 1998. (The guidance is intended to assist firms in understanding when, and to what extent, leniency will be available, the conditions for a grant of leniency and the process for applications.)

The second consultation concerned a proposal to amend the OFT's guidance on the appropriate amount of a penalty to be imposed for an infringement of Chapter 1 or Chapter II prohibitions of the Competition Act 1998 or Articles 101 or 102 of the TFEU. (The guidance also applies to concurrent regulators when imposing financial penalties under the Competition Act 1998.)

The Competition Committee responded to the specific questions in the second consultation, and stated generally in relation to the first that:

> We believe that the draft guidance on leniency applications has a number of useful new aspects such as the overview charts and checklists. The process for making a leniency application is explained in more simple terms and we welcome the extra detail on the circumstances in which the OFT will provide confidential guidance. We also agree that it is appropriate to consolidate the existing guidance on 'no action' letters into this Guideline. Indeed, we think it important that the OFT seeks, as far as possible, to produce a single, detailed point of reference in relation to the areas on which it provides guidance.
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> Consequently, we limit our responses to two areas: (i) the conduct of internal investigations where the OFT seeks, unusually, to limit the amount of legal advice that a company can obtain; and (ii) the waiver of legal privilege where we recognise that the OFT has a legitimate aim but wonder whether it might be achieved in a less radical manner

*Competition Law and Intellectual Property Law Committees*

The Competition Law and Intellectual Property Law Committees recently submitted a joint response to the European Commission's "Review of the Current Regime for the Assessment of Technology Transfer Agreements". (See http://ec.europa.eu/competition/consultations/2012_technology_transfer/questionnaire_en.pdf for the consultation paper and http://www.citysolicitors.org.uk/FileServer.aspx?oID=1122&lID=0 for the response.)

The review related to the Technology Transfer Block Exemption Regulation (772 / 2004) ("TTBER"). In April 2004, the Commission adopted the Regulation on the application of Article 81(3) of the Treaty [now Article 101(3) TFEU] to categories of technology transfer agreements, and Guidelines on the applicability of Article 81 of the Treaty to technology transfer agreements. Both instruments will expire on 30 April 2014.

The review sought to ensure that the new regime will reflect current market realities and provide for the possibility of non-competitors and competitors entering into technology transfer agreements where such agreements contribute to economic welfare without posing a risk to competition.

In general terms, the response supported the introduction of a new block exemption regulation for technology transfer agreements when the TTBER expires in 2014. It also argued that:

- The Commission should acknowledge and give greater recognition to the pro-competitive or benign competitive effects of most bilateral exclusive licensing and other technology transfer agreements.

- Having a well drafted regulation in this area would be extremely useful and would provide a level of legal certainty for businesses that no set of guidelines (with all of their caveats and qualifications) would be able to provide. As the submission mentioned, business executives will want to know, in simple terms, whether they are allowed to include certain terms in their technology transfer agreements.
- The general approach of any new regulation should be to provide a clear "safe harbour" for most technology transfer agreements that are encountered in practice, based on criteria that can be readily applied by any commercial lawyer or business executive, without the need to consult an economist.

*Insolvency Law Committee*

The Insolvency Law Committee recently responded to the Insolvency Service consultation "Reform of the Process to Apply for Bankruptcy and Compulsory Winding Up". (See http://www.bis.gov.uk/insolvency/Consultations/petition%20reform for the consultation paper and http://www.citysolicitors.org.uk/FileServer.aspx?oID=1120&lID=0 for the response.)

As the consultation paper stated, the proposed reforms build upon proposals to reform the debtor petition bankruptcy process by removing the court from the application stage where there is no dispute between the parties about the outcome. Specifically, the consultation proposed the following arrangements:

- Electronic applications should be made to a specially appointed Adjudicator, with an office based at The Insolvency Service. (The Adjudicator would decide the outcome of each application where there is no disagreement between the parties, and courts would focus on dealing with disputes that require a judicial settlement.)

- Debtors who want to apply for bankruptcy for themselves should have the choice of submitting electronic or paper applications, as well as the option of making the requisite payment to enter the process by instalments.

- Creditors who are looking to instigate proceedings would first have to take all reasonable steps towards reaching a mutually satisfactory solution to the debt problem, and debtors would be encouraged to seek early, free, independent debt advice.

In its response, the Insolvency Law Committee focused mainly on the proposals contained in the Consultation relating to corporate debtors and compulsory winding up, and made a number of general comments rather than confining its comments to the particular questions raised. This was as the Committee considered that, as an initial step, it was necessary to address the key assumptions underpinning the consultation. The submission also stated generally that:

> **5.** We generally agree with the consensus reached following earlier consultations that the process by which an individual can file for his or her own bankruptcy could potentially be streamlined, removing the need for automatic court involvement in the process, provided that appropriate safeguards were in place.
>
> **6.** We would, however, emphasise the need for there to be procedures to ensure that an individual receives appropriate advice as to the available

options, and the very serious consequences of bankruptcy, before seeking a bankruptcy order. The bankruptcy of an ill-informed debtor who made an application remotely and who then failed to co-operate with a process that they did not expect could prove more expensive to the court system, and less beneficial to that individual, than the procedures currently in place.

**7.** The previous proposals have been significantly extended far beyond the initial concept of providing a "voluntary" way to enter into an insolvency procedure, so as to provide individuals with a similar procedure to a creditors' voluntary liquidation. The Consultation now proposes that the same procedure could also apply to a bankruptcy petition presented by a creditor, even in the face of debtor opposition[1], unless the debtor chooses to refer the matter to the court. A petition willingly presented by a debtor is significantly different to a petition presented by a creditor. The fact that the creditor, rather than the debtor, is taking this step suggests that there is some element of dispute, if only as to whether the debtor considers that he or she should be made bankrupt at that stage as a result of their inability to pay the admitted sum. If this were not the case, the debtor would, presumably, have presented the petition.

**8.** The Consultation states that it does not have any impact on any human rights issues.[2] We find this surprising in the light of articles 6(1) of the European Convention of Human Rights[3] which requires decisions impacting on individuals to be made in a "fair and public hearing" and "by an independent and impartial tribunal". It is difficult to imagine a more important issue for an individual than being made bankrupt as the effect of bankruptcy would deprive an individual of his property and, potentially, ability to work. Notwithstanding this, under the proposals there is no "public hearing", no "tribunal" and the Adjudicator is not demonstrably impartial.[4] The current legal regime entitles a debtor who opposes a statutory demand or a bankruptcy petition to a hearing. The proposals envisage that this right to a hearing would come at the cost of paying a fee and only upon payment of that fee would the debtor benefit from his human right of an impartial hearing.

**9.** If there is any disagreement as to whether a bankruptcy order should be made, the matter should be referred to the court because, as noted in the Consultation, the Adjudicator "*will not have a Judge's capacity to weigh up competing interests and exercise discretion when making decisions"*.[5] It should not be for the Adjudicator to decide whether any disagreement is sufficiently material to be referred to the court, particularly given the draconian consequences which follow an individual being declared bankrupt.

**10.** The previous proposals have also been extended by the proposal that a similar procedure could also apply to the compulsory liquidation of

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[1] Page 38 of the Consultation Paper
[2] Page 96 of the Consultation Paper
[3] Incorporated into English law by the Human Rights Act 1998
[4] In the case, Secretary of State for Trade and Industry v Frid [2004] UKHL 24, the House of Lords held that The Crown is regarded as a single entity in its dealings, even though various aspects of its affairs may be handled through different government departments
[5] Page 44 of the Consultation Paper

companies. We do not consider, for the reasons set out below, that it would be appropriate for the proposed streamlined procedure to be extended to apply to the compulsory liquidation of companies.

**11.** We are also concerned at the inclusion of the proposals contained in the Consultation for a pre-action process aimed at encouraging constructive debtor/creditor dialogue. We do not consider that these proposals fully take into account the key differences between a litigation claim made by one party against another seeking damages and a class remedy such as bankruptcy or winding-up. Where an individual or company is potentially insolvent, every stakeholder is likely to be affected by an agreement between the debtor and one or more of its creditors.

**12.** We consider that the potential consequences of the current proposals for a pre-action process could be to:

> (i) further encourage individual creditors to use the threat of bankruptcy or winding-up as a debt collection tool;
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> (ii) encourage an insolvent debtor to reach an agreement with the creditor who made the threat, potentially to the detriment of its other creditors; and
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> (iii) restrict existing creditor rights. A creditor with (for example) an unsatisfied judgment should not be placed in a position where a debtor can buy further time by making "reasonable" payment offers, which that creditor does not have sufficient information to evaluate properly. Still less should that creditor face potential sanctions if it were to proceed with a compulsory winding-up petition at atime when a "reasonable" offer remained on the table.

*Litigation Committee*

The Litigation Committee recently responded to the MoJ consultation paper "Fees in the High Court and Court of Appeal Civil Division" (CP15/2011). (See http://www.justice.gov.uk/downloads/consultations/appeal-high-court-fees-consultation.pdf for the consultation paper and http://www.citysolicitors.org.uk/FileServer.aspx?oID=1125&lID=0 for the response.) The consultation paper proposed changes to fees in the High Court and Court of Appeal Division. The stated aim of the proposals was to charge users of these two jurisdictions more proportionally for the resource their cases consume, while protecting access to justice for the most vulnerable, with the aim of reducing the taxpayer subsidy of the courts service. The Committee responded to the specific questions contained in the consultation paper.

The Litigation Committee also recently responded to the MoJ's consultation "Appointments and Diversity: 'A Judiciary for the 21st Century'" (See http://www.justice.gov.uk/downloads/consultations/judicial-appointments-consultation-1911.pdf for the consultation paper and http://www.citysolicitors.org.uk/FileServer.aspx?oID=1133&lID=0 for the response).

As the consultation paper stated:

> This consultation sets out proposals for changes to the statutory and regulatory frameworks for judicial appointments. The consultation is aimed at members of the judiciary, legal practitioners and their representative organisations, those responsible for aspects of the judicial appointments process, equality and diversity groups and those who have an interest in judicial appointments.

As The Right Honourable Kenneth Clarke QC MP Lord Chancellor and Secretary of State for Justice stated (at page 3)**:**

> …I am consulting on legislative changes to achieve the **proper balance** between executive, judicial and independent responsibilities, improve **clarity, transparency and openness**; create a more **diverse** judiciary that is reflective of society; and deliver **speed and quality of service** to applicants, the courts and tribunals and value for money to the taxpayer.

The response dealt with the specific questions contained in the consultation paper.

*Planning & Environmental Law Committee*

The Planning & Environmental Law Committee recently responded to the DECC Consultation "The Green Deal and Energy Company Obligation" (11D/886). (See http://www.decc.gov.uk/assets/decc/11/consultation/green-deal/3607-green-deal-energy-company-ob-cons.pdf for the consultation paper and http://www.citysolicitors.org.uk/FileServer.aspx?oID=1116&lID=0 for the response.)

The three main purposes of the consultation paper were stated to be:

- To explain the context for the development of the Green Deal and Energy Company Obligation (ECO);
- To set out DECC's proposals for the Green Deal and the ECO; and
- To highlight key issues, for consultation.

The consultation and the questions posed by it raised practical policy issues in relation to the details of the Green Deal and ECO policies that are to be implemented in secondary legislation and under the energy licensing framework. In its response, the Committee did not respond to the majority of the questions raised, but only those that were particularly relevant to the legal industry and property professionals.

*Professional Rules and Regulation Committee (PR&RC)*

The PR&RC recently responded to the SRA's "The regulation of international practice" consultation. (See http://www.sra.org.uk/sra/consultations/regulation-international-practice.page for the consultation paper and http://www.citysolicitors.org.uk/FileServer.aspx?oID=1134&lID=0 for the response.)

As the SRA's press release on this issue stated (http://www.sra.org.uk/sra/news/press/last-week-international-strategy-consultation.page):

> The SRA is currently consulting with stakeholders on regulating an increasingly global profession. Views are sought on the ways in which the authority as a single regulator can fulfil its principal duty of consumer protection without constraining a competitive and highly sophisticated international sector.
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> The consultation document 'The Regulation of International Practice' sets out the SRA's proposals on how it might regulate the international practice of firms with headquarters in England or Wales. The document, launched on 8 November, contains proposals that cut through some of the regulatory maze facing international firms, supporting them in the development of single global businesses.
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> If the proposals are accepted, they should lead to firms having greater flexibility to operate in any form that is allowed in other countries and bring into their partnerships anyone who is recognised as a lawyer in their home country. Such firms would also benefit from a significant reduction in paperwork and welcome cost savings.

> Around 160 branches of law firms that currently have to register and comply separately with SRA regulations even when overseas would instead come under a single international firm 'passport to practice', a more appropriate regulatory oversight regime. Under the proposals, the SRA has suggested opening up a route to partnership in English law firms for lawyers in key emerging markets who have not previously been permitted to become partners in solicitors' firms here.
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> Last year the SRA paved the way by opening up a new requalification track in English law for foreign lawyers - the Qualified Lawyers Transfer Scheme (QLTS). The SRA is also seeking views on whether to allow European law firms more flexibility to choose whether to be regulated as foreign law firms or as English firms, depending on the services they wish to offer. The SRA has held meetings with public and private sector stakeholders and other organisations interested in these proposals all of whom have broadly welcomed the direction of travel proposed.

The Committee responded to the specific questions at the end of the consultation paper.

*Regulatory Law Committee*

The Regulatory Law Committee recently produced comments on the proposed Market Abuse Regulation ("MAR") and Market Abuse Directive ("MAD"). (See http://www.citysolicitors.org.uk/FileServer.aspx?oID=1128&lID=0 for a copy of the paper.) The European Commission has now published its formal legislative proposal for a new MAR and MAD2 to replace the existing MAD adopted in 2003. The purpose of the paper was to highlight the principle areas where the Committee had identified that the proposed Regulation and Directive raise legal concerns, particularly focusing on areas where the proposals create risks for legal uncertainty. The paper also proposed specific solutions or identified areas for further consideration.

The Regulatory Law Committee also recently responded to the Questionnaire on MiFID/MiFIR 2 by Markus Ferber MEP. (See http://www.citysolicitors.org.uk/FileServer.aspx?oID=1112&lID=0 for the response.)

Furthermore, the Committee also recently published comments on the section of the FSA December 2011 quarterly consultation (CP11/27) relating to Performance Management Data Returns ("PMDR") transactions (guidance on the role of brokers). (See http://www.fsa.gov.uk/library/policy/cp/2011/11_27.shtml for the consultation paper and http://www.citysolicitors.org.uk/FileServer.aspx?oID=1127&lID=0 for the response.) The relevant part of the consultation concerned proposed amendments to the FSA Handbook, namely to the guidance in the Code of Market Conduct, relating to the disclosure of inside information by brokers during deals in which stock owned by persons discharging managerial responsibilities (PDMRs) is being sold (Chapter 6).

As the response stated generally:

> We support the rationale underpinning the proposed exemption from the market abuse (improper disclosure) offence –namely, enabling the divestiture of illiquid stock that would otherwise be unsaleable.
>
> However we are concerned that the FSA is not proposing any form of corresponding exemption for prospective purchasers of such stock. Without such a corresponding buy-side exemption, any well-advised buy-side institution may well be reluctant to acquire the stock being offered, for fear of falling foul of the market abuse (insider dealing) offence. This would defeat the very object of the FSA's proposed exemption.

> In practice, it is likely to be difficult, if not impossible, for any buy-side firm to be able to demonstrate that its acquisition of the stock was not "on the basis" of the PDMR information divulged by the broker, pursuant to (new) MAR 1.4.4A – as indicated in the second sentence of paragraph 6.21 of the CP. Indeed, [in] many cases, the purchase decision will – as a matter of fact – be inextricably linked to the disclosure by the broker that the seller is a PDMR.
>
> Put another way, without a form of corresponding 'safe harbour' for the buy-side, the FSA's (well-intentioned) proposal may well prove of no use in practice.
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> Accordingly, we would strongly urge FSA to introduce into MAR 1.3 a corresponding 'safe harbour' for buy-side firms to whom an offer of such illiquid stock is being made by a broker, in accordance with MAR 1.4.4A.

The response also commented specifically on the proposed new provisions in MAR 1.4.4A, designed to implement the sell-side illiquid stock exemption.

*Revenue Law Committee*

The Revenue Law Committee recently commented on the draft clauses of the Finance Bill 2012 published on 6 December 2011 relating to controlled foreign company reform and the document "Controlled Foreign Company (CFC) – an update" published in January 2012. (See http://www.hm-treasury.gov.uk/controlled_foreign_companies.htm for the relevant HMT documents, and http://www.citysolicitors.org.uk/FileServer.aspx?oID=1129&lID=0 for the response.)

As the "Controlled Foreign Company (CFC) – an update" document stated:

> 1.1 On 6 December 2011 the Government published the document *Controlled Foreign Company (CFC) Reform - response to consultation* which set out how the proposals for CFC reform had developed in the light of the consultation over the summer and autumn. Draft legislation for most of the new CFC rules was published at the same time. This document covers the initial feedback received on the proposals and draft legislation and how the Government intends to respond. It also sets out further proposals on the finance company rules, the application of the CFC rules to exempt foreign branches, the temporary period of exemption, commencement provisions and further details on how the new rules will apply to the financial sector.
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> 1.2 The draft legislation has now been updated to include the rules applicable to exempt foreign branches and amended rules for the treatment of finance profits. The remainder of the draft legislation is as originally published and therefore does not yet reflect either the further changes discussed later in this note or any other feedback received during consultation. Annex A provides a guide to the additional draft legislation that is being published today.
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> 1.3 Engagement with interested parties since December continues to be very helpful. The Government is keen that all interested parties continue to engage throughout the consultation period and beyond to ensure the best possible outcome when the rules are introduced in Finance Bill 2012.
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> **Feedback since December**
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> 1.4 The document *Controlled Foreign Company (CFC) reform: response to consultation* published in December was well received - it has been generally acknowledged that the detailed policy proposals achieve the Government's objectives for CFC reform, and that a number of important changes have been made since the June 2011 consultation document. However, many respondents feel that, although the legislation achieves the right result, the compliance burdens in getting there are excessive. These concerns have been raised in respect of the current legislative form of the Gateway in particular.

1.5 The Government recognises that ensuring that the Gateway operates as intended is key to achieving the objectives of CFC reform. The intention is to ensure that groups and their foreign subsidiaries can more readily identify whether or not they are within the scope of the rules. In response to this feedback the Government is considering proposals to achieve this, including developing the Gateway to provide clear entry conditions which work on a qualitative basis and allow groups to be able to assess, in a straightforward manner, that a foreign subsidiary is outside the scope of the rules. This will avoid the need for companies to carry out the calculations required in the current Gateway legislation, except where there is a reasonable probability that a charge will arise. The IP working group is now focusing specifically on the Gateway, and revised draft legislation on the Gateway will be shared with business when it is available.

1.6 Other issues on which specific feedback has been received include the complexity of the excluded territories exemption and the scope of the targeted anti-avoidance rules (TAARs). Officials are in discussion with businesses and advisers on these issues.

*Training Committee*

The Training Committee recently published a briefing note on the Joint Legal Education and Training Review of the SRA, the Bar Standards Board and ILEX Professional Standards. (See http://www.citysolicitors.org.uk/FileServer.aspx?oID=1137&lID=0 for the paper). As the executive summary for the paper states:

- The “solicitor” qualification should be available only to those who have been trained to a high standard, as achieving excellence should be the ultimate aim for all solicitors if the public is to receive the service it deserves from the profession.
- City solicitors (like specialist solicitors in a number of sectors of the profession) need to be able to offer "premium quality" service to demanding clients above any regulatory minimum so this must be capable of being recognised at all the stages of the training continuum.
- Law degree and GDL courses should be reviewed for content and consistent standards.
- A period of work-based learning must be retained as part of the solicitor's qualification process.
- The consolidation of legal education providers carries risks which should be addressed.
- The mis-match between the number of students choosing to do the GDL/LPC in order to become solicitors and the number of traineeships available each year should be addressed.
- There should be multiple entry points to becoming a solicitor.

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